

(2021) 11 CAT CK 0019
In the Central Administrative Tribunal
Case No : Original Application No. 918 Of 2010

Suresh Kumar & Others

APPELLANT

Vs

Union Of India & Others

RESPONDENT

Date of Decision : 10-11-2021

Acts Referred:

Administrative Tribunals Act, 1985 — Section 4(5)(a), 4(5)(b), 19

Citation : (2021) 11 CAT CK 0019

Hon'ble Judges : A.K. Bishnoi, Member (A); R.N. Singh, Member (J)

Bench : Division Bench

Advocate : M. Sharda, Piyush Gaur

Final Decision : Partly Allowed

Judgement

R.N. Singh, Member (J)

(Through Video Conferencing)

1. In the present OA, filed under Section 19 of the Administrative Tribunals Act, 1985, the applicants have challenged the order dated 23.04.2020 (Annexure A-1) issued by the respondent no.2, whereby the claim of the applicants for appointment/promotion to the post of Postal Assistant (hereinafter referred to as 'PA'), despite being topper/declared successful in the relevant selection process, has been rejected by the respondents on the ground that there was no vacant post in the Gurgaon Division in terms of the notification for examination conducted on 15.09.2019 and 09.02.2020 and vacant posts in other divisions had also been filled in and, therefore, the applicants could not be selected for the post of PA/Sorting Assistant (hereinafter referred to as SA) in the said examination.

2. The facts leading to the present OA are that the applicants are working on the post of MTS, Postman, Mail Overseer, etc., under the respondents. The Recruitment Rules, 2015 (Annexure A-1A) had been framed and notified by respondent no.1 for the posts of PA/SA (Group-C Non-Gazetted), which provide

that 50% of the posts to be filled up by way of promotion through a Limited Departmental Competitive Examination (hereinafter referred to as LDCE), failing which by way of direct recruitment of Gramin Dak Sewaks (hereinafter referred to as GDS) of the recruiting division or unit, and the remaining 50% of posts to be filled up by way of direct recruitment. The respondents had issued notification dated 24.06.2019 (Annexure A-2) for conducting LDCE for recruitment of PAs/SAs from the Postman/Mail Guard/Despatch Rider and MTS for the vacancy year 2019 (01.01.2019 to 31.12.2019). The number of total tentative vacancies available under various recruiting divisions/units for the post of PA had been shown to be 27 and/or for SA vacancies had been shown to be 16 in the said notification. For Gurgaon Division, 2 vacancies have been shown for the post of PA. Subsequently, a notification dated 05.08.2019 (Annexure A-3) had been issued by the respondents wherein no vacancy had been shown against Gurgaon Division of the respondents for the posts under reference. The LDCE was held on 15.09.2019. The respondent no.1 issued letter dated 26.09.2019 (Annexure A-4) seeking feedback/comments on provisional answer keys in respect of LDCE/Competitive Examination for the posts of PAs/SAs, held on 15.09.2019. The LDCE Papers- I & II, which were only to be qualified, were conducted on 09.02.2020 and the result of LDCE exam of Haryana Circle was declared on 12.02.2020 (Annexure A-5). The applicant no.1 topped in the said examination in the Gurgaon Division by securing 80 marks in Paper-I, and other candidates were also found to be successful, and a total number of 22 candidates were finally selected and appointed to the post of PA by promotion in Haryana Circle. However, applicant no.1, who had topped in his division, and other applicants, who had also been declared successful in the said examination, were not appointed to the post under reference. A copy of the letter dated 12.02.2020 (Annexure A-6) reflecting the names of the candidates declared successful in the said examination, has been placed on record. Aggrieved by the fact that in spite of the applicants being eligible for the promotional post of PA/SA, after qualifying the said examination not being appointed, the applicant no.1 represented to the respondents, vide representations dated 28.02.2020, 13.03.2020 and 20.03.2020 (Annexure A-7 to Annexure A-9 respectively), which came to be rejected by the respondents, vide the impugned communication dated 23.04.2020. However, the applicants came to know through one of their colleagues, namely, Sh. Deepak Kumar, that respondent no.2, vide their communication dated 24.04.2020 [Annexure A-10 (Colly)] had informed under RTI Act, that 16 vacancies of PA for the vacancy year 2019 (01.01.2019 to 31.12.2019) were lying vacant. The respondents further informed that the Haryana Circle was still working on the process of ascertaining the vacancies for the said post. The applicant no.1 again made a representation dated 01.05.2020 (Annexure A-11) to the respondents seeking appointment keeping in view the availability of vacancies as informed by the respondents themselves under RTI Act. However, the said representation of the applicant remained pending consideration. Since the respondents, as per the Calendar of Examination (Annexure A-12), were likely to proceed with the LDCE-2020 examination, the

applicant no.1 made another representation dated 05.06.2020 (Annexure A-13). When no action was taken thereon by the respondents for redressal of the grievances of the applicants, the applicants have approached this Tribunal by way of the present OA, seeking the following reliefs:-

"(1) Direct the respondent no.2 to appoint all the applicants to the vacant posts of Postal Assistants which are total 16 posts (out of which 8 are to be filled by promotion) in the Gurgaon Division, Gurgaon as they are the successful candidates of LDCE exam 2019 in time; and/further

(2) Direct respondent no.2 to appoint all the applicants throughout the Haryana Circle wherever vacancy is there for PA post 2019 for which the process is still on as per the O/o Supdt of Post Office Gurgaon Division vide its letter dated 24.04.2020 which process requires to be completed in time i.e. before the next LDCE exam 2020 in the interest of justice; and

(3) Award cost of litigation; and

(4) Pass such further order(s) in favour of the applicants as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

3. The applicants have also prayed for grant of interim relief in terms of para 9 of the OA, and this Tribunal, in the facts and circumstances, passed the interim order dated 06.10.2020 with a direction to the respondents not to take any steps for filling up the vacancies under the LDCE category in the entire Circle, till final disposal of the present OA.

4. The respondents have filed their counter reply and one Miscellaneous Application being MA No.2055/2020 praying therein for vacation of interim order. After hearing at length, vide order dated 19.11.2020, the Tribunal disposed of the said MA by refusing to vacate or modify the interim order dated 06.10.2020, however, permitted the respondents to proceed in the matter for LDCE-2020 for any other Circle except Haryana Circle, till the final disposal of the OA.

5. In the counter reply, the respondents have taken preliminary objection to the effect that all the applicants are residents of Haryana and offices of the respondent nos.2 to 4 are also situated in Haryana, therefore, the present OA is liable to be dismissed on the ground of lacking territorial jurisdiction of this Bench of the Tribunal. On merit, it is contended by the respondents that subsequent to the notification dated 24.06.2019 (Annexure-A-2), another notification dated 05.08.2019 (Annexure A-3) was issued by the respondents wherein no vacancy had been notified for Gurgaon Division and in absence of any challenge to the said notification dated 05.08.2019, the present OA is liable to be dismissed. In para 4.3 of the counter reply filed on behalf of the respondents, it is specifically asserted by the respondents that 21 Leave Reserved (hereinafter referred to as 'LR') posts of PA were erroneously included in the vacancies for the year 2016-17 and in view thereof, it was decided to adjust the aforesaid LR vacancies against the vacancies for the year 2018 and future vacancies, vide respondents' letter

dated 06.09.2018. Therefore, 12 vacancies of PA cadre during the year 2018 were adjusted against the vacancies for the year 2018 and vacancy position of 2018 remained nil. 7 vacancies during the year 2019 were adjusted against LR vacancies and 4 vacancies were notified in the year 2019. 50% of the 4 vacancies i.e., 2 vacancies were notified, vide notification dated 24.06.2019 and 6 vacancies of LR posts are to be adjusted against future vacancies. Therefore, no vacancy was notified in respect of Gurgaon division in notification dated 05.08.2019. In para 4.7 of the counter reply, it has been admitted by the respondents that on 12.02.2020, the result of 17 vacancies of Postal Division and 5 vacancies of RMS Division were declared with respect to Haryana Circle. These facts have been reiterated by the respondents again in para 4.11 of their counter reply. Further, in para 4.12, it has been stated by the respondents that though the applicants requested them to consider their claim against 2 posts allotted to the departmental candidates, vide notification dated 24.06.2019, however, vide letter dated 24.06.2019, all the divisions were directed to consider the transfer case under Rule 38 of the Postal Manual Volume-IV and submit the revised vacancy position in respect of PA/SA cadre and after considering the same, vacancy position was revised and the notification dated 05.08.2019 was issued showing nil vacancy in Gurgaon division.

6. The applicants have filed the rejoinder. They have submitted that LDCE exam is controlled and conducted by the respondent no.1. Besides, the respondent no.1, who is the policy maker and had also issued the relevant rules, is situated in Delhi and, since the respondent no.1 has failed to ensure compliance of the relevant rules and rule of law, therefore, this Bench of the Tribunal is vested with the jurisdiction in the matter. The applicants have further stated in the rejoinder that the respondents have deliberately and with a malafide intention have not given any reply to the specific pleas raised by the applicants in the OA. The applicants were expected to be appointed to the un-filled vacancies of 2019 anywhere in the Haryana Circle and the respondents were duty bound to first ascertain vacancies of the Haryana Circle before commencing the subsequent LDCE. It is also asserted by the applicants that in the counter reply, the respondents have admitted the fact that they have erroneously included 21 LR posts in the PA Cadre for the vacancy year 2016-17, however, in place of rectifying their mistakes, the respondents have malafidely started adjusting those persons, who had been declared successful by them for the said vacancy year even in absence of clear cut vacancy position, and to adjust them further, they have modified their notification dated 24.06.2019 by issuing another notification dated 05.08.2019 showing nil vacancy against the Gurgaon Division. It is further reiterated by the applicants that as per their own admission, the respondents have included 21 LR vacant posts in the PA cadre in the year 2016-17 and the respondents have illegally decided to adjust 12 posts out of 21 posts in 2018-19 and have adjusted the same. The respondents have repeated such illegality in the year 2019, as out of 7 vacancies arose in 2019, 3 posts were illegally adjusted against LR posts.

7. One additional affidavit dated 15.12.2020 has also been filed by the respondents and the grounds and reasons, as noted in the counter reply, have been reiterated therein. Further, the respondents have stated therein that applicant nos.1 & 2 were not eligible against the vacancies year 2016-17, and applicants no.3 to 6 had appeared in LDCE examination held on 09.12.2018 for the vacancy years 2016-17, 2017-18 and 2018 but they were not found successful therein.

8. In the aforesaid facts and circumstances, the issue arises is that as to whether the applicants can be deprived of the benefits of their performance and result in the LDCE 2019 on the ground of non-availability of vacancies to the post of PA/ SA in Gurgaon division/Haryana Circle.

9. Ms. Sharda, learned counsel for the applicants, has vehemently argued that once it is admitted by the respondents that vacancies were available in Gurgaon Division/Haryana Circle and reflected the same in the initial notification dated 24.06.2019, merely for the reasons that the respondents have committed mistake in calculation of the vacancies for the vacancy year 2016-17 by erroneously including 21 LR posts of PA and in place of correcting their such mistakes, the respondents have decided to adjust such persons, who have been selected against the vacancy year 2016-17, i.e., in absence of the actual vacancies, and being adjusted against the future vacancies of 2017-18, 2018-19, etc., the applicants cannot be deprived of the benefit of their performance in the relevant LDCE-2019 exam. Learned counsel for the applicants has vehemently argued that after admitting the mistake of inclusion of 21 LR posts for the vacancy year 2016-17, the respondents have aggravated the illegality by adjusting those persons, who were selected against vacancy year 2016-17, against the future vacancies and, thus, deprived the applicants and similarly placed persons of the benefit of their performance in the subsequent LDCEs. She has further argued that for any appointment and/or promotion, necessity of being a vacancy available is must, and if somebody has been selected in absence of any vacancy, such selection is no selection and the respondents are not entitled to adjust them against any future vacancy by depriving the persons of their performance in the subsequent examinations.

10. Per contra, Mr. Gaur, learned counsel for the respondents, has referred to the counter reply and argued that in absence of the vacancy, the applicants have got no enforceable right to be appointed. He has further referred to the judgment of the Hon'ble Apex Court in Civil Appeal Nos.6124-625 of 2019 arising out of SLP (Civil) Nos. 175-176 of 2019 in the case of the Superintendent of Post Offices vs. Hanuman Giri, to submit that it has been held by the Hon'ble Apex Court in the said case that the notification was properly issued and circulated to all concerned. The applicants also applied and appeared in accordance with the directions issued in the said notification. The merit list of each division has been prepared separately and keeping in view the nil vacancy in the Gurgaon Division, the right of the applicants is not sustainable. He has also referred and relied

upon to the judgment of Hon'ble Apex Court in *Dhananjay Malik & Ors. vs. State of Uttranchal & Ors.*, reported in 2008 (4) SCC 171 (Annexure R-5 to the additional affidavit) and also in *Union of India & Ors. vs. S. Vinodh Kumar & Others*, reported in 2007 (8) SCC 100 (Annexure R-6 to the additional affidavit). By referring to these judgments, Mr. Gaur, learned counsel for the respondents, has argued that when the applicants had appeared in the relevant examinations without any demour, they are estopped from complaining that the selection process was not in accordance with rules, and if they thought that the advertisement and selection process were not in accordance with rules, they could have challenged the advertisement and the selection process without participating in the said selection process.

11. We have considered the submissions made by the learned counsels for the parties and have carefully perused the pleadings available on record.

12. It is not in dispute that the relevant recruitment rules have been framed by the respondent no.1 and the respondent no.1 is required to ensure compliance of the said rules, relevant instructions and policy on the subject. The respondent no.1 is also expected to ensure that fair treatment is accorded to its employees including the applicants herein. It is also not in dispute that the relevant examination is controlled by the respondent no.1 and the respondent no.1 is having its offices in Delhi/New Delhi. Thus, we are of the considered view that part of the cause of action has arisen to the applicants in Delhi and, therefore, in view of the provisions of Section 4(5)(a) and (b) of the AT Act, this Bench of the Tribunal is having the territorial jurisdiction to entertain and adjudicate the present OA. Accordingly, the objection of the respondents qua lack of jurisdiction of this Bench of the Tribunal stands rejected.

13. By quoting the judgments of the Hon'ble Apex Court in the matters of *Dhananjay Malik* (supra) and *S. Vinodh Kumar* (supra), the learned counsel for the respondents may be right in saying that if the applicants have chosen to participate in the selection process pursuant to the notifications dated 24.06.2019 and 05.08.2019 without any demour or objection and after being declared unsuccessful in the said examination, they are estopped from challenging the said notifications and/or selection process. However, admittedly, in the present OA neither the said notifications are under challenge nor the selection process, instead, the applicants have applied and participated in the relevant selection process pursuant to the said notifications, and they are only seeking the benefit of their performance in the said examination(s). Even though a few things have been said about the question-answers in the said examination at few places of the OA, but the fact remains that the applicants have neither challenged the notifications nor they have prayed for any relief against the said notifications and/or selection process pursuant to the same. In this view of the matter, we are of the considered view that the judgments, referred to and relied upon by the learned counsel for the respondents, is out of context and is of no help to the respondents.

14. It is pertinent to note here that once the respondents have specifically admitted that 21 LR posts have been included erroneously against the selection process for the year 2016-17, it was incumbent upon the respondents to take remedial action for correcting their mistakes and not to perpetuate and aggravate such mistakes by adjusting and appointing the persons selected without there being any vacancy for the said vacancy year.

15. From the aforesaid facts, it is evident that the respondents have not only adjusted the persons against the vacancies of subsequent years but also adjusted them against the vacancies for which the applicants have participated in the selection process. Moreover, the respondents have decided to adjust a few persons even against the vacancies for which examination was likely to be conducted in future. It is trite that the applicants are not having any enforceable right in the matter of appointment and/or promotion. However, it is equally trite that the applicants are entitled for being considered in just, fair and equitable manner.

16. In this view of the matter, we are of the considered view that the applicants are entitled to be considered for the vacancies meant for Gurgaon Division/ Haryana Circle keeping in view their performance/merit position in the LDCE-2019.

17. In the aforesaid facts and circumstances, we are of the considered view that the OA deserves to be allowed and the same is accordingly partially allowed, with the following directions:-

(1) The impugned order dated 23.04.2020 (Annexure A-1) is set aside;

(2) The respondents are directed to consider the applicants' claim on the basis of their performance in the LDCE-2019 and by ignoring their contention of non-availability of vacancies for the vacancy year 2019, of course, subject to fulfilment of other conditions and formalities in accordance with the relevant rules and policy on the subject;

(3) If on such consideration, the applicants are appointed, they shall be entitled for grant of seniority and fixation of pay on notional basis from the date on which the respondents had granted those benefits to the persons adjusted against the vacancies for LDCE-2019, who have been appointed to such posts. However, the applicants shall not be entitled for arrears/difference of pay;

(4) The respondents are further directed to comply with the aforesaid directions within a period of eight weeks of receipt of a copy of this order.

18. However, in the facts and circumstance, there shall be no order as to costs.

19. Pending MAs, if any, shall stand disposed of.