

CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH

Commercial Complex (BDA)
Indiranagar
Bangalore - 560 038

Dated : 23 FEB 1989

APPLICATION NO (s) 783 / 88 (F)

W.P. NO (s) /

Applicant (s)

Smt N.B. Vijayalakshmi
To

Respondent (s)

V/s The Collector of Central Excise & Customs,
Bangalore & another

1. Smt N.B. Vijayalakshmi
386, III Block, III Stage
VI Main, West of Chord Road
Basaveshwaranagar
Bangalore - 560 079
2. Shri S.K. Srinivasan
Advocate
No. 10, 7th Temple Road
15th Cross, Malleeswaram
Bangalore - 560 003
3. The Collector of Central Excise & Customs
Central Revenue Building
Queens Road
Bangalore - 560 001
4. The Assistant Collector of Central Excise
131, Infantry Road
Bangalore - 560 001
5. Shri M.S. Padmarajaiah
Central Govt. Stng Counsel
High Court Building
Bangalore - 560 001

Subject : SENDING COPIES OF ORDER PASSED BY THE BENCH

Please find enclosed herewith a copy of ORDER/ADVISORY/INTERIM ORDER
passed by this Tribunal in the above said application(s) on 21-2-89.

Received
K. R. J. M.
24-2-89

D/P
By _____
DEPUTY REGISTRAR (Judicial)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

BANGALORE BENCH: BANGALORE

DATED THE 21ST DAY OF FEBRUARY, 1989.

Present

THE HON'BLE MR. JUSTICE K.S.PUTTASWAMY .. VICE CHAIRMAN
THE HON'BLE MR. L.H.A. REGO .. MEMBER(A)

APPLICATION NO.783 OF 1988(F)

Smt. N.B.Vijayalakshmi,
386, III Block, III Stage,
VI Main, West of Chord Road,
Basaveshwaranagar, Bangalore-79

Applicant

(By Shri S.K.Srinivasan, Advocate for the applicant)

-vs.-

1. The Collector of Central Excise
and Customs,
Central Revenue Building,
Queens' Road, Bangalore-1.

2. The Assistant Collector of Central
Excise,
131, Infantry Road,
Bangalore-1. ..

Respondents.

(Sri M.S.Padmarejaiah, Sr.Standing Counsel for Central
Government for respondents.)

This application coming on for hearing

this day, the HON'BLE MR. REGO, MEMBER(A), made
the following:

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ORDER

The applicant herein, impugns Letter dated 28-4-1988(Ann.A8) by Respondent (R) 2, informing her, that she had not passed the prescribed Departmental Examination(DE) in full, and that the second and subsequent annual increments drawn and paid to her were to be recovered. She also challenges Letter dated 24-5-1988(Ann.A-10) of R-2, informing her, that she has not passed the DE, within a period of 2 years, as prescribed and consequently, the increments drawn and paid to her erroneously, have to be recovered in instalments, as specified therein. She further prays for a direction to the respondents, to constitute a Board of Examiners ('Board'), to hold the Viva-Voce and to allow her to appear therefor and to issue such other orders or directions as deemed proper, in the facts and circumstances of this case.

2. The following is in short, the background to this case: The applicant entered as Upper-Division Clerk ('UDC') in the Central Excise Department at Bangalore, from 6-9-1976. In course of time, she came to be promoted as Inspectress (OG), of Central Excise ("Inspectress" for short), on 20-4-1983, by R-1, by his Order bearing the same

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date (Ann.A-1). According to para-4 of that Order, she was required to pass the prescribed DE, within a period of 2 years, from the date of reporting for duty, as Inspectress(DG) of Central Excise.

3. According to the syllabus prescribed for the DE, for the post of Inspectors/Inspectresses of Central Excise - vide para 144 of the Central Excise Circle and Divisional Office Procedure Manual ('Manual' for short), as corrected upto 30-4-1973 and Rule 5 of Appendix XVI thereof, the candidates are required to appear for the following six Papers, the maximum marks awarded for each, being 100.

Paper (1)	Subject (2)
I	Central Excise (without books)
II	Customs (with books)
III	Administration (with books)
IV	Law (with books)
V	<u>Viva Voce</u>
VI	Hindi

4. The applicant is said to have passed in all these Papers, except Paper-V, relating to Viva Voce (vide Ann.A-2 to A7).

5. The applicant states, that as a result, periodical annual increments in the post

of Inspectress, were released to her, from 1984 to 1988 (both years inclusive) with effect from the 1st of April each year.

6. The applicant further avers, that all of a sudden, R2, by his impugned letter dated 28-4-1988 (Ann.A8), directed her, to credit immediately, the amount of Rs.3,370/- said to have been overpaid to her, towards release of her annual increments (second increment and onwards) for the period from 1-4-1985 to 30-4-1988, as she had not passed the prescribed DE, in full.

7. Thereon, the applicant is seen to have represented to R-1, on 11-5-1988(Ann.A-9), stating, that she had already passed the prescribed DE except the Viva Voce, as the respondent had not conducted the same for her, so far. She is said to have pointed out therein, that according to the Manual, Viva Voce (Paper V), had to be conducted by a Board, with an officer^{or not} lower in rank than the Assistant Collector of Excise as Chairman and two officers, not below the rank of Superintendents. The applicant alleges, that the respondents neither asked her to submit an application, for admission to the Viva Voce (Paper V) nor directed her to appear for the same, before the Board on/at a specified date/time. She states that consequently,

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she was under the bona fide impression, that the Viva Voce for her, would be conducted by the Administration, at its convenience and therefore, she was not at fault, for not appearing for the same. She further states, that she is ready even now, to appear for the Viva Voce, on/at the date/time, that would be fixed by the respondents. In view of the foregoing, she avers, that she had requested the respondents not to recover from her, the annual increments released to her earlier, for the period from 1-4-1985 to 30-4-1988.

7. R-2 however, negatived her request, by the aforesaid impugned letters dated 28-4-1988(Ann.A8) and 24-5-1988(Ann.A-10), on the score, that she did not pass the DE, within the prescribed period and ordered recovery in instalments, as specified therein, of the overpayment made to her, on account of release of annual increments as aforementioned.

8. Aggrieved, the applicant has come before us, through her present application, for redress.

9. The respondents have filed their reply countering the application.

10. The main thrust of the attack of Shri S.K. Srinivasan, learned Counsel for the applicant, was, that his client, had faithfully appeared for the written tests

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in Papers I to IV and VI, but she could not appear for the Viva Voce(Paper V), as the respondents had not constituted the Board, according to Annexure 'B' to Appendix XVI [Para 144(a)] of the Manual and directed her, to appear for the same on/at the specified date/time. He asserted, that his client was eager to acquit herself, even in the Viva Voce and was awaiting a direction from the Board to appear before it.

11. The applicant he said, had appeared for the written tests in Papers I to IV, between June 1977 to June 1979, when she had finally cleared these tests. After a lapse of nearly six years, he stated, the respondents released the second annual increment of his client, with effect from 1-4-1985 and the ensuing increments as well, which he emphasised, led her to believe, that she would be required to appear for the Viva Voce, only when directed by the Board. But, to her surprise, Shri Srinivasan submitted, ~~that~~ R-2, by his impugned Memo dated 25-5-1988(Ann.A-10), imputed the blame of "contributory negligence" to her, for not passing the DE. Shri Srinivasan asserted, that thereby, R-2, had admitted, that the respondents were also blameworthy, in not directing the applicant to appear for the Viva Voce, before the Board, either through an application from her or suo motu, for which lapse, he

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sedulously

sedulously contended, his client could not be vicariously held liable.

12. He pointed out, that the annual increments were released to his client, as long as after six years in 1985, after she had cleared the written test last, in 1979. He refuted the contention of the respondents, that this was an inadvertent error, as these increments were released after careful pre-audit and scrutiny of the service record, including the Service Book of his client. The respondents were disingenuous, in trumping up this excuse, he said, as the increments were released for four years at a stretch, from 1985 to 1988. The only inference that could be drawn therefrom he affirmed, was, that the respondents had released the annual increments to his client, with full awareness and knowledge of the facts of the case and therefore, it ill-behoved them to take recourse ^{by of} to a volte face, after an unconscionable delay, as long as nearly five years, to recover a substantial amount from his client, on the plea of erroneous payment. In fact, he said, the bar of promissory estoppel operated in law, against them, in effecting this highly belated recovery. He also held the respondents guilty, of recovering a sizeable sum from his client retrospectively, with effect from 1-4-1985, without affording her any opportunity to substantiate her case, specially when such recovery resulted in serious civil consequences.

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13. Vehemently repelling the above contentions, Shri Padmarajaiah, learned Central Government Senior Standing Counsel, appearing for the respondents, submitted, that according to para-4 of Ann.A-1, relating to the promotion of the applicant as Inspectress, it was incumbent on the applicant, to pass the prescribed DE, within a period of two years, from the date of her reporting for duty, as Inspectress. She was required to acquit herself of this DE, in full and the applicant was well aware of the same, he stressed, but for reasons best known to her, she failed to do so. The Department however, he conceded, erroneously released the annual increments to her, with effect from 1-4-1985, to which she was not legitimately entitled and this irregular payment had later to be recovered from her, he explained. He maintained, that the applicant was answerable for her negligence, in not applying for appearing for the Viva Voce and alleged, that the applicant was making a pretence of her innocence, by throwing the entire blame on the Department.

14. Shri Padmarajaiah, sought to fortify his argument, relying on Rule 6(2)(ii) of Appendix XVI to the Manual, which reads thus:

"6. Consequences of not passing the Departmental Examination.—

(1) xx xx xx
 xx xx xx

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(2) (i)(a) & (b) xx xx xx
 xx xx xx

(ii) Officers appointed otherwise than on probation, whether by direct recruitment, promotion or by transfer, who are required to pass a departmental examination under these Rules will not, except in the case of persons appointed as Lower Division clerks, be allowed to draw further increments if they fail to pass the examination within the prescribed period.

The next increment in such cases should be allowed with effect from the date on which the officer concerned actually passes the departmental examination, the determining date of passing the examination being the last day of the examination in which he passes and not from the date on which it fell due."

15. He also placed reliance on Rule 11 ibid on the caption: "Compilation of the list of candidates for the Examination", to buttress the same. This Rule is extracted below:

"11. Compilation

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"11. Compilation of the list of candidates for Examination.— All officers who wish to appear in the Departmental Examination should formally intimate their intention to the Circle Officer, Divisional Officer/Collector, as the case may be, by the end of December/June for the examination to be held in May/November. The Circle Officers and the Divisional Officers should prepare lists of such officers and forward them to the Collector so as to reach him before the end of January/July for the May/November examination. The Collector will prepare a consolidated list for the whole Collectorate, assign a roll number to each candidate and inform them through their Divisional Officer of the dates and centres of the examination."

16. Elaborating, Shri Padmarajaiah stated, that intimation in this regard, was sent to the concerned Range Office, through the Divisional Office, in which the applicant was working at the relevant time. According to instructions in the Manual, he stressed, it was the duty of the applicant, to intimate to the appropriate authority, in the prescribed proforma, her intention to appear for the Viva Voce, for the particular half-yearly period. He referred to the specimen proforma at Ann.R-1, which he said, was explicit. On receipt of intimation as above, he clarified, that the Divisional Officer, would forward the various applications to the Headquarters' Office, for assigning Roll Numbers to the candidates, intending to appear for the DE.

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17. Shri

17. Shri Padmajaiah further stated, that it was pertinent to mention, that the applicant herself, was at the material time, dealing with administrative correspondence, when the aforesaid communication, in regard to holding the DE, was circulated and was thus well aware, that she was required to appear for the Viva Voce, to enable her to pass the DE in full, to qualify for drawal of her annual increments. She could not thus feign ignorance in this respect, he argued.

18. The conduct of the applicant too, in this episode was dubious, he alleged, in that she remained cryptically silent and complacent, for as long as nearly 6 years from 1979 to 1985, when her increments were not released. She was not a new entrant but had put in a fairly long length of service and was thus well-conversant, with rules and regulations and therefore, he said, that in the heart of hearts, she must have known, that her not acquitting herself in the Viva Voce, must have been the impediment, to the annual increments not having been released to her, for so long. She did not even bestir herself, he asserted, to seek instructions from the concerned authorities, about the factual position, in regard to clearance of the Viva Voce by her. These antecedents, he said, were revealing, as to the dubious conduct of the applicant.

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19. Shri Padmarajaiah therefore pleaded, that the applicant was not truthful and urged, that the application be dismissed, as devoid of merit.

20. We have given due thought to the rival pleadings and examined carefully, the relevant record and other material placed before us. In order to help unravel the truth, let us first examine the pertinent rules, governing the DE and the Viva Voce in particular, the course of events that took place and the conduct of the respondents as well as the applicant. Rule 5(iii) of Appendix XVI of the Manual, prescribing the DE, for those appointed by promotion, from within the Department, in which category the applicant falls, reads thus:

"5. Period within which the Departmental Examination should be passed.—

(i) xx xx xx

(ii) xx xx xx

(iii) Officers appointed by promotion from within the Department or by transfer from other Department should, subject to the provisions of Rule 7(a) (i), pass the examination prescribed for the grade to which they are promoted within two years of their appointment "or within the first two years chances occurring after their appointment, whichever is later" at the end:

Provided that in case where an officer is not able to pass the examination within the prescribed period, the Central Board of Excise and Customs may for good and sufficient reasons extend the period."

21. The portion regarding Paper V on Viva Voce in Annexure 'B' to Appendix XVI of the Manual, reads as follows:

"Paper V - Viva Voce"

Questions on general working of the Collectorate, Economics, Geography and general knowledge relating to production etc., of excisable goods in India. The candidate's knowledge of procedures and work he has been handling during the period of training will be particularly tested.

This examination will be conducted by a Board of Examiners with an Officer not lower in rank than an Assistant Collector as Chairman and two officers not below the rank of Superintendents."

22. The Note below the tabular statement, in para 1 of the Letter dated 12-6-1984(Ann.R-1), addressed by R-1, to the Deputy Collector of Customs(Hqrs.) Mangalore and to all Assistant Collectors of Customs, in charge of Divisions, clearly states as under:

"NOTE: Viva Voce Test and Hindi Oral (i.e., test in reading of petitions etc., and conversation in Hindi) should be conducted by respective Heads of Offices within 10 days of the conclusion of the written papers."

23. From the following Annexures furnished by the applicant, it is seen, that she passed in the

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written

written tests in the various Papers as below, according to the results declared by R-1.

S.No.	Reference to Annexure.	Papers in which passed.				Date of the DE.
		I	II	III	IV	
(1)	(2)	(3)		(4)		
(i)	A-3 dt. 1-9-1977	P	P	F	A	June 1977
(ii)	A-2 dt. 5-6-1978	-	-	P	-	Decr. 1977
(iii)	A-6 dt. 27-4-1979	F	P	-	-	22-12-1988
(iv)	A-7 dt. 30-10-1979	-	-	-	P	June 1979
(v)	A-5 dt. 14-11-1979	P	-	-	-	June 1979

Abbreviation: 'A' means 'Absent'

'F' means 'Failed'

'P' means 'Passed'

24. The above Annexures, which are in the nature of Establishment (General), Standing Orders of R-1, generally stipulate, that necessary entries be made in the Service Book of the concerned individuals, regarding the results of the DE, citing reference to the pertinent Standing Orders.

25. Ann.4 dated 16-7-1977 reveals, that the applicant was exempted by R-1, from passing Paper IV (Hindi) (seems to be a mistype for Paper VI), as she

had

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had passed the S.S.L.C. Examination with Hindi, as one of her subjects.

26. It is striking, that none of the above Annexures, relating to declaration of the results of the DE, indicate the result of the Viva Voce. According to Annexure R-1(para 22 above), the Viva Voce, is required to be held by the respective Heads of Offices, within a period of 10 days of the conclusion of the written Papers(emphasis added).

27. It is thus evident, that the Viva Voce is to be held in a matter of days, after conclusion of the Written tests. Shri Padmarajaiah explained, that as the applicant did not apply in the prescribed proforma (Ann.R-1), indicating her desire to appear for the Viva Voce, this test was not held for her. This explanation prima facie, does not carry conviction, for the following reasons: Firstly, Shri Padmarajaiah has not produced the said application form filled in, by the applicant. Secondly, it appears from the Note, reproduced in para 22 above, that the Viva Voce, is an inevitable concomitant of the written tests and has to be held by the Board(para 21 above), within a period of 10 days (para 26 ibid). The various Annexures in the form of Standing Orders of R-1 reveal(para 24 ibid), that the entries regarding



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the declaration of the results of the DE, are to be promptly made in the Service Book, of the concerned individuals. This implies, that the Department was required to monitor vigilantly, the passing of the DE in full, by each individual, to help regulate release/grant of increments/promotions. We can understand the probability of a stray human error on this account, on the part of the Department, in respect of passing of Paper V, Viva Voce, by the applicant, but we cannot bring ourselves to believe, that it could have recurred as many as five times, when the results of the DE were declared on each occasion (para 23 above), over a period of nearly 3 years and that this should have escaped the notice of the Department, for a period of nearly a decade i.e., upto 28-4-1988(Ann.A-8) and 24-5-1988(Ann.A-10), when these impugned letters were issued by R-2. We are of the view, that in the light of the above facts and circumstances, this flagrant lapse on the part of the respondents was unconscionable, for which vicarious blame cannot be imputed to the applicant, even on grounds of "contributory negligence", as they now seem to do. In this context, the respondents are well advised to bear in mind, the legal maxim, that "no one ought to be put in an unfair position, by the act of another" - non debet alteri per alterum iniqua conditio inferri. Further, the

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applicant

applicant is seen to have proved her bona fides, by readily appearing for the Viva Voce, even when held far too belatedly, by the respondents on 1-7-1988, on their own and to have passed therein.

28. Shri Padmarajaiah invoked the decision in 1987(2) SLR 144 CAT(GOAWAHATI) [DIN DAYAL MUKHERJEE -vs.- U.O.I. & ORS.] to bring home the point, that it was not obligatory on the part of the respondents, to make the applicant appear for the Viva Voce.

29. We have gone through the facts in DIN - DAYAL MUKHERJEE's case. We find that they are not similar to those in the case before us, primarily because in the former, the applicant had failed to pass the written test, while in the present case, the respondents have clearly admitted in para-3 of their reply, that the applicant has passed in all the Papers, except in Paper V, relating to Viva Voce. The decision in DIN DAYAL MUKHERJEE's case, is therefore of no avail, to the respondents.

30. On the contrary, the dicta of the Supreme Court in 1981(1) SLR 326(SC) [THE STATE OF MAHARASHTRA & ANR. -vs.- CHANDRAKANT ANANT KULKARNI & ORS.] has a bearing on the present case. In that case, the Supreme Court held, that the applicant could not have been reverted for not passing the DE, as the same was not held by Government. In the present case, we are



of the view that the Viva Voce, should have been held by the Department on its own, for the reasons stated by us in paras 26 and 27 supra. On this analogy, it is clear, that the annual increments of the applicant in the case before us, could not have been stopped by the respondents, as they themselves failed to hold the Viva Voce in time and in fact, held it later on their own, after an inordinate lapse of nearly a decade. In fact, the decision in DIN DAYAL MUKERJEE's case reveals, that the Viva Voce is to be held, only after the individual passes the written tests. Nothing prevented the Department from holding the Viva Voce, for the applicant within 10 days of her ^{dein} passing the remaining written tests, in Papers I and IV in June 1979, specially, when it was required to monitor vigilantly, the passing of the various tests by the applicant, as observed by us in para 27 supra.

31. The doctrine of promissory estoppel, relied on by Shri Srinivasan, is far-fetched in this case, as what is necessary for this principle to apply, is that the promisee, should have altered his position, in reliance on the promise. Such is not the case before us.

32. In the result, we make the following Order and directions:

(i) We declare that the Department ought to have arranged, to hold the Viva Voce in respect of the applicant on its own,

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in terms of Annexure 'B', to Appendix XVI of the Manual, no sooner than she had passed in all the Written Tests i.e., Papers I to IV and VI, without insisting on a formal application from the applicant, to hold the said Viva Voce for her.

(ii) As a result, we quash Letters dated 28-4-1988(Ann.A-8) and 24-5-1988(Ann.A-10), addressed by R-2, to the applicant, directing her to repay the amount of Rs.3370/- (said to have been paid to her in excess, on account of erroneous release of her annual increments for the period from 1-4-1985 to 30-4-1988) as this recovery is illegal, specially, when the applicant has later in July 1988, appeared for the Viva Voce, no sooner than directed by the Department on its own and passed in the same.

33. The application is disposed of in the above terms. No order as to costs.



Sd/-

(K.S.PUTTASWAMY) 21/2/88
VICE CHAIRMAN.

Sd/-

(L.H.A.REGO)
MEMBER(A)

TRUE COPY

P.T. *[Signature]*
DEPUTY REGISTRAR (JD) 23/2/88
CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE