

**CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH
ERNAKULAM**

O.A. No. 184/2013

Dated: thisthe....16th day of January, 2015

CORAM:

HON'BLE MR. U. SARATHCHANDRAN, JUDICIAL MEMBER'
HON'BLE MS. MINNIE MATHEW, ADMINISTRATIVE MEMBER

K.A. Benny, aged 47 years,
S/o late Alex, Postman, Thodupuzha HO.,
Idukki Division, Residing at 'P&T Quarters',
Thodupuzha, Idukki District. ...Applicant

(By Advocate Mr. Shafik M.A.)

Vs.

1. Union of India, represented by the
Chief Postmaster General,
Kerala Circle, Trivandrum -695 033.
2. The Senior Superintendent of Post Offices,
Idukki Division, Thodupuzha, Idukki District- 685 584.
3. P.K. Roy, Postman, Adimali Post Office,
Adimali, Idukki District-685 561. ...Respondents

(By Advocate Ms.Shaheera for Shri M.K. Aboobacker, ACGSC (R1&2)

(The application having been heard on 10.12.2014, the Tribunal on
.....16-01-2015 delivered the following):

ORDER

HON'BLE MS. MINNIE MATHEW, ADMINISTRATIVE MEMBER

This O.A. has been filed seeking the following reliefs:

i) To call for the records relating to Annexure A-1 to A-6 and to declare that the selection of 3rd respondent as the selected candidate in the examination conducted on 16.11.2011 for the vacancy of the year 2011 as Postal Assistant is incorrect and bad in law;

ii) To declare the applicant, the 2nd highest mark holder, as qualified against the vacancy of postal Assistant of the year 2011 in Idukki Division and to promote him with effect from the date on which other candidates are promoted as postal Assistant in other divisions;



Or in the alternative

iii) To direct the respondents 1 & 2 to publish a supplementary list of qualified candidates and to promote the 2nd highest mark holder as Postal Assistant against the vacancy of Postal Assistant notified as per A-1;

iv) To issue such other appropriate orders or directions this Hon'ble Court may deem fit, just and proper in the circumstances of the case.

2. Brief facts of the case are that, the applicant while working as Postman in Thodupuzha head office under the 2nd respondent participated in an examination conducted by the 2nd respondent in pursuance of Annexure A-1 notification dated 20.7.2011 for promotion of Lower Grade Officials (LGOs for short) to the cadre of Postal Assistants/Sorting Assistants. As per the said notification one vacancy was notified in Idukki division. The 3rd respondent herein who secured 138 marks was declared as qualified in the examination. The applicant in the O.A. secured only 122 marks. Being a competitive examination and having regard to the availability of only one vacancy for the year 2011, the 3rd respondent, who was the most meritorious candidate was selected. However, he was not promoted to the cadre of Postal Assistant since he was awarded the punishment of withholding of his next increment for one year without cumulative effect as per memo No. B-2/Misc. dated 22.8.2011 of the 2nd respondent. By virtue of this order the increment due to the 3rd respondent on 1.7.2012 was to be withheld upto 30.6.2013. As the 3rd respondent proceeded on continuous extra ordinary leave (EOL) from 27.8.2011 the increment due on 1.7.2012 could not be sanctioned and consequently the punishment could not be given effect to. As the 3rd respondent had not joined the post even though all other selected candidates in all divisions joined their respective posts after training, the applicant submitted a

representation on 3.8.2012 seeking appointment as Postal Assistant as he was also qualified and entitled for promotion. The said representation was replied to vide Annexure A-6 letter dated 14.2.2013 stating that the applicant's request cannot be considered as there was only one vacancy of Postal Assistant in the examination that was conducted. The applicant is aggrieved that the respondents have failed to maintain a supplementary list which can be operated in situations where a selected candidate is not in a position to accept the appointment. If such a list was maintained then the applicant who is in the 2nd position would automatically get appointment as Postal Assistant if the selected candidate did not join. It is the contention of the applicant that even if the 3rd respondent joins back he would have to first earn an increment in order for the punishment to become effective. It is only thereafter that his promotion to the post of Postal Assistants could even be considered. Further as per the Hon'ble Supreme Court's decision, no official could be promoted if he is undergoing punishment. The applicant is also aggrieved by the fact that the respondents have permitted the 3rd respondent to take part in the examination conducted on 16.10.2011 by which time he had already been imposed a penalty vide orders of the 2nd respondent dated 22.8.2011. The refusal of the respondents to consider the case of the applicant who had secured 2nd highest marks in the division for promotion to the post of Postal Assistant would mean that the vacancy of Postal Assistant for the year 2011 would have to be kept vacant till 2015, till the punishment imposed on the 3rd respondent is over.

3. The respondents have contested the OA by filing a reply. They have taken preliminary objection that the O.A. is hopelessly barred by limitation



as the matter related to the examination of promotion of Lower Grade Officials to the cadre of Postal Assistants held on 16.10.2011 and the results thereof was published on 10.2.2012. They have rejected the claim of the applicant for promotion on the ground that there is only one vacancy of Postal Assistant and that the applicant who secured only second position in merit cannot be considered. They submit that there is no provision for maintenance or publication of supplementary list for the LGO examination. Being a departmental competitive examination, the candidate who secured the minimum qualifying marks in each paper and also who scored the highest marks in aggregate in the order of merit will be selected, subject to the number of vacancies declared.

4. The respondents admit that the applicant ranked second in Idukki division but could not be selected as there was only one vacancy. They also submit that the selection has to be confined to the notified vacancies only as held by the Hon'ble Supreme Court in Ashok Kumar and others Vs. the Chairman Banking Service Recruitment Board which was also followed by this Tribunal while dismissing the O.A.211/11 on 4.12.2012. As such this O.A. is squarely covered by the above decision.

5. Adverting to the applicant's contention that an employee undergoing penalty should not have been permitted to appear in the departmental examination, the respondents have cited Clause 21 of Rule 11 of the CCS(CCA) Rules which stipulates that, any official can be admitted for examination if he satisfies all other conditions prescribed for admission to such examination, even though he may be under suspension or if



disciplinary proceedings might have been initiated against him. It was further stated as follows:

"If on the basis of the disciplinary proceedings a punishment is imposed (other than removal, dismissal or retirement in which case the question would not arise), the appointing authority should consider each case on its merits to see whether a person should be promoted in spite of the penalty imposed on the basis of the results of the examination which he has passed. If it is decided to promote him, then he should be promoted only after the expiry of the penalty..."

6. As such, the respondents aver that they have to consider the 3rd respondent who was the most meritorious candidate in the departmental examination. The respondents have also denied the contention of the applicant on the need for maintenance of waiting list. They submit that "no waiting list is necessary to be maintained since all the posts are filled up by qualified candidates irrespective of whether they are within the same division or not. As such, no vacancy will be left unfilled so long as qualified candidates are in the surplus list". Hence maintenance of waiting list does not arise. They have also stated that the applicant's averment that as the disciplinary action is pending against the selected candidate, the 2nd meritorious candidate should have been selected, is contrary to the existing rules which provide for promotion of the selected candidate after the expiry of the penalty. The rules do not stipulate that the next candidate in merit should be selected for the vacancy. The respondents have also filed an additional reply reiterating the provisions of clause 21 of Rule 11 of CCS(CCA) Rules in support of their contention that the 3rd respondent can be promoted after the disciplinary proceedings are completely over. They have also stated that the 3rd respondent has rejoined duty on 16.7.2013 and is continuously working and that it is not possible to fill up the vacancy by promoting the applicant overlooking the candidate

who secured more marks in the same examination.

7. The applicant has also filed a rejoinder annexing A-7 communication regarding the conduct of Limited Departmental Competitive Examination for promotion to the cadre of Inspector of posts issued on 17.6.13 in which the DG Posts has clarified that the competent authority before recommending the applicant for appearing in a test/examination is required to ensure and certify that (i) no disciplinary action is pending or contemplated against an official; (ii) no punishment is current against the official; (iii) no adverse entry in the APAR/ACR in the last five years. It was also directed therein that the nodal officers have to verify and ensure that the candidates having any of the infirmities are not permitted to appear in the examination even on provisional basis. He submits that such an exercise was not done in the instant selection as a result of which the 3rd respondent was wrongly permitted to appear for the examination. It is his contention that the notified vacancy ought to have been filled up by promoting the applicant as he ranked second in Idukki division and the 3rd respondent was incapacitated to be promoted.

8. Although notice was served on the 3rd respondent, there was no representation on his behalf. He has also not filed any reply statement.

9. We have heard the learned counsel for the applicant and the official respondents. We have considered the pleadings, arguments as well as the material placed on record. As the respondents have taken a preliminary objection regarding the maintainability of the OA on the ground of



limitation we shall first consider this preliminary objection. The respondents' contention is that the examination took place on 16.11.2011 and the results were published on 10.2.2012. Thus, as he has not approached the Tribunal within the stipulated time the O.A. is barred by limitation. Further, an examination for the vacancies for the year 2012 was also conducted and the applicant did not turn out successful in the examination also. Admittedly, the examination was held on 16.10.2011. The applicant vide his Annexure-A5 representation dated 3.8.2012 had requested the first respondent to consider him for the vacant post of Postal Assistant in Idukki division as he ranked 2nd with 122 marks in the departmental competitive examination and as the 3rd respondent who was selected in the aforesaid examination has not been issued with promotion and posting orders. He has thus, requested the respondents for appointment against a vacant post in Idukki division which has been lying vacant for several months. Even though no direct reply to the applicant's representation has been given, he has been served with a copy of the 2nd respondent's report submitted to the first respondent on 14.2.2013 on his request for promotion to the Postal Assistant's vacancy in Idukki Division. In the said Annexure A-6 letter the 2nd respondent has informed the 1st respondent that the request of the applicant who secured the second position in merit cannot be considered as there was only one vacancy of Postal Assistant and that the 3rd respondent has not declined his promotion and that his name has not been deleted from the select list. Immediately on receipt of this communication the applicant has filed this O.A. on 5.3.2013. Hence we hold that the O.A. is not barred by limitation.



10. In Annexure A-I notification, the respondents have notified vacancies for 2011. Ordinarily, the said vacancies should be filled up immediately after the declaration of the results. In the instant case, the vacancy was not filled up as the 3rd respondent, who secured the highest marks, has been imposed a penalty of stoppage of increment for one year without cumulative effect.

11. It is the case of the respondents that the vacancy cannot be filled up by the next meritorious candidate as the 3rd respondent is eligible for promotion after the expiry of the penalty. The respondents have also maintained that there is no provision for maintaining and operating supplementary list in a LDCE. In this particular case, the 3rd respondent who has secured the highest marks was also on Extraordinary Leave from 23.08.2011. Therefore, the penalty would become operative only after the date on which the 3rd respondent re-joins duty and earns increment. As the 3rd respondent has rejoined duty only on 16.7.2013, the earliest date by which he could be promoted is 2015. In a situation when the most meritorious candidate is not at all available for being considered for promotion on account of Extraordinary Leave availed of by him, there is hardly any justification for not filling up the vacancy with the next available candidate. It goes without saying that the most meritorious candidate can be promoted only if he is physically available on duty. Further, it cannot be the case of the respondents that a vacancy of 2011 should be kept vacant indefinitely in the fond hope that the most meritorious candidate will rejoin duty after expiry of Extraordinary Leave and earn an increment so as to enable him to first undergo the penalty that was imposed.



12. The respondents have relied on the judgment of this Tribunal in support of their action in not considering the applicant, who secured the second highest marks.


13. We have given our thoughtful consideration to the judgment of this Tribunal in O.A.No.211/2011, dated 4.12.2012. The question that was adjudicated by this Tribunal in the aforesaid OA was whether selection can be made against vacancies which have not been actually notified. According to the applicants therein, the number of vacancies notified by the respondent-department for the post of Postman should have been 16, as against 6 vacancies notified by the respondent-department. After due consideration the Tribunal dismissed the OA with the finding that there was nothing wrong in the calculation of vacancies by the respondents and that it is settled law that the selection has to be confined to the notified vacancies only.

14. This judgment has no applicability to the instant case. In this OA, the applicant has not challenged the number of vacancies notified by the respondents. His claim is that a waiting list should have been maintained and appointment given to him against the notified vacancies since the most meritorious candidate had proceeded on Extraordinary Leave and was suffering penalty upto 2014 and was thus rendered incapacitated to be appointed. Thus, the facts and circumstances of the aforesaid OA are entirely different. We, therefore, hold that the judgment quoted by the respondents is of no help to them in this case.



15. The respondents have justified their action of not promoting the applicant on the ground that the 3rd respondent can be promoted after expiry of the penalty. However, the 3rd respondent has not only suffered a penalty but has proceeded on continuous Extraordinary Leave from 27.08.2011 and he rejoined duty only on 16.07.2013 on expiry of leave.

16. The question that arises for consideration therefore is whether in such a situation, the respondents are justified in keeping the vacancy of 2011 unfilled till 2015.

17. We hold that the very purpose of holding a LDCE for filling up available vacancies will be defeated if the course of action adopted by the respondents is upheld. A perusal of the Personal File of the 3rd respondent shows that he has been applying for EOL/Leave without pay on medical grounds in different spells ranging from one day to 100 days between 23.08.2011 to 25.07.2012 ~~on medical grounds~~ without actually submitting  any medical certificate on most occasions. In the Personal File, we did not find any leave application of the 3rd respondent after 25.07.2012. However, the Inspector of Posts, Munnar Sub-Division, has issued sanctions for EOL from 1.9.2012 to 30.9.2012, 1.10.2012 to 31.10.2012, 1.11.2012 to 14.11.2012, 19.11.2012 to 16.2.2013, 17.2.2013 to 18.2.2013, 20.3.2013 to 31.3.2013, 1.4.2013 to 30.4.2013, 1.5.2013 to 18.5.2013, 22.5.2013 to 31.5.2013, 1.6.2013 to 28.6.2013, 29.6.2013 to 30.6.2013 and 1.7.2013 to 15.7.2013. Such absence should ordinarily have been treated as unauthorized absence and dealt with accordingly. Respondents 1 and 2 would do well to have a thorough audit done of the Leave Account of the 3rd




respondent and enquire as to how EOL has been sanctioned by the Inspector of Posts without a supporting Leave Application. Further, after his purported joining on 16.7.2013 also, the 3rd respondent has been sanctioned EOL in many spells without any application being found in the Personal File. The Personal File also shows that on account of his unauthorized absence after rejoining duty, the period from 30.9.2013 to 28.10.2013 and 24.2.2014 to 18.3.2014 has been treated as DIES NON.

18. Having regard to the above, the non-availability of the 3rd respondent should have been a sufficient ground for considering the case of the next candidate in the merit list for promotion.

19. Considering the peculiar circumstances of the case and the non-availability of the most meritorious candidate for promotion, when the results were declared, the respondents are directed to consider the applicant, who undisputedly secured the second highest marks against a vacancy notified in Annexure.A1 notification subject to his eligibility in all respects. Three weeks time is granted for compliance.

20. The OA is allowed as above. No order as to costs.


(MINNIE MATHEW)
ADMINISTRATIVE MEMBER


(U.SARATHCHANDRAN)
JUDICIAL MEMBER

(Dated, this the ...16th... day of ...JANUARY... 2015)

Dsn.