

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH
OA NO. 218/05**

WEDNESDAY THIS THE 12th DAY OF SEPTEMBER, 2007

CO R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE DR. K.B.S. RAJAN, JUDICIAL MEMBER**

Sathimol PS D/o Sri P.S.Sukumaran
Postal Assistant, Kattapana HO
residing at Puthenpurakkal House
Kattappana PO, Pin 685 508

Applicant

By Advocates Mr. O.V. Radhakrishnan Sr.,and Mr. Antony Mukkath

Vs.

- 1 Director General, Department of Posts
Dak Bhavan, New Delhi.
- 2 Chief Postmaster General
Kerala Circle, Thiruvananthapuram.
- 3 Union of India represented by its Secretary
Ministry of Communications, New Delhi. Respondents.

By Advocate Mr. C.M. Nazar, ACGSC

ORDER

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

The applicant herein is presently working as a Postal Assistant in Idukki Postal Division and is aggrieved by her non selection to the post of Inspector of Posts though she qualified in the Limited Departmental Competitive Examination conducted by the respondents for the

purpose. According to Rule 3 of the Department of Posts, Inspector of Posts (Recruitment Rules), 2001, method of recruitment to the category of Inspector of Posts shall be 33.34 percent by direct recruitment and 66.66 percent by promotion through limited departmental competitive examination. Not less than five years service in the grade as Postal Assistant, LSG etc. is required to appear in the examination. The respondents notified eleven unreserved vacancies by letter dated 10.6.2003 at Annexure A-2. The applicant was permitted to appear for the examination held from 26.8.2003 to 28.8.2003. The Directorate communicated the result of the examination as per letter dated 31.3.2004 and the 2nd respondent in turn notified the select list consisting of 11 candidates for appointment to the post of Inspector of Posts by Annexure A-3 Letter dated 7.04.2004. The applicant was not included therein and she applied for communication of her marks which was conveyed to her by A-4 memo, according to which she has passed in all the papers.

2 The applicant's case is that one out of the 11 candidates, one Sri Wilson George declined the promotion and he did not join the post. And he subsequently tendered his resignation which had been accepted by the Department and she should have been accommodated against that vacancy. The applicant has further submitted that she has learnt from reliable sources that she stands next below the last person included in Annexure A-3 and therefore the vacancy available by the non-joining of Sri Wilson George should necessarily be filled up by offering it to the next below candidate. Though she has represented, her representations at A-5 and A-6

remained unanswered upon which she filed OA 883/04 which was disposed off by directing the disposal of A-6 representation. Now it has been rejected by the impugned order at Annexure A-9 on the ground that the select list has been prepared based on the number of declared vacancies and no modification can be made after declaration of the result of the examination and that the result of the subsequent examination for the year 2004 has also been held. The applicant submits that the stand of the respondents is illegal and the vacancy remaining unfilled due to non-joining of the selected candidate in respect of 2003 cannot be carried forward to 2004 as that examination was held for the vacancies arisen in 2004.

3 A reply statement has been filed. It is submitted that no waiting list has been published. The IPO examination is a competitive one and the result of successful candidates is limited to the number of vacancies and the applicant cannot claim that she be put on the waiting list to be absorbed on the occurrence of the vacancy. Moreover Sri Wilson George tendered his resignation only in 2005 and the vacancy was not included in the notified vacancies for 2004.

4 The applicant filed a rejoinder taking the contention that the officer who filed the reply statement is not competent to do so as it is not accompanied by an authorisation as mandated by Rule 12(3) of the CAT (Procedure)Rules and citing the decisions in Ram Rakha vs Union Of India reported in 1988(8) ATC16 and AIR 1952 SC 317 and AIR1967 SC 295 decisions of the Hon'ble Supreme Court. On merits it has been submitted that the applicant has secured more than 58.8% marks and her name was not included not because she had not qualified but because the merit list was restricted to the number of

vacancies. A memo issued by the CPMG, Karnataka Circle marked as Annexure A-10 adding one name of Sri Hasabee thus modifying the select list of suitable candidates deputed for training at PTC, Mysore has been produced along with the rejoinder to show that the applicant has been discriminated against.

5 The applicant's contentions about the acceptability of the Reply statement on the ground that it was filed by an incompetent officer was found to have no merit and was rejected by the court. Further two additional reply statements have been filed also clarifying certain doubts expressed by the court regarding the total marks obtained by one Sri Jayesh included in the merit list. With reference to the modification carried out in the Karnataka circle, the respondents have pointed out that it was on a totally different ground since one of the candidates declared to have passed the examination was not actually in service and it amounted to only correction of an error in the merit list and the applicant cannot compare herself to that candidate. There is no rule to modify the selection list after the declaration of the result and the applicant has no legally valid claim according to the respondents.

5 We heard the Learned Senior Counsel Sri O.V. Radhakrishnan for the applicant and Sri Shaji for the ACGSC. The Senior counsel argued that the averments of the respondents are devoid of any force or merit and the failure to draw up a waiting list would necessarily lead to a situation of leaving the announced vacancies for which the selection was made, unfilled for subsequent years. The respondents have not shown any good or valid reason for not drawing up a waiting list to meet exigencies of situations like death, resignation, abandonment etc. He further relied on the following decisions of the

Apex Court :-

- i) 1991 3 SCC 47
- ii) 1996 4 SCC 319
- iii) 1996 1 SCC 332
- iv) 1994 Suppl. II SCC 591
- v) 1999 3 SCC 696
- vi) 2001 2 SCC 276
- vii) 2003 11 SCC 559
- viii) 2004 2 SCC 681

6 The main issues posed for our consideration in this application can be summed up as - whether (1) the applicant who was not included in the select/merit list can be considered for inclusion in the event of a vacancy becoming available and (2) has a right to be appointed being the next qualified person even if no waiting list was published. A related question is also raised whether a select list prepared on merit basis can be altered.

7 It is necessary to recapitulate the factual position before we embark on a discussion of these issues. The applicant had appeared in the IPO examination for the year 2003 held on 26th to 28th August 2003. The result of the examination was declared in March 2004. The vacancies notified for the above examination were unreserved-11, ST-3, Total-14. The result was published with 11 candidates in the merit list. The respondents have argued that the applicant who could not be included in the select list with reference to the marks secured by her cannot claim to be included later as the IPO examination is a competitive one and a list equal to the number of vacancies announced for the respective years only can be published. The

applicant had applied for communication of her marks and on receipt of the same she made a representation dated 16.9.2004 to the second respondent that one Sri Wilson George whose name figured in the merit list has not yet joined the post and as such she is the next meritorious candidate eligible for the post. This representation has been rejected by the first respondent on the ground that no modification in the list of successful candidates can be made after the declaration of the result.

8 According to columns 11 and 12 of the Inspectors of Posts Recruitment Rules (A1), 66.66 percent of the posts are required to be filled up by promotion through Limited departmental competitive examination. It is further provided in Note 1 under Col. 12 that a candidate is allowed only four chances to appear for the examination and under Note 3 that the syllabus, and the percentage of mark as required for qualifying the said examination shall be as decided by the Department from time to time. Annexure A-3 is the communication issued by the respondents after the examination. Though the subject of this letter is noted as result of the Department examination held in 2003", it is clear from the contents that it is a list of selected candidates for appointment arranged in the order of merit and the enclosed merit list contains 11 names only, it does not stipulate other details regarding category etc. In any case that is the defence taken by the respondents that it is a select list limited to the no of vacancies. After several clarification were sought and additional replies filed, the respondents have come up with the list of qualified candidates annexed to the additional reply in Annex R-2 which shows that 22 candidates have qualified in the examination and the applicant is figuring at Sl. No 12

thereof. Hence this list at R-2 is the result of the examination and not Annexure A-3 which is a select list. From this list it is clear that the applicant is the next person in order of merit who would be eligible to be included in the panel as those upto S No.11 have been empanelled. With the product of R-2 document, the distinction between the select list and the list of qualified persons is clearly brought about, in as much as the Annexure A-3(2) , produced in the OA is the panel of candidates who were selected from those qualified in the examination arranged in the order of merit and R2 is the List of qualified candidates who passed in the examination also arranged in the order of merit. It is also evident that the panel has been prepared confining to the no. of vacancies notified.

9 In this context, it is pertinent to advert to the two contentions taken by the respondents. Firstly they have stated that there is no waiting list and the applicant cannot claim that she be put on the waiting list to be absorbed on the occurrence of a vacancy caused due to any reason in the list of successful candidates. It is true that no waiting list has been prepared. It is now well settled law that selectees cannot claim appointment as a matter of right and mere inclusion in the select list does not confer any right to be selected even if some of the vacancies remain unfilled. In the case of Sankarsen Dash v Union of India it has been held by the court that even if number of vacancies are notified for appointment and even if adequate number of candidates are found fit, the successful candidates do not acquire any indefeasible right to be appointed against existing vacancies. This position has been reiterated by the Apex Court in State of UP vs Rajkumar Sharma &ors reported in 2006 SCC L&S 565. When those included in the select list

have no indefeasible right , what right can those who are not even in the waiting list claim and to that limited extent the respondents are right as far as the general proposition is concerned. But the Hon'ble Supreme Court itself have dealt with different situations arising in the context of operation of "select list" and "waiting list" and postulated certain principles in dealing with such situations. One such case is Gujarat State Deputy Executive Engineers Association vs State of Gujarat and others reported in 1994 supp (2) SCC 591, and heavily relied on by the Learned senior counsel for the applicant. Para 9 reads thus:

"A waiting list prepared in an examination conducted by the commission does not furnish a source of recruitment. It is operative only for a contingency that if any of the selected candidates does not join then the person from the waitinglist may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the government may as a matter of policy decision pick up a person from the merit list.'

10 Though ultimately in conclusion in this case, the court did not agree with the High court's view that the since the vacancies had not been worked out properly, therefore the candidates were liable to be picked up from the waiting list and deprecated the operation of the waiting list as an infinite stock for appointment. In Madan Lal vs State of J&K (1995 3 SCC 486) it was held :

"Consequently the actual appointments to the posts have to be confined to the posts for which recruitment to which the requisition is sent by the government. In such an eventuality candidates in excess of 11 who are in the merit list of candidates can only be treated as waitlisted candidates in the order of merit. Once the 11 vacancies are filled by candidates taken in order of merit from the select list that list will get exhausted ,having served its purpose."

11 Similar observations have been made in several other judgements also. The factual situation in each of these cases is

different and distinct. Therefore the decision in any one case cannot be made squarely applicable to another and observations made cannot be taken out of context to establish that a next meritorious candidate has no right for appointment or that a waitlist cannot be operated at all. The decisions noticed above therefore can be said to lay down the following propositions that (1) a waiting list can be acted upon having regard to the vacancies fixed in terms of the advertisement (2) it cannot remain operative beyond a prescribed period (3) no right is created by mere inclusion in the Select/wait list. Any action taken therefore within the limitations prescribed above should be deemed to be in accordance with law. The judgement in the case of Gujarat Dy Exec. Engineers case does recognise the right of a waitlist candidate to be appointed to the limited extent viz when a candidate does not join for some reason or other and during the currency of the list being still operative.

12 Against the above boundaries set by the law, the facts in this case have to be looked into. Sri Wilson George who was no. 5 in the list was on deputation to Maldives. He resigned only in January 2005. There is no averment regarding the events that would have taken place from the date of publication of the panel on 7.4.2004 to January 2005 to show whether the post was offered to Sri George and he had refused etc. The applicant had, as early as on 16.9.2004 put in a representation stating that Sri Wilson George has not joined the post. The respondents did not take a view on the request and only after the intervention of the Tribunal, the representation was disposed of rejecting the request. The respondents are still maintaining that the vacancy created by Sri Wilson George's resignation has not been carried forward or included in the calculation of vacancies for the year

2004, for which the IPO examination 2004 was held. A select panel ordinarily is valid for a period of one year. This panel communicated on 7.4.2004 was valid till 7.4.2005, so even if Sri George's vacancy due to resignation is said to have arisen in Jan. 2005, it was during the validity of the select list and it would have been perfectly legal for the respondents to fill up the vacancy by the next meritorious candidate from the list of qualified persons. Such action would be perfectly within the limits set by the legal pronouncement as the select list was still valid and the number of vacancies notified was not exceeded. By not doing so, the respondents have unnecessarily thwarted the chances of the next candidate in getting the deserved promotion after her having put in all the efforts to appear in the examination and the vacancy has been lost since it was not carried forward also to the next year. For reasons not mentioned, the authorities have not prepared a waiting list, probably because it was only a departmental examination. Since the recruitment Rules prescribed a percentage to be filled by promotion, it was incumbent on the respondents to fill up all the slots earmarked for promotees for that year when qualified candidates were available. It was not a direct recruitment by the Public service commission or any such agency. It was only a Limited departmental promotion examination. The Rules stipulate that the 66.36% posts are earmarked for the departmental candidates for promotion. Having passed the examination therefore the applicant had every right to be considered for promotion. The applicant's request does not go beyond the no of vacancies determined for the year as she is only seeking the slot which could not be filled up as a selected candidate resigned and she did not join the post. We therefore consider that it would be unfair to

import all the postulates regarding select/merit list applicable in the direct recruitment process into the instant case of promotion. If such a rigid view is taken, the candidates will have to go on appearing in the examinations and posts would remain unfilled. Therefore applying the ratio of the judgement in **Madan Lal** case referred to supra, it has to be held that the list of qualified candidates can only be treated as waitlisted candidates in the order of merit and the respondents should have filled up all the notified vacancies from that list and once all the vacancies of that year are filled, that list will get exhausted. It is also to be noted that the respondent had no such case while rejecting the applicant's request. The only ground stated for rejection was that "**No modification in the list of successful candidates can be made after declaration of the result of the examination**". For this they relied on Annexure A3 according to which modification in the result can be made only in the cases shown below:-

- (i) if a candidate is later found eligible to take the examination
- (ii) In the case of any mistake later found with regard to announcement of results
- (iii) Consequent upon re-totalling and re-verification of the answer scripts.

13 This argument does not hold good at all as there are conditionalities applicable to the declaration of results of the examination. We have already stated that the applicant is seeking an inclusion in the select panel which is a merit list and not any change in the result of the qualifying examination and the stipulations made above can be applicable from the very wordings in the letter to the list of qualified candidates at R-2 and not to the panel enclosed to Annex

 A-3. The applicant has also pointed out a case in the select list of

Karnataka Circle wherein such a correction was made when an official had left the Department by resigning his post, on the ground that the official had resigned before the announcement of the result, the respondents have sought to justify their action. From the order at Annex. R1 issued by the Karnataka Circle, it is seen that it is not a mere change in the result but that the respondents altered the panel to induct the next meritorious candidate on 9.6.2005 by which time the validity of the panel itself had also expired. Evidently this points to a discriminatory treatment.

14 In the light of the above discussions, we come to the conclusion that the respondents should have considered the request of the applicant who is the next meritorious candidate to be appointed against the vacancy that arose on the acceptance of the resignation of Sri Wilson George in January 2005 after the panel was exhausted by appointing the last candidate therein Keeping the vacancy unfilled was against the mandate of the recruitment Rules. They did not carry forward the vacancy also to the next year. Therefore we are of the considered view that the applicant has made out a case. We are also fortified in taking this view by noticing the instructions issued in GOI Dept. of Personnel & Training OM No. 41019/18/97-Estt.(B) dated 13.6.2000 on this subject. Paras 2 & 3 read as under:-

"2 The Fifth Central Pay Commission, in Para 17.11 of its Report, has recommended that with a view to reduce delay in filling up of the post, vacancies resulting from resignation or death of an incumbent within one year of his appointment should be filled immediately by the candidate from the reserve panel, if a fresh panel is not available by then. Such a vacancy should not be treated as a fresh vacancy. This recommendation has been examined in consultation with the UPSC and it has been decided that in future, where a selection has been made through UPSC, a request for nomination from the reserve list, if any, may be made

to the UPSC in the event of occurrence of a vacancy caused by non-joining of the candidate within the stipulated time allowed for joining the post or where a candidate joins but he resigns or dies within a period of one year from the date of his joining, if a fresh panel is not available by then. Such a vacancy should not be treated as fresh vacancy.

3 It has also been decided that where selections for posts under the Central Government are made through other recruiting agencies such as Staff Selection Commission or by the Ministries/Departments directly and the reserve panels are similarly prepared, the procedure for operation of reserve panels maintained by UPSC as described in Para 2 above will also be applicable for the reserve panels maintained by the other recruiting agencies/authorities."

15 We accordingly direct the respondents to promote the applicant in the vacancy for the year 2003 which remained unfilled due to non-joining of the candidate in the merit list dated 7.4.2004. The applicant filed this OA in March 2005 and the details of the appointments made from the panel or subsequent panels prepared are not before us. Hence as regards the prayer for consequential benefits we would leave it to the respondents to decide the question of seniority, backwages and other related benefits in accordance with rules. The directions shall be complied with within a period of six weeks from the date of receipt of this order. OA is allowed accordingly.

Dated 12.9.07



DR. K.B.S. RAJAN
JUDICIAL MEMBER



SATHI NAIR
VICE CHAIRMAN

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