

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

**W.P.C.T 108 of 2022
Dipangshu De
Vs.
Union of India & Ors.
and**

**W.P.C.T 109 of 2022
Saikat Das
Vs.
Union of India & Ors.
and**

**W.P.C.T 110 of 2022
Sayan Dutta
Vs.
Union of India & Ors.**

Appearance:

For the Petitioners	:	Mr. Ujjal Roy, Adv. Mr. Arpa Chakraborty, Adv. Mr. Soumen Mukherjee, Adv.
For the Union of India	:	Mr. Asok Kumar Chakraborti, Ld. ASG. Mr. D.S. Mishra, Adv. Mr. A. Majumdar, Adv.
Judgment On	:	20.04.2023

Harish Tandon, J.:

Pursuant to the publication uploaded on the website of the Staff Selection Commission relating to Combined Graduate Level Examination, 2018 for filling up Group-B and Group-C posts in the various Ministries, Departments, and Organisations in the Government of India., the writ

petitioners of the aforementioned writ petitions applied their candidature. The said publication would indicate that the examination would be conducted on four level i.e. computer-based examination/Tier-I, Tier-II, Tier-III (Descriptive) and Tier-IV (Skill Test). All the aforesaid writ petitioners were successful in the Combined Graduate Level Examination, 2018 and figured in the list of successful candidates published subsequently. The writ petitioners were recommended by the Commission for the appointment against the vacancies reported for Junior Accountant cadre available in the Postal Accounts Offices. Subsequently, an Office Order was issued on 28.5.2021 requesting all the successful candidates to furnish state wise preference in the enclosed pro-forma and it was clearly indicated therein that the allocation would be with reference to a rank obtained in the said examination *vis-a-vis* the preference given and vacancies available in the respective cadre. All the aforesaid writ petitioners furnished the State preference and opted for Kolkata, State West Bengal within the time stipulated therein. The writ petitioners felt aggrieved when the authorities have issued the appointment letter in Junior Accountant cadre in the Postal Department in other zone than Kolkata/West Bengal. According to the petitioner, two dossiers contained in the Office Order dated 9/10.8.2021 revealed that despite there being a clear vacancy under the Unreserved category in which the petitioners offered their candidatures, those have been filled up by the candidates belonging to OBC categories. Even apart, those OBC category candidates would not have been accommodated under the Unreserved category ranked much below the rank of the writ petitioners and, therefore, the authorities have compromised the merit and arbitrarily

selected the candidates in a particular category which is impermissible in law.

After revelation of the aforesaid facts that the petitioner who stood higher in rank in the merit list have not been given appointment to a first preferred zone which should be on the basis of the merit; the less meritorious candidates belonging to the different categories have been appointed in the Unreserved category and the approach was made to Tribunal individually. All the writ petitioners herein had approached the Tribunal individually but their applications were taken up together by the Central Administrative Tribunal and were disposed of by a common order dated 14.9.2021 directing the writ petitioners to make representations, which shall be decided by the competent authority on the basis of the office memorandum dated 4.6.2010. The Tribunal further directed the writ petitioners to furnish their documents as called for vide Memo dated 28.5.2021 within a stipulated time.

Pursuant to the aforesaid liberty having granted, the representation was filed by the respective writ petitioners before the competent authority within the time indicated therein. By a Speaking Order dated 24.9.2021, the competent authority did not accept the grievance raised by the writ petitioners and disposed of the said representation as there is no illegality and/or arbitrariness in taking a decision in posting the writ petitioner at different zones than Kolkata, State of West Bengal. The Speaking Order would reveal that few OBC candidates from West Bengal who were selected in UR category subsequently submitted representations to be considered as OBC category candidate as per the subject Rules/guidelines of the DoPT OM

dated 9.10.2007; Rule 38 of the Postal Manual Rules, Volume IV of the Department of Posts postulates that the order of transfer issued by the headquarters of due approval of DG (Posts) on several representations from the Union may permit the circle transfer to accountants from one circle to other as a welfare measure and, therefore, these transfer orders were passed in relation to a Junior Accountant and Senior Accountant which were pending for quite some time. The third reason which it appears therefrom relates to an adjustment of the vacancies in a deficit circles to overcome the administrative exigencies faced in such circles and, therefore, certain posts were allotted to a different circles and for such reason there is a nil vacancy under the UR category at PAO Kolkata. However, the suggestion was also made in the said Speaking Order that the petitioner may opt for option to join the department where he has been offered the post and then apply for a transfer under the said Rule 38 of Postal Manual, Volume IV which will be considered by the authorities on merit. The said Speaking Order is challenged by the writ petitioners before the Tribunal individually and all the Tribunal Applications were taken up together and were dismissed upholding the stand of the respondent authorities.

According to the petitioner, the moment the publication for Combined Graduate Level Examination, 2018 is uploaded on the Staff Selection Commission meaning thereby that the said process has been activated, the authorities again whimsically changed the Rules affecting the valuable rights of the candidates. It is thus contended that the said publication was silent to the number of posts which would be evident therefrom in the following:

“F. No. 3/1/2018-P&P-1: Staff Selection Commission will hold the Combined Graduate Examination, 2018 for filling up Group “B” and Group “C” posts in various Ministries/Departments/Organizations in the Government of India. The Tier-I of CGL Examination in Computer Based Mode is scheduled to be held from 25.7.2018 to 20.8.2018. Final Selection through the Combined Graduate Level Examination, 2018 to various posts would be according to the confirmed number of vacancies from the concerned indenting Ministries/Departments/Offices/Cadres before the declaration of result.

It is further contended that the final vacancies for Junior Accountant in CGLE i.e. Combined Graduate Level Examination as disclosed under RTI filed by the other candidate revealed 90 Unreserved posts, 7 Scheduled Castes, 1 Scheduled Tribe and 12 OBC totalling 39 vacancies were declared for West Bengal (Kolkata) and those were disclosed in reply under RTI dated 28.1.2020. It was further indicated therein that four posts are earmarked for Ex-serviceman and one post under the Physically Handicapped (OH) category and, therefore, the appointment has to be made strictly in terms of such vacancies having subsequently ascertained and/or determined and not in an arbitrary manner. It is further contended that subsequent to the ascertainment and/or determination of the vacancies in the respective zones, further office memorandum dated 29.7.2021 taking out 16 dossiers from PAO Kolkata and allotting to different zone under the UR category as proposed by the committee of 3 members was accepted. According to the learned Advocate for the petitioner such decision is contrary to the rule of the game but further contends that even if the same is taken on the face of

it, there were 3 clear vacancies under the Unreserved category and the petitioner is standing on the first three ranks for the aforesaid zone should have been accommodated. It is further contended that the stand taken by the authorities before the Tribunal was categorical in the sense that the OBC category candidates were accommodated under the UR category. It was subsequently noticed and they were reverted to the vacancy earmarked for OBC at PAO Kolkata. In such event, it is contended that it gives 3 clear vacancies under the Unreserved category and the writ petitioners being the first 3 candidates in the rank should have been accommodated therein. It is arduously submitted that the Tribunal has proceeded on the basis that the moment the authorities have readjusted the vacancies under the UR category and allotted to a different zone on the ground of administrative exigencies and took a stand that there is no vacancy under the UR category, no interference is called for is patently illegal on the face of the facts discerned from the record and, therefore, needs interference.

On the other hand, learned ASG appearing for the respondent authorities contends that there is no infirmity and/or illegality in applying Rule 38 of Postal Manual, Volume IV which contemplates a transfer of the employees from one zone to another and the same in fact, has been done which cannot be said to be arbitrary and/or illegal. It is further contended that the moment the readjustment of the vacancies initially declared has been done and if there is no clear vacancy available at the West Bengal zone, it does not confer any right upon the incumbent to be posted to such posts if such readjustment is necessitated by an administrative exigencies or convenience. The learned ASG further submits that the Unreserved posts ,remained after readjustment, were filled up by an Ex-serviceman in terms

of the extant Rules and, therefore, the stand of the petitioner in this regard is untenable.

On the conspectus of the aforesaid facts, let us examine whether the stand of the authorities in this regard can be sustained on the parameters of law. Indubitably, the Combined Graduate Level Examination, 2018 in relation to various posts in the Ministries/Departments were published without indicating the total number of vacancies for which such examination is conducted. Even if the publication indicates that the exact number of vacancies would be ascertained subsequently, it cannot be said that subsequent ascertainment of the vacancy would tantamount to changing the rule of the game after it is played nor the selection process undertaken by the SSC shall be vitiated. The petitioner being conscious of the aforesaid fact participated in the examination and according to the merit and the rank achieved by them respectively; there is no fetter on the part of the authorities to offer appointment in a particular Department/Ministry. Admittedly, the petitioner was offered an appointment in the Postal Department as Junior Accountant Officer and there is no challenge in this regard.

The grievance of the petitioner is restricted to stand of the authorities offering the appointment in a different zone than the Kolkata, State West Bengal even after the preference was sought. The letter of preference dated 28.5.2021 indicates that the candidate must fill in the pro-forma attached thereto within a stipulated time and the dossiers would be sent to the Postal Accounts Office as per the preference filled up on existence of vacancies in the relevant category after completion of allocation process. It further

postulates that allocation will be strictly with reference to the rank obtained in the said competitive examination and in the event two or more candidates have given a preference of a particular State than the candidate who is higher in rank shall be given a priority over other. Clause 9 thereof in our opinion throws further light on the above aspect where the consequence for non furnishing of the pro-forma has been provided that the authority would deem that no preference has been furnished and the dossiers may be sent to any of the Postal Account Offices where the vacancies exist after the allocation of the candidates who have furnished such pro-forma.

What can be seen from the aforesaid office memorandum dated 28.5.2021 that in the event the successful candidate submits the pro- forma indicating the preference of his appointment in a particular zone, such preference shall be considered to a vacancy in a particular category on the basis of rank in the merit list. The object and purpose behind the above exercise can be perceived that the authorities would place the successful candidate in the order of preference on the basis of the rank in respective category and such preference would lose importance in respect of a candidate who does not furnish such pro-forma within the time stipulated therein. We do not find any other purpose behind seeking such preference from the successful candidate. There is no ambiguity in our mind that the authorities can post the candidate in any zone where no preference is given by the candidates and the Court shall be slow to interfere with such administrative decision. However, the moment the preference is sought and there is a clear vacancy in different zone in particular category, the appointment shall be on the basis of a merit and the position of a candidate in the merit list. We would not have faulted the decision of the authority

taken on 26.8.2021 that the candidate cannot claim where he is to be posted as he may be asked to serve anywhere in the country but the moment preference is sought indicating the object and purpose and the manner in which is to be dealt with, the authorities cannot take a plea inconsistent therewith or to render such preference meaningless.

As indicated above, the total number of vacancies in the Postal Department was subsequently ascertained and/or determined in 2020 and 19 posts were shown vacant under the Unreserved category. Subsequently, 16 dossiers out of 19 under the Unreserved category have been distributed to a different zone on account of administrative exigencies /convenience after the examination is over. Even if we accept the stand of the parties that because of the administrative exigencies the dossier taking out certain clear sanctioned vacancy of the particular candidate is permissible yet, it left out 3 clear vacancies under the Unreserved category. The stand of the respondent authorities were categorically before the Tribunal that those were initially filled up with the candidates belonging to OBC category taking recourse to rule 38 of Postal Manual Vol. IV. There is a fallacy in the stand of the authorities in this regard. There is a clear distinction between a transfer and the appointment to a post; the transfer being an incident of service can only be activated after a person is appointed in a sanctioned post. The transfer in service jurisprudence perceived a notion that a person who has been appointed in one zone or a department is placed in another zone or the department of the same organisation. Rule 38 can only be pressed in action after an appointment is made and cannot be construed to expand his horizon at the time of appointment to a post. The Tribunal ought to have considered the aforesaid aspect and should not have proceeded on the

assertion of the respondent authorities solely on the ground of an administrative convenience or an exigency.

The another plea was taken that the moment the post have been diverted to a different zone earmarked for Unreserved category there is no vacancy left and, therefore, the petitioner cannot claim any right over unavailable post. The record would indicate that 16 out of 19 were diverted to a different zone leaving 3 clear posts under the UR category which can never be perceived to be nil. The moment the 3 vacancies under the UR category is discerned from the record, the candidates who stood higher in rank in such category cannot be posted in another zone as it goes contrary to the office memorandum dated 28.5.2021.

Interestingly, the learned ASG has prevaricated the stand which was neither taken by the authority in the Speaking Order nor before the Tribunal in a reply filed therein. It is contended that those 3 posts under the UR category has been filled up with the Ex-serviceman and Physically Handicapped person in terms of the **Enforcement (Re-employment in Central Civil Service and Posts), Rules 1979** . The said Rules provides the reservation of vacancy for Ex-serviceman and such vacancies appears to be on a horizontal level and not in a vertical level. There is no indication in the said Rules which permit vacancy to be filled up in a vertical manner as the vacancy earmarked for each category has to be filled up with the Ex-serviceman in a vertical manner. There is neither any pleading in this regard nor has been taken by the authority in the Speaking Order nor before the Tribunal. The case which has not been pleaded nor made out cannot be permitted to be taken for the first time at the Bar. There is an inconsistency

in the stand of the authorities before the Tribunal as well as before us. It was a specific stand of the Tribunal that the remaining vacancies were filled up by the OBC category candidates which was later on rectified but there is no explanation that after such rectification, the remaining vacancy under the Unreserved category becomes nil. There were 3 clear vacancies under the UR category even after taking out 16 dossiers therefrom and there was a complete silence on the part of the authorities in this regard. There is a complete digression from the notifications issued at the time of conducting the examination or the merit list or ascertainment of the vacancies and the moment the vacancies have been taken out from the UR category after the result was published, it tantamount to changing the rule of the game. In a recent judgment rendered in case of **Sureshkumar Lalitkumar Patel & Ors. vs. State of Gujarat & Ors. reported in (2023) SCC Online SC 167**, the Apex Court has held that the subsequent decision changing the pattern or the norms which were already fixed is arbitrary and unjustified. The Apex Court have further highlighted that if the decision has been taken on an extraneous reasons to accommodate some ineligible persons, it cannot stand on a sound logic nor can be said to be a valid informed decision in the following:

“30. The decision to reduce the cut-off marks is not based upon an objective-criteria, namely, the suitability of the candidate to the post, but for extraneous reason, i.e., to accommodate otherwise ineligible candidates. In other words, earlier cut-off marks were fixed on a conscious consideration of the marks required to be eligible for the post, which could not be reduced, unless there is a sound reason

that the reduced marks also would be sufficient to be suitable for that post.”

In view of the above, there is a clear 3 vacancies in an Unreserved category even if correcting the initial defect by taking of the OBC category candidates to their respective category and the petitioners being higher in rank are entitled to be posted in such post.

The order of the Tribunal is hereby set aside.

The respondent authorities are directed to issue a fresh appointment letter to the petitioner to be posted as Junior Accountant Officer in Kolkata (West Bengal) in remaining three unreserved category within a period of 4 weeks from date.

The writ petitions are, thus, disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon,J.)

(Prasenjit Biswas, J.)

Later:

After the delivery of the judgment in open Court, the learned Advocate for the Union of India prays for stay of the instant judgment/order.

We do not find any justification for stay of the instant judgment/order.

The prayer is thus refused.

(Harish Tandon,J.)

(Prasenjit Biswas, J.)