

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 215 of 2008

Wednesday, this the 27th day of August, 2008

C O R A M :

**HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER
HON'BLE DR. K S SUGATHAN, ADMINISTRATIVE MEMBER**

Sri P.A. Ramakrishnan,
S/o. Late P.K. Ayyappan,
Postmaster, Guruvayoor Main Dak Ghar,
Residing at 'Koodaram' (Penghattu House),
Koorkanchery, Trichur : 7

... Applicant.

(By Advocate Mr. Shafik M.A)

v e r s u s

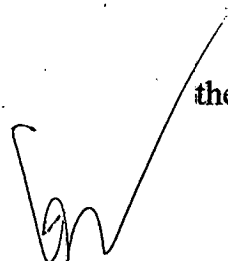
1. Union of India represented by
Secretary/Director General,
Department of Posts, Dak Bhavan,
Sansad Marg, New Delhi.
2. The Chief Postmaster General,
Kerala Circle, Trivandrum - 33
3. The Senior Superintendent of Post Offices,
Trichur Division, Trichur.
4. Sri C.V. Simon,
APM A/Cs, HSG II, Trichur Head Post Office,
Under orders of posting as Postmaster,
Kunnamkulam, Head Post Office.

... Respondents.

(By Advocate Mr. M.V.S. Nampoothiry, ACGSC)

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

The applicant had joined as Postal Assistant in 1970 and was promoted to the LSG Grade in September, 1996. At present he is functioning as Post Master,



Guruvayoor Main Dak Ghar against a norm based HSG II Post.

2. Respondent No. 4 joined as postal Assistant in 1969 and was promoted to the LSG Grade in December, 1997. Prior to the issue of the impugned order whereby he has been promoted as HSG I, he was functioning as HSG II
3. In the Annexure A-2 gradation list of LSG Officials, the name of the applicant figured in serial 86, while that of respondent No. 4, in serial No. 88.
4. The next promotional post from LSG is HSG II and the applicant as well as respondent No. 4 were promoted to that grade vide Annexure A-3 order dated 19-10-2006 and Annexure A-4 order dated 17-11-2006 and in both the lists, the name of the applicant appears above that of Respondent No. 4.
5. Vide Annexure A-5, for filling up of the post of HSG Gr. I, on ad hoc basis, willingness from three eligible candidates was called for and the applicant and the fourth respondents responded positively, while the other individual declined.
6. While the applicant was anticipating an order of ad hoc promotion to the HSG I grade, the impugned Annexure A-1 order dated 11-04-2008 was passed whereby the fourth respondent was afforded the ad hoc promotion to the HSG I.
7. Aggrieved by the above order, the applicant has moved this Tribunal with the following prayer:-

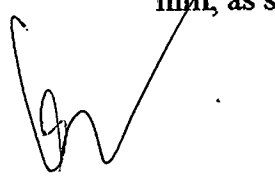
(a) To quash Annexure A-1 order to the extent it grants officiating promotion to the fourth respondent;

(b) To direct the respondents to consider the case of the applicant on the lines of the order dated 30-03-1988, which states that where ad hoc appointment is by promotion from the feeder grade, it may be done on the basis of seniority cum fitness, even where promotion is on selection method.

8. At the time of initial hearing, an interim order was passed to the effect that status quo with regard to the appointment of private respondent No. 4 in pursuance of Annexure A-1 order was passed and the said interim order still continues. Notice to Private respondent was issued and served.

9. Official Respondents have contested the O.A. According to them, the post to be filled up being by way of selection method, and the bench mark for HSG Gr. I being 'Good' even if the vacancy is to be filled up by way of ad hoc promotion, the norms of general promotion shall have to be followed. As per the records, the applicant's grading for 2007-2008 was only average and hence, the applicant could not be promoted to the said grade. At the same time, the other individual, i.e. Respondent No. 4 having got the grade 'Good' he was promoted.

10. Respondent No.4 has not filed any counter. However, service of notice to him, as stated earlier, is complete.



11. Applicant has filed his rejoinder, stating that till the filing of the OA no adverse remarks were communicated to the applicant and it was only in May, 2008 that he was communicated vide Annexure A-7, an adverse remark, though it was dated 18-04-2008. According to the applicant, this remark cannot be taken into account for selection for that vacancy, which arose prior to March, 2008.

12. Counsel for the applicant has submitted that the entire action on the part of the respondents in issuing the impugned Annexure A-1 order is illegal, as the applicant should have been offered the post. Grounds for this contention were as under:-

(a) The vacancy pertains to the period prior to March, 2008 and hence, ACR for 2007-2008 need not have been taken into consideration.

(b) Adverse remarks should have been communicated even if it were average and not literally adverse. This has not been done.

(c) The one communicated does not talk of the grading on the basis of which the applicant was dropped.

(d) Even that which has been communicated was after the selection was over. Hence, the adverse remarks which have not been communicated should not have been taken into account (assuming that ACR for the year 2007-2008 could also be considered for the vacancy.)



(e) For ad hoc promotion, the mode of selection, in any event, is seniority cum fitness as held by this Tribunal vide order dated 31st July 2007 in O.A. No. 88/2007.

13. Counsel for the respondents has submitted that the reports in respect of respondent No. 4 being better than that of the applicant and the applicant's grading being less than the benchmark, promotion was given to respondent No. 4.

14. After hearing and when order was reserved, respondents were directed to produce the relevant records leading to the issue of impugned order and promptly, the same had been made available.

15. Arguments were heard and documents perused. Promotion from HSG II to HSG I is, no doubt, by method of selection. However, the promotion in question in this case happens to be one on ad hoc basis. As such, what is to be seen is the procedure as laid down for consideration for ad hoc promotion. Para 4 of the O.M. Date 30th March, 1988 prescribes certain conditions for ad hoc appointments. Para 4(iii) thereof stipulates as follows:-

"Where ad hoc appointment is by promotion of the officer in the feeder grade, it may be done on the basis of seniority-cum-fitness basis even where promotion is by selection method as under:

(a) Ad hoc promotions may be made only after proper screening by the appointing authority of the records of the officer.

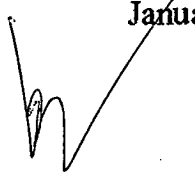
(b) only those officers who fulfill the eligibility conditions prescribed in the Recruitment Rules should be considered for ad hoc appointments. If, however, there



are no eligible officers, necessary relaxation should be obtained from the Competent Authority in exceptional circumstances.

(c) The claims of Scheduled Castes and Scheduled Tribes in ad hoc promotions shall be considered in accordance with the guidelines contained in the Department of Personnel and A.R. Office Memorandum No. 36011/14/83-Estt (SCT) dated 30-04-1983 and 30-09-1983."

16. Thus, the criteria for promotion is **seniority cum fitness**. Admittedly, the applicant has been shown senior in the gradation list as well as in the order of promotion to the HSG II. Thus what is to be seen is fitness of the applicant to enshoulder the higher responsibility. The next question, therefore, is whether the applicant could be rejected on the ground that his grading in the ACR for the year 2007 – 2008 has been registered as Average. To answer this question, it is first to be seen, as also contended by the counsel for the applicant, whether for the vacancy which had arisen prior to 31st March 2008, ACR for the period ending 31-03-2008 should at all be considered. Vide O.M. No. 22011/7/98-Estt (D) dated 6th October 2000, Service records with particular reference to the CRS for **five preceding years** should be considered. The term 'Preceding years' for this purpose is explained in OM No. 22011/9/98-Estt(D) dated 08-09-1998 as per which, the crucial date for determining eligibility in case of financial year-based vacancy year would fall on January, 1, immediately preceding such vacancy year and in case of calendar year based vacancy year also, the first day of the vacancy year i.e. January 1 itself would be taken as the crucial date. To illustrate the point, January 1, 2000 would be the crucial date for the vacancy year 2000 (calendar



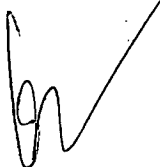
year) as well as vacancy year 2000 – 2001 (financial year). The DOPT has also given a model calendar as per which the ACRs upto 1999 alone should be considered, in case of vacancy year 2000 (calendar year) or 2000-2001 (financial year).

17. In the instant case, vacancy being of 2008, ACRs for the preceding five years would be of 2006-07, 2005-06, 2004-05, 2003-04 and 2002-03. Thus, report of 2007-08 cannot be considered.

18. Even if the report of 2007-08 could be considered, then again, where adverse remarks have not been communicated, that report cannot be considered. In the instant case, admittedly, till 18-04-2008, no adverse remarks were communicated. Even the one communicated was not relating to grading, while rejection of the case of the applicant for promotion was on the ground that his grading was only 'average'.

19. That any grading below the bench mark should be communicated has been spelt out in the decision by the Apex Court in the case of Dev Mutt vs Union of India CA No. 7631 of 2002 decided on May 12, 2008, wherein the Apex Court has held as under:-

"5. The stand of the respondent was that according to para 6.3(ii) of the guidelines for promotion of departmental candidates which was issued by the Government of India, Ministry of Public Grievances and Pension, vide Office Memorandum dated 10.04.1989, for promotion to all posts which are in the pay scale of Rs. 3700-5000/- and above, the bench mark grade should be 'very



good' for the last five years before the D.P.C. In other words, only those candidates who had 'very good' entries in their Annual Confidential Reports (ACRs) for the last five years would be considered for promotion.

The post of Superintending Engineer carries the pay scale of Rs. 3700-5000 and since the appellant did not have 'very good' entry but only 'good' entry for the year 1993-94, he was not considered for promotion to the post of Superintending Engineer,

6. The grievance of the appellant was that he was not communicated the 'good' entry for the year 1993-94. He submitted that had he been communicated that entry he would have had an opportunity of making a representation for upgrading that entry from 'good' to 'very good', and if that representation was allowed he would have also become eligible for promotion. Hence, he submits that the rules of natural justice have been violated.


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10. In the present case, the bench mark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' entry for the last five years. Thus, in this situation the 'good' entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours of the entry which is important, not the phraseology. The grant of a 'good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or as an adverse effect on his chances.

11. Hence, in our opinion the 'good' entry should have been communicated to the appellant so as to enable him to make a representation praying that the said entry for the year 1993-94 should be upgraded from 'good' to 'very good'. Of course, after considering such a representation it was open to the authority concerned to reject the representation and confirm the 'good' entry (though of course in a fair manner), but at least an opportunity of making such a representation should have been given to the appellant, and that would only have been possible had the appellant been communicated the 'good' entry, which was not done in this case. Hence, we are of the opinion that the non-communication of the 'good' entry was arbitrary and hence illegal, and the decisions relied upon by the learned counsel for the respondents are distinguishable.



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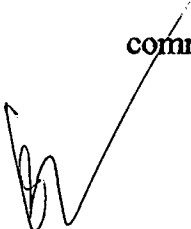
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17. In our opinion of the Office Memorandum dated 10/11.09.1987, is interpreted to mean that only adverse entries (i.e. 'poor' entry) need to be communicated and not 'fair', 'average' or 'good' entries, it would become arbitrary (and hence illegal) since it may adversely affect the incumbent's chances of promotion, or get some other benefit.

18. For example, if the bench mark is that an incumbent must have 'very good' entries in the last five years, then if he has 'very good' (or even 'outstanding') entries for four years, a 'good' entry for only one year may yet make him ineligible for promotion. This 'good' entry may be due to the personal pique of his superior, or because the superior asked him to do something wrong which the incumbent refused, or because the incumbent refused to do sycophancy of his superior, or because of caste or communal prejudice, or for some other extraneous consideration."

20. From the above, it is clear that in their action in not communicating the grading of Average to the applicant, the respondents have denied the applicant an opportunity to make representation. His report for 2007-2008 ought not have been considered at all. In fact, a perusal of the records would show that the case was put up the higher authority on 26th March, 2008 reflecting in the note that the applicant was senior and that the ad hoc promotion may be granted to him. However, the authority (presumably, the SSPO) has called for CR and stated that the applicant has earned only average grading, while the respondent No. 5 had earned 'good' and hence, the latter was promoted to the HSG I on ad hoc basis. The authority had not bothered to realize that such report not pertaining to the period anterior to the vacancy year cannot be taken into account, more so when the same contained grading lower than the Bench mark which had not been communicated to the applicant, much less representation called for against the

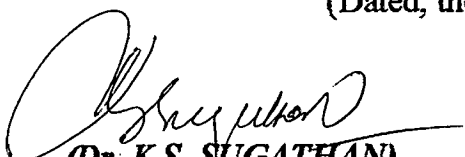


same and the least the same considered and decided. It is trite law that when a Confidential Report contains an adverse remark, the same should be communicated and on receipt of such representation the same duly considered and decision arrived and communicated, and unless this specific drill is complete, the very report containing the adverse remarks cannot be taken into account.

21. Thus, a serious and patent error had been committed by the authorities in not considering the case of the applicant, who is senior, to the post of HSG I. The impugned Annexure A-1 order thus has to be quashed and set aside and we order so. Respondents shall review the selection and consider the case of the applicant along with other eligible individuals and while so considering, consideration shall be only with reference to those A.C.Rs, which pertained to the period anterior to the vacancy year. Further action on the basis of the review be taken. This exercise be completed within a period of two months from the date of communication of this order.

22. OA is allowed on the above terms. No costs.

(Dated, the 27th August, 2008)


(Dr. K S SUGATHAN)
ADMINISTRATIVE MEMBER


(Dr. K B S RAJAN)
JUDICIAL MEMBER