

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A No. 345/2011

Wednesday this the 19th day of October, 2011.

CORAM

HON'BLE Dr K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Ms. K NOORJEHAN, ADMINISTRATIVE MEMBER

V.S.Achuthan,
S/o late V.K.Subramanian,
GDSMD, Kottamuri,
Irinjalakkuda-680 732.Applicant

(By Advocate Mr R Sreeraj)

v.

1. Union of India represented by the
Chief Postmaster General,
Department of posts,
Kerala Circle, Trivandrum.
2. The Postmaster General,
Department of Posts,
Central Region, Kochi-682 018.
3. The Superintendent of Post Offices,
Department of Posts,
Irinjalakkuda Division,
Irinjalakkuda-680 121.
4. Smt Renuka K.A.,
Postman, Nattika.P.O.
PIN-680 373.Respondents

(By Advocate Mr. Sunil Jacob Jose, SCGSC for R.1 to 3)

(By Advocate Ms K Radhamani Amma with Mr OV Radhakrishnan, Senior
for R.4)

This application having been finally heard on 10.10.2011, the Tribunal on
19.10.2011 delivered the following:

ORDER

HONBLE Dr K.B.S.RAJAN, JUDICIAL MEMBER

The following legal issues are involved in this case:-

- (a) Whether the applicant's claim for re-valuation of the answer sheet for a particular question in respect of which for the same answer, nil mark had been given to the applicant, while others have been awarded marks is legally sustainable.
- (b) When the vacancies for the post of Postman initially sought to be filled up were 10, while unexpectedly two more vacancies arose, but the vacancies filled up, in fact, were only six, whether even without re-valuing the answer sheet as claimed by the applicant, the applicant could be considered for appointment to the post of postman as he is next in the merit list and there are vacancies available even within the vacancies for which examination was conducted.
- (c) Whether the appointment of the private respondent, whose merit position may go down if the applicant's claim for re-valuation of the answer sheet is allowed and he is awarded marks as given to others, should be protected.

2. Now a vignette of the facts of the case:- The applicant is functioning as GDSMD, Kottamuri and on the notification of certain vacancies to the post of Postman under the GDS Merit Quota for the year 2010, the applicant appeared for the examination held on 29-08-2010. He had secured 140 marks out of 150. One of the questions in Paper B reads as under:-

"What is the percentage of return if a postman delivers 450 articles out of 500? "

3. The applicant answered the same in vernacular language and the English translation is as under:-

Percentage of return: $100 \times 50 / 500 = \underline{10\%}$

In addition, the applicant had written as under:

Articles delivered: $100 \times 450 / 500 = 90\%$

4. The examiner had awarded nil marks to the above answer. However, for the same answer of 10% written by others, the candidates had been awarded full marks for that particular question.

5. The applicant filed a representation and his case for revaluation is under examination. Meanwhile, he had filed this OA impleading, apart from the official respondents, one private respondent, whose merit position would go down if additional marks are awarded to the applicant on revaluation.

6. Respondents have contested the O.A. So also the private respondent.

7. Counsel for the applicant submitted that when there were twelve vacancies duly notified, posts filled up were only six. Again, there were two more vacancies which arose unexpectedly after the issue of notification but within the same year of recruitment i.e. 2010.

8. Counsel for the official respondents stated that the matter is under examination.

9. Counsel for the private respondent submitted that the applicant ought not have written more than what was asked and thus, by writing the percentage of delivery which was 90 percent, the answer created confusion which made the examiner not to award any mark.

10. Arguments were heard and documents perused. The contention of the counsel for the private respondent that the applicant has, in addition writing the answer as 10% also wrote things which were not required (i.e. percentage of delivered articles) and hence rightly he was not awarded marks for the said question has to be summarily rejected as what the applicant had done after wiring the correct answer was only to reinforce his answer. Nothing less, nothing else.

11. The first question for consideration, as stated in para 1 above is whether revaluation is permissible. Rule 15 of Appendix 37 of the P & T Manual Volume 4 stipulates that the answer papers are not subject to revaluation (though retotalling is permissible). However, after the delivery of the judgment in the case of **Himachal Pradesh Public Service Commission vs Mukesh Thakur (2010) 6 SCC 759** the respondents have issued a communication on 02-08-2010 which inter-alia reads as under:-

“3. It may be seen that representations requesting for

revaluation of answer papers are being received in this office specifically pointing out the following grievances:

- i) Particular answer(s) were not evaluated.
- ii) Excess attempted answer(s) were not evaluated.
- iii) For the same answer(s), the examiner awarded marks to one candidate and to another candidate no marks were assigned or the answer struck off as wrong.
- iv) All the answers were evaluated but justified marks were not awarded by the examiner.

4. The issues indicated at (i) to (iii) above are justified and need to be examined by the competent authority to find out the facts and if the claim of the candidate appears to be genuine, revaluation may be got done by an independent examiner in such cases and further necessary action may be taken. In so far as the issues indicated at (iv) above, there is no need to consider such requests and merits rejection at the initial stage itself."

12. And, in para 4 of the reply, the respondents have themselves stated that the request of the applicant for revaluation of his answer paper for Paper B in the Postman Examination held on 29-08-2010 is under examination at the appropriate office.

13. The case of the applicant falls under category (iii) above in respect of which, provision for revaluation does exist. As such, the applicant is entitled to have the answer sheet B revalued. The result of the said revaluation is obvious. The applicant would secure more than 140 (originally awarded without any marks to the aforesaid question) in which event, the applicant would secure marks more than the private respondent. If the posts to be filled are to be restricted to six as already filled up, in the event of the applicant's appointment as Postman against one of the six vacancies, the same would compel the respondents to

dislodge the private respondent. It is here that the second and third issues raised in para 1 above arise.

14. For answering the above question, certain rulings are required to be taken for guidance.

15. In a judgment of the Constitution Bench in the case of ***Shankarsan Dash v. Union of India, (1991) 3 SCC 47***, the Apex Court has held interalia as under:-

"Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons."

16. What is arbitrariness is explained in yet another case of ***Shrilekha Vidyarthi (Kumari) v. State of U.P., (1991) 1 SCC 212***, wherein the Apex Court has stated as under:-

"36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary."

17. Whenever vacancies are notified provision to make alteration in the

future vacancies and thus, not permissible in law. (Vide *State of Bihar v. Secretariat Asstt. Successful Examinees Union 1986, Prem Singh v. Haryana SEB, Ashok Kumar v. Banking Service Recruitment Board, Surinder Singh v. State of Punjab and Rakhi Ray v. High Court of Delhi.*)"

19. The above law had been reiterated in the case of **Rakhi Ray vs High Court of Delhi** (2010) 2 SCC 637 wherein the Apex Court has stated:-

"12. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, the process of selection comes to an end. Waiting list, etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more."

20. Equally well settled principle is that the Government is not in any obligation to fill up any vacancy for good reasons and as such it need not initiate any action for filling up of such vacancies at all, as held in the aforesaid case of *Rajkishore Nanda*, wherein, vide para 18 thereof, the Apex Court has held as under:-

"18. It is the exclusive prerogative of the employer/State Administration to initiate the selection process for filling up vacancies occurred during a particular year. There may be vacancies available but for financial constraints, the State may not be in a position to initiate the selection process for making appointments. Bona fide decision taken by the appointing authority to leave certain vacancies unfilled, even after preparing the select list cannot be assailed. The courts/tribunals have no competence to issue direction to the State to initiate selection process to fill up the vacancies. A candidate only has a right to be considered for appointment, when the vacancies are advertised and

number of vacancies is manifested in the notification and where such provision is inserted, any alteration either to increase the number of vacancies (of course pertaining to the particular recruitment year) or to reduce the vacancies is in the hands of administration. In the case of

Union Public Service Commission vs Gaurav Dwivedi (1999) 5 SCC 180, the Apex Court has held as under:-

“There is no rule which has been brought to our notice which prohibits the change in the number of vacancies which are once notified. Indeed it is not necessary or incumbent upon the Government to fill up all the vacancies which are notified even if candidates have been selected.”

(In this case, there has been a clear stipulation in the very notification that the number of vacancies is subject to alteration)

18. In so far filling up of the vacancies over and above notified vacancies, there has been a clear bar as held by the Apex Court in the case of **State of Orissa vs Rajkishore Nanda (2010) 6 SCC 777**, wherein, the Apex Court has held:

“**11.** It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as “the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution”, of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to “improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational”, otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of

selection process commences, if he possesses the requisite eligibility."

21. The situation is entirely different where posts filled were less than the notified vacancies and there is neither a conscious decision not to fill up nor has there been any good ground for such reduction in the number of posts filled up. In the case of **A.P. Public Service Commission vs P. Chandra Mouleesware Reddy (2006) 8 SCC 330**, the Public Services Commission by mistake omitted to send the list of all selected candidates, consequent to which the State had filled up only that many vacancies as the number of candidates in the select list sent by the Service Commission. The Court allowed the petition filed by the candidate who was selected but whose name was not enlisted in the list of selected candidates. The Apex Court has in that case held as under:-

"15. The candidates, therefore, in our opinion, should not suffer owing to a mistake on the part of the State."

22. In the instant case, the fact that there were 12 vacancies of which two were unexpected and vacancies for which steps were taken to fill up were ten. Para 8 of the Reply of the respondents refers. And, admittedly, vacancies filled up were only 6. Following the decision in the case of **Chandra Mouleesware Reddy (2006) 8 SCC 330** cited above, the mistake of the respondent should not recoil on the selected candidate. Thus, if on revaluation, the applicant secures higher marks than the private respondent, then, instead of reverting the said private respondent, he could easily be accommodated against the one of the notified vacancies. The seniority would obviously be based on the merit position in the

examination.

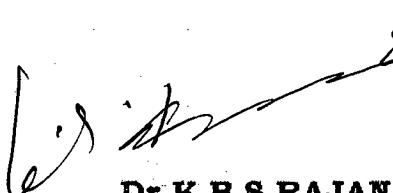
23. The application thus, fully succeeds. It is declared that the answer Sheet B of the applicant deserves to be revalued and on such revaluation if the applicant secures higher marks than the private respondent, the applicant shall be immediately appointed as Postman with all consequential benefits of seniority, fixation of pay etc. The pay fixation of the applicant would be such that it is at least at par with that of his immediate junior.

24. In so far as the private respondent is concerned, if his merit position suffers due to the improved merit of the applicant, then again, he shall be accommodated against one of the notified vacancies within the category to which he belongs. Thus, the appointment of the private respondent as postman shall not be disturbed (though he could be transferred to any nearby place if necessity arises to accommodate the applicant).

25. This order shall be complied with, within eight weeks from the date of receipt of a certified copy of this order.

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


K. NOORJEHAN
ADMINISTRATIVE MEMBER


Dr K.B.S. RAJAN
JUDICIAL MEMBER