

NAIR SERVICE SOCIETY  
v.  
DISTT. OFFICER, KERALA PUBLIC SERVICE COMMISSION  
AND ORS.

NOVEMBER 17, 2003

[V.N. KHARE CJ., S.B. SINHA AND DR. AR. LAKSHMANAN, JJ.]

*Service Law:*

*Kerala State and Subordinate Service Rules, 1958—Rules 15 to 17—Constitution of India, 1950—Article 16(4)—Appointment of Sub-Engineers in State Electricity Board—Rules providing reservation including carry forward of vacancy not exceeding 50% and that every alternate appointment is for open competition (merit) and every succeeding alternate appointment for reserved candidates—State Public Service Commission preparing rank list and also separate supplementary list recommending 239 names, 177 from main rank list and 62 from supplementary list—For getting reserved candidates, candidates 1 to 18 recommended from supplementary list of Muslims—Others not advised since main list got exhausted—20 candidates comprising of 11 from open competition, 3 SCs, 3 OBC and 3 Muslims not joining duty—19th candidate in Muslim supplementary list claiming appointment to one of the vacancies of Muslims, along with similar other writ petitioners—High Court directing Commission to advise candidate from supplementary list—In writ appeals Division Bench holding that once main list got exhausted supplementary list also automatically gets extinguished—However, High Court directed appointment from supplementary list—Correctness of—Held: Candidates not entitled to appointment based on supplementary list since that would exceed percentage of reservation beyond 50% against statutory protection violating 50:50 rule—However, appointments made pursuant to order of High Court not to be disturbed.*

**State Public Service Commission selects candidate for appointment in Government service for which Rules of Reservation laid down in Kerala State and Subordinate Service Rules, 1959 have to be followed. Rules 15 to 17 provide for 50% reservation in the aggregate for SC, ST and OBCs; and**

**A** that every alternate appointment is for open competition (merit) and succeeding alternate appointment for reserved candidate.

**B** State Electricity Board sought preparation of a select list for appointment of Sub Engineers. State Public Service Commission prepared a rank list of 177 and also prepared separate supplementary lists. Commission advised in all 239 names, drawing 177 names from the main rank list and 62 names from the supplementary list. For reservation candidates Commission advised names of candidate nos.1 to 18 from among the supplementary list for Muslims. Commission could not advise further names from supplementary list as the main rank list got exhausted. Out of 89 candidates advised, 20 candidates comprising of eleven from open competition, three SC's, three OBCs and three Muslims did not join duty. These non-joining duty (NJD) vacancies were reported to the Commission but no advice was made. Thereafter, candidate No.19 in the Muslim supplementary list filed a writ petition claiming appointment to one of these NJD vacancies of Muslims being the next candidate in the Muslim supplementary list. Commission contended before the High Court that as the main rank list stood exhausted by advising the last of the candidates included therein, the supplementary list of reservation candidates also ceased to be in force as otherwise rule of 50:50 would stand violated. Single Judge of High Court allowed the petition and directed the Commission to advise names of candidates to NJD vacancies. Commission then filed writ appeals. Division Bench of the High Court dismissed the appeals and directed that the petitioners in the original petition would be entitled to appointment based on the supplementary list despite its holding that once the main list got extinguished the supplementary list also automatically gets extinguished. Thereafter, the Commission implemented the decision of High Court and did not file any appeal against the order; therefore, the present appellant-Society has filed instant appeals in public interest.

**G** Appellant contended that by the impugned judgment the backward turns alone are to be filled in whereas Rule 14 lays down that the open category turn is to be filled in first and then the backward turns; that the procedures indicates that in order to workout the rotation open competition candidates would also be available; that Rule 15 provides that in no year reservation including carry forward of vacancies to a category of post shall exceed 50% of the total number of vacancies for which by direct recruitment is resorted to in that year and the direction in the impugned judgment violates this provision; that the Commission has fixed the life of a rank list under its power to regulate the procedure for selections and the procedure followed is that

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once the main list is exhausted the supplementary list has no survival on its own; that the Division Bench has not given any valid or good ground for taking the view that NJD vacancies can be filled up by candidates included in the supplementary list even if the main list is exhausted or expired; and that the supplementary list cannot be acted upon and the respondents would not be entitled to any reliefs.

Respondent contended that though the Commission contended before the High Court that the supplementary list has no independent existence after the exhaustion of the main list, it has not preferred any special leave petition before this Court and has decided to implement the order passed by the Division Bench of the High Court.

#### Disposing of the appeals, the Court

**HELD:** *Per Lakshmanan, J. (for himself and CJI):*

1. Once the main list is exhausted, the supplementary list has no survival of its own. Therefore High Court is not correct in its conclusion that the respondents would be entitled to appointment based on the supplementary list and also it cannot exceed percentage of reservation beyond 50% against the statutory protection. However, appointments already made pursuant to the impugned judgment are not disturbed. [560-C-D; 562-C]

2.1. It is well-settled principle of law that the Court should not substitute the provision of a statute by its own decision. In the instant case, the impugned judgment ignored the provisions of statutory rules to substitute the decision in that place. [562-G]

2.2. Kerala State and Subordinate Service Rules, 1959 lays down the principle of reservation under Article 16(4) of the Constitution and the procedure to be followed in giving effect to the reservation for SC, ST and OBC in the State. Rule 15 refers to the integrated cycle of rotation and the procedure to be adopted in selections where any candidate may become available for recruitment from the reserved group. It lays down the principle of limitation of percentage of reservation including the carry forward which shall not exceed 50% of the total number of vacancies for which selection by direct recruitment to that category is resorted to in that year.

[562-H; 563-A-B]

2.3. The statutory rules envisage making a rank list defined in Rule 2(g) of KPSC Rules of Procedure. Rules 14-17 do not contemplate making a

A supplementary list. Therefore, the supplementary list prepared by KPSC to satisfy the rules of reservation has no statutory backing. Thus when the main list is exhausted or expired, supplementary list cannot be allowed to operate. If the supplementary list alone is allowed to operate it would amount to giving greater sanctity to it and long life than the main list prepared in accordance with the Rules. It would violate the first proviso to Rule 15(c) of the General Rules since the NJD vacancies in respect of OBC candidates cannot be filled up after the expiry or exhaustion of the main list and only reserved candidates can be advised from the supplementary list which would violate 50% rule as no OC Category candidates could be advised. Furthermore, the reason given by the Division Bench that if any NJD vacancy arises in the OC category, the same could be filled up in the next batch of appointment thereby, the rights of OC candidates can very well be protected without any violation of the proviso to Rule 15 is not legally acceptable. This reasoning is, equally acceptable to NJD vacancies which arise in the reserved categories as well. By advising candidates from the supplementary list, without any opportunity of balancing the advise with an open competition candidate the consequence would have been a violation of 50:50 rule with excess reservation over 50% in the year in favour of the reserved candidates. [563-E-H; 564-A-B]

2.4. The normal period for which the list is to remain in force is one year from the date on which it is brought into force, but it will continue to be in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of three years whichever is earlier. Based on the procedure so prescribed, KPSC prescribes the ranked merit list in the order of merit. The candidates are arranged strictly according to merit and are not arranged according to community or caste or group or according to the cycle of rotation, in reservation. These candidates are advised for appointment as and when vacancies are reported but following the rules of reservation and rotation prescribed in Rules 14 to 17. [565-F-H; 566-A]

2.5. With a view to secure adequate representation of reserved communities in the selection and thereby to effectuate the policy of reservation, KPSC prepares what it calls supplementary list of candidates for the different reserved communities who will be entitled to appointment, comprising of a number equal to half the number of turns as per the quota to each reservation group. The advantage of this procedure was that no reservation turn will be passed over to open competition and reservation groups will get the representation due to them, at the same time maintaining the balance of 50:50 between open competition and reservation candidates.

There was no supplementary list prepared in relation to open competition merit candidates for the reason that where the last of the candidates has been advised from the rank list in the open competition, there was no further scope for drawing on the supplementary list or advising from that list, as all the advice hitherto was on the basis of one open competition followed by reservation, thereby keeping the balance of 50:50. [566-B-E]

*Indra Sawhney etc. etc. v. Union of India and Ors. etc. etc.*, AIR [1993] SC 477 and *State Bank of India Scheduled Caste/Tribe Employees' Welfare Association and Anr. v. State Bank of India and Ors.*, [1996] 4 SCC 119 - referred to.

*Per Sinha J. (Concurring):*

1.1. Non-statutory Rules framed by the State Public Service Commission must be read in such a manner which would fulfill the reservation criteria contained in the Statutory Rules. In terms of Rules 4 and 12 two separate rank lists were required to be prepared—a separate rank list for open category candidates as also a supplementary list for the purpose of satisfying the rules of reservation of appointment of reserved category candidates. The purport and object being absolutely clear and unambiguous that such list should be in the nature of waiting list so that the vacancies arising during the period when such list is prepared till the publication of a new list as envisaged in Rule 13 can be filled up. Kerala Public Service Commission under a misconception prepared a supplementary list only in relation to the reserved category of candidates for filling up the vacancies by the some candidates not joining their posts and not in terms of the open category candidates. It would be illegal, as thereby the relevant provision relating to the percentage of reservation contained in Rule 15 of the statutory rule would stand infringed.

[573-E-G]

1.2. High Court granted the prayer of advising names of the candidates against NJD vacancies of Muslim candidates holding that the rule of reservation is not affected as the vacancies created by reason of non-joining of the posts belonging to open category candidates may be filled up in the later year. It did not consider the hardship created to one category of candidates in terms of Rule 13 inasmuch as such vacancies may not be filled up for a period of three years and violated the reservation policy of the State in Kerala State and Subordinate Service Rules, 1958. [574-B-D]

1.3. For the purpose of making the reservation policy a reasonable one the extent thereof should not exceed 50% save in exceptional situation and

**A** also the statutory rules contain such a prohibition. Article 16(4B) of the Constitution is also a pointer to the said fact in terms whereof an enabling provision has been created whereby and whereunder the State may consider to fill up the unfilled vacancies of a year which are reserved for being filled up in that year in accordance with the provisions made under clause (4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on the total number of that year. Therefore, the judgment of High Court, if implemented, would be violative of Article 16(4B) of the Constitution as also the statutory rules. [574-D-G]

**C** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4075-4081 of 1998.

From the Judgment and Order dated 5.8.97 of the Kerala High Court in O.P. No. 18154, 18176, 18409/95, 357, 3655/97, W.A. No. 582 and 583 of 1997.

**D** K.K. Venugopal, K.V. Mohan and V. Balachandran for the Appellant.

P.A. Mohammed, T.L.V. Iyer, Fazlin Anam, E.M.S. Anam, Vipin Nair, P.B. Suresh, Romy Chacko, Ms. V. Mohana and Ramesh Babu M.P. for the Respondents.

**E** The Judgment of the Court was delivered by

**DR. AR. LAKSHMANAN, J.** The appellant before us is a Society called Nair Service Society ('NSS' in short) filed the above appeals through its Secretary against the common judgment and order dated 05.08.1997 passed by the Kerala High Court in Writ Appeal No. 582 of 1997 etc. batch and also to stay the operation of the common judgment and also by restraining the respondent authorities from giving effect to the above judgment in any manner and not to appoint any person from the supplementary list. The appellant-Society was not a party before the High Court. The appellant-Society sought leave to file the above appeals. The reason given by NSS for filing the appeals by a non-party is that the Kerala Public Service Commission (in short 'the KPSC') which had lost in the High Court was not filing any appeal after the impugned judgment which was against the interests of the public and, therefore, the NSS was filing the appeal *bona fide* in public interest to protect the weaker sections who would not be able to come to this Court after the impugned order. This Court on 09.01.1998 directed issue of

show-cause notice to the respondents and granted leave thereafter on 17.08.1998. A

The original petitions were filed by the candidates before the High Court seeking to direct the KPSC to advise candidates against the non-joining duty ('NJD' for short) and also for other consequential and incidental reliefs. B

The KPSC makes the selection of candidates for appointment in Government as well as in governmental bodies like the Kerala State Electricity Board (hereinafter referred to as 'KSEB'). Appointments in Government service have to be made following the Rules of Reservation laid down in Rules 15 to 17 of the Kerala State and Subordinate Service Rules, 1958 (hereinafter referred to as 'the KSSR') framed under Article 309 of the Constitution. The Rules, *inter alia*, provide for a 50% reservation in the aggregate for Scheduled Castes (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC). They also provide as to how the reservation vacancies are to be filled in by the various categories and castes included in the SC, ST and OBC groups. It is only necessary to note here that every alternate appointment is for Open Competition (merit) and every succeeding alternate appointment is for reserved candidates. Suffice it to say that the first proviso to Rule 15 (C) lays down categorically that in no year reservation, including carrying forward vacancies to a category of post shall exceed 50% of the total number of vacancies for which selection by direct recruitment to that category is resorted to in that year. The Note to the rule lays down that the period of one year for purposes of this proviso shall commence on and from the day on which the rank list of candidates prepared by the Commission in respect of that post comes into force. C D E

The dispute in these appeals arise out of what are called NJD vacancies. This is illustrated with reference to the facts of one of these cases. F

The KSEB had sought preparation of a select list for appointment of Sub Engineers. The KPSC prepared a rank list of 177. Along with that it also prepared separate supplementary lists. Copies of these lists are annexed at pages 125 to 128. The list came into force on 04.07.1994. There was a requisition from the KSEB for 150 names on 20.08.1994. These names were advised. There was a second requisition on 21.12.1994 for 100 more names. The KPSC could furnish only 89 names, as with that advise the list of the candidates in the merit list stood advised for appointment. Thus, the KPSC advised in all 239 names, drawing 177 names from the main rank list and 62 names from the G H

A supplementary list, which became necessary to fill up the alternate reservation vacancies in the cycle of rotation of appointment. Be it stated, that in this total advice of 239 candidates, the KPSC which had resorted to the supplementary list for getting reservation candidates had advised nos. 1 to 18 among the supplementary list for Muslims. No. 19 onwards to that list could not be advised as the main rank list got exhausted in the meanwhile.

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 Out of the second advice of 89 candidates, 20 candidates did not join duty which comprised of eleven open competition candidates, three SC's, three Ezhavas (OBC's) and three Muslims. Those NJD vacancies were therefore, reported to the KPSC for advice on 20.06.1995. No advice was, however, made by the KPSC whereupon No.19 in the Muslim supplementary list who claimed appointment to one of these NJD vacancies of Muslims, he being the next unadvised candidate in the Muslim supplementary list filed O.P.No. 12305 of 1995 in the Kerala High Court for a direction to the KPSC to advise candidates to the NJD vacancies of Muslims. This was followed by similar other writ petitions.

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 The stand taken up by the KPSC was that once the main rank list stood exhausted by advising the last of the candidates included thereon the supplementary list of reservation candidates also ceased to be in force as otherwise the rule of 50:50 will stand violated as pointed out thereon. The KPSC's stand will be clear from the counter affidavit at pages 79 to 81 as also in the Writ Appeal pages 102-106 and counter affidavit pages 163-168 in this Court.

F  
 A learned Single Judge of the High Court on 13.02.1997 allowed the petition filed by the respondents herein holding that there was no justification to reject the case of the petitioner therein on the ground that the main list got exhausted on 21.12.1994 and directed the KPSC to advise respondent No.5 therein to appoint them on the NJD vacancy. In holding so the learned Judge ignored the mandate of the proviso to Rule 15(c) of the KSSR that the reservation cannot in any case exceed 50% in any year. In terms of the said order, other original petitions filed by other candidates were also disposed of.

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 Aggrieved by the said order, the KPSC filed writ appeals in the High Court and contended that the supplementary list is an appendage to the main list and when the main list ceased to operate, no candidate could be advised from the supplementary list. It was also pointed out that the supplementary lists are prepared to make good the deficiency of reserved communities in the main list and when the main list ceased to operate the supplementary list

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cannot be allowed to operate independently. A Division Bench of the High Court, by its common judgment, dated 05.08.1997 dismissed the appeal filed by the KPSC and allowed the writ petitions filed by the respondents and directed the respondents to issue advise memo for appointments to those without going into the question whether the limit of reservation would exceed 50% and also whether they were entitled to be appointed at all and also the primary question as to what is to be done to the 11 NJD vacancies existed in case of open category candidates and that there was no supplementary list in their case.

The High Court in para 8 of its judgment has observed as follows:-

“The petitioners in these Original Petitions contended that they are all entitled to get appointment against the N.J.D. vacancies as their names are included in supplementary lists. The stand taken by the P.S.C. is that once the main list is exhausted or expired it is not possible to advise any candidate who is included in the supplementary list. It is true that once the main list is exhausted or expired further advice cannot be made from the supplementary list for the vacancy that may arise subsequently. That is also the view taken by one of us (Balakrishnan,J.) in O.P. No. 3902/93. But as regards N.J.D. vacancies, we do not think that the supplementary list can be totally ignored under all circumstances. If a few candidates belonging to reserved communities failed to join duty and there arose some N.J.D. vacancies, if there are candidates available in the supplementary list, such candidates can very well be advised for appointment. The vacancies to be filled are the actual vacancies which ought to have been filled up along with the candidates in the main list. Learned counsel for the P.S.C. pointed out that the N.J.D. vacancies may include the open competition vacancies as well as vacancies in the reserved category and if reserved posts alone are allowed to be filled up, that will exceed the quota earmarked for reservation and it would be a violation of the proviso to Rule 15 of the K.S. & S.S.R. that in no year reservations including carrying forward vacancies to a category of post shall exceed 50% of the total number of vacancies for which selection by direct recruitment to that category is resorted to in that year. Such situation may occur under certain circumstances, but that does not amount to denial of opportunity of a particular class of persons as the general N.J.D. vacancies are filled up in the next batch of selection. Even in the instant case, 150 candidates were advised on

A 26-8-1994. Out of 150 candidates, 125 candidates were against fresh vacancies and 25 were N.J.D. vacancies and the counsel for the P.S.C. admitted that 25 N.J.D. vacancies were filled up and thereafter the roster point was fixed in respect of 125 candidates. Therefore, it cannot be said that there is any violation of the proviso to Rule 15 of the K.S. & S.S.R. in the sense that there was denial of opportunity to any of the candidates, either open competition candidates or the reserved candidates.”

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C Aggrieved against the above judgment, the appellant-Society, after obtaining leave from this Court filed the special leave petitions against the common judgment impugning the judgment as erroneous and is against the provisions of the statute, namely, Kerala State and Subordinate Service Rules, 1958 and is, therefore, liable to be set aside.

On the above facts and circumstances, the following two primal questions of law arise for consideration by this Court:-

- D (1) Whether the High Court, after holding that once the main list got extinguished the supplementary list also automatically gets extinguished, is correct in its conclusion that the petitioners in the original petition would be entitled to appointment based on the supplementary list when they did not have any legal rights or fundamental rights over the selection.
- E (2) Whether it is open to the High Court to exceed the percentage of reservation beyond 50% against the statutory provisions.

F We heard Mr. K.K. Venugopal, learned senior counsel for the appellant, and Mr. P.A. Mohammed and Mr. T.L.V. Iyer, learned senior counsel for the contesting respondents. Learned senior counsel invited our attention to the relevant Rules, namely, Rules 14-17 of the Kerala State and Subordinate Service Rules, 1959 which lays down the principle of reservation under Article 16(4). The Rules lay down the principle and procedure to be followed in giving effect to the reservation for Scheduled Castes/Scheduled Tribes and G Backward Classes in the State of Kerala. Our attention was drawn to the relevant Rules of the Kerala Public Service Commission Rules of Procedure (Annexure-P7) and the Circular No. 17/87 dated 04.07.1987 of the Kerala Public Service Commission and other relevant records. Mr. Venugopal, learned senior counsel for the appellant, further submitted that the impugned judgment is against the statutory principle and that by the judgment the backward turns H

alone are to be filled in whereas Rule 14 lays down that the open category A  
 turn is to be filled in first and then the backward turns. The order of rotation  
 is also laid down. It was further submitted that all these procedures indicates  
 that in order to workout the rotation open competition candidates would also  
 be available. Mr. Venugopal would further contend that Rule 15 provides that  
 in no year reservation including carrying forward of vacancies to a category B  
 of post shall exceed 50% of the total number of vacancies for which by direct  
 recruitment is resorted to in that year. The direction in the impugned judgment  
 violates this provision. According to Mr. Venugopal, the supplementary list  
 prepared and operated should only satisfy the reservation under Article 16(4)  
 and that the said Article is always conditioned by the mandate of Article 335 C  
 and, therefore, the operation of the supplementary list after expiry of the main  
 list against the mandate of Article 335 also. The KPSC has fixed the life of  
 a ranked list under its power to regulate the procedure for selection and the  
 procedure followed is that once the main list is exhausted the supplementary  
 list has no survival on its own. Learned senior counsel would also submit that  
 the Division Bench has not given any valid or good ground for taking the  
 view that NJD vacancies can be filled up by candidates included in the  
 supplementary list even if the main list is exhausted or expired except a  
 sweeping statement that on an analysis of various provisions of law on this  
 point they take the view aforesaid. Concluding his submission, learned counsel D  
 submitted that the High Court has committed a grave error in directing the  
 KPSC to give appointment to the Respondents without going into the question E  
 whether they are eligible when according to the KPSC the respondents were  
 not even entitled to appointment. It was submitted for the aforesaid reasons  
 the supplementary list cannot be acted upon and the respondents would not  
 be entitled to any reliefs.

Mr. T.L.V. Iyer, learned senior counsel, submitted that though the KPSC F  
 contended before the High Court that the supplementary list has no  
 independent existence after the exhaustion of the main list, the KPSC has not  
 preferred any special leave petition before this Court and has decided to  
 implement the order passed by the Division Bench of the High Court. It was  
 also contended by learned counsel for the KPSC that the appellant is not a  
 party in the High Court proceedings commenced from 1995 and had no right  
 or *locus standi* to rush to this Court and that the appeal at the instance of  
 the third party society is not maintainable in law. G

We do not propose to deal with the question of maintainability at this  
 stage since the special leave petitions were filed after obtaining leave from H

A this Court and later this Court also had granted leave to the appellant. This apart, it was stated in the counter affidavit filed in this Court that the appointment to the services was done in complete regard and compliance of the High Court and, therefore, the petitioner-Society ought not to have any grievance. Moreover, as per the said directions of the High Court, the KPSC advised for appointments of some respondents and the vacancies were filled up by the candidates included in the supplementary list and all the appointed candidates are working in various departments of the Government of Kerala. We, therefore, do not propose to disturb the said appointments at this distance of time, that too at the instance of the appellant Nair Service Society, a third party to the proceedings in question. We are also not inclined to disturb the appointments since the really aggrieved persons have not questioned the correctness of the appointment of some of the candidates who were included in the supplementary list. We make it clear that this judgment of ours shall not affect the appointments already made pursuant to the judgment of the Division Bench of the High Court.

D These appeals have been filed by the appellant-Society by way of public interest litigation. In the judgment in *R.K. Jain v. Union of India and Ors.* reported in AIR (1993) SC 1769, in paragraph 74 at page 1803 of the judgment, it has been held that,

E “.....In service jurisprudence, it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no *locus standi* to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public spirited person.”

F Since the question of law raised by learned senior counsel is of great public importance, we are inclined to consider and decide the two questions formulated by us for our decision in this appeal.

G We have given our thoughtful consideration to the legal submissions made by the counsel appearing for the respective parties. The impugned judgment, in our opinion, did not appreciate the well-settled principles of law that the Court should not substitute the provision of a statute by its own decision. In this case, the impugned judgment ignored the provisions of statutory rules to substitute the decision in the place. The K.S. and S.S. Rules, 1959 lays down the principle of reservation under Article 16(4). The Rules laid down the principle and the procedure if followed in giving effect to the reservation for Scheduled Castes and Scheduled Tribes and Backward Classes

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in the State. Rule 15 refers to the integrated cycle of rotation and it deals with the procedure to be adopted in selections where any candidate may become available for recruitment from the reserved group. This Rule lays down the principle of limitation of percentage of reservation including the carry forward. The reservation of vacancies including carry forward vacancies shall not exceed 50% of the total number of vacancies for which selection by direct recruitment to that category is resorted to in that year. Rule 16 provides that there is sub-rotation among OBCs. Rule 17 enumerates the sub groups among OBCs mentioned in Rule 14(a) and Rule 16. Through out these rules, there are clear indications that the scheme of reservation followed in the State of Kerala under direct recruitment is with respect to vacancies. Rule 14(c) lays down the manner of making appointments. Rule 15 also makes it clear that appointment referred to is with reference to vacancies as made out in the proviso under rule 15(c) and the note thereunder. The judgment of the High Court proceed on the wrong premise that the principle of reservation is with reference to the post. In our view, Rules 14-17 do not contemplate making a supplementary list and the statutory rules envisage making a ranked list which is defined in Rule 2(g) of the KPSC Rules of procedure. Rule 2(g) of the KPSC Rules of procedure reads thus:-"

"ranked list" means list of candidates arranged in the order of merit either on the basis of interview or examination or by both".

The above definition shows that there is only one ranked list. Therefore, the supplementary list prepared by the KPSC to satisfy the rules of reservation has, in fact, no statutory backing. For that reason when the main list is exhausted or expired, supplementary list cannot be allowed to operate. If the supplementary list alone is allowed to operate it would amount to giving greater sanctity to it and long life than the main list prepared in accordance with the Rules. Secondly, after the expiry or exhaustion of the main list if the supplementary list is operated it would violate the first proviso to Rule 15(c) of the General Rules. The reason is that the NJD vacancies in respect of OBC candidates cannot be filled up after the expiry or exhaustion of the main list and only reserved candidates can be advised from the supplementary list which would violate 50% rule as no OC Category candidates could be advised. As rightly contended by Mr. Venugopal, it would adversely affect the OC Category candidates and violate the statutory Rule. The reason given by the Division Bench that if any NJD vacancy arise in the OC category, the same could be filled up in the next batch of appointment thereby, the rights of OC candidates can very well be protected without any violation of the proviso

- A to Rule 15 of K.S and S.S.R. is not legally acceptable. The above reasoning, in our opinion, is equally acceptable to NJD vacancies which arise in the reserved categories as well. By advising candidates from the supplementary list, without any opportunity of balancing the advise with an open competition candidate the consequence would have been a violation of 50:50 rule with a tilt in favour of the reserved candidates lasting their quota above 50%. The net result is that there will be excess reservation over 50% in the year.

B In our opinion, the KPSC has failed to protect the interest of the open competition candidates while implementing the decision of the High Court. It is an admitted position in the present case that the open competition quota of NJD vacancies have not been filled up and the only plea that the list got exhausted. If the list was not expired, the NJD vacancies of the OC category also would be filled up. The open competition candidates who belong to the forward communities alone do not get the appointment by the process evolved by the KPSC.

D For regulating, *inter alia*, procedure in relation to the preparation of the rank lists the KPSC has made rules entitled the KPSC Rules of Procedure, Rule 3 enumerates the various types of lists/examination which the Commission may conduct to assess the merits of candidates considered for appointment to a post. Needless to say it includes written examination and oral test [interview]. Rule 4 insofar as it is relevant provides that where a written examination is conducted, the Commission shall prepare a list in the order of merit of such number of candidates as it may determine from time to time. The provisos to the Rule enable the Commission to prepare separate rank lists in the order of merit of candidates coming under separate groups in accordance with the qualifications or other conditions as stipulated in the notification; and also further that for the purpose of satisfying the rules of reservation of appointment of SC's, ST's and OBC's, also, the Commission may prepare such supplementary lists as found necessary from time to time in the order of merit of the candidates belonging to such classes. The relevant part of the Rules reads as under:

G "4. Where a written examination and/or a practical test is conducted by the Commission for recruitment to a service or post, the Commission shall:

(i) announce:

H (a) The qualifications required of the candidates for the examination.

(b) The conditions of admission to the examination including the fees A

(c) The subjects, scheme or syllabus of the examination, and

(d) The number of vacancies to be filled from among the candidates for the examination B

Provided that where the exact number of vacancies to be filled is not ascertainable, the commission may either announce the approximate number of vacancies to be filled or state that the number of vacancies has not been estimated.

(ii) Invite applications and consider all the applications so received. C

(iii) Make all arrangements for the conduct of the examination for the candidates, whose applications are found to be in order, and

(iv) Prepare a list in the order of merit of such number of candidates as the Commission may determine from time to time. D

Provided that the Commission may also prepare separate ranked lists in the order of merit of candidates coming under separate groups in accordance with the qualifications or other conditions as stipulated in the notification. E

Provided further that for the purpose of satisfying the rules of reservation of appointment to scheduled Castes, Scheduled Tribes and other Backward classes also the commission may prepare such supplementary lists as found necessary from time to time in the order of merit of the candidates belonging to such classes." F

It is only necessary to refer to one more Rule, namely, Rule 13 which provides the period for which a list as above prepared shall remain in force. The normal period for which the list is to remain in force is one year from the date on which it is brought into force, but it will continue to be in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of three years whichever is earlier. Based on the procedure so prescribed, the KPSC prescribes the ranked merit list in the order of merit. The candidates are arranged strictly according to merit and are not arranged according to community or caste or group or according to the cycle of rotation, in reservation. The number of candidates to be included in this rank G H

A list is filled with reference to some principles followed by them, which are explained in para 4 of the KPSC's Writ Appeal before the High Court (pages 102-103). The candidates are advised for appointment as and when vacancies are reported, but following the rules of Reservation and rotation prescribed in Rules 14 to 17 of the KSSR.

B With a view to secure adequate representation of reserved communities in the selection and thereby to effectuate the policy of reservation, the KPSC prepares what it calls supplementary list of candidates for the different reserved communities who will be entitled to appointment, comprising of a number equal to half the number of turns as per the quota to each reservation group.

C Thus if Muslims were entitled to ten turns in the list, the supplementary list of Muslims will comprise of at least five Muslims. The advantage of this procedure was that no reservation turn will be passed over to open competition and reservation groups will get the representation due to them, at the same time maintaining the balance of 50:50 between open competition and reservation candidates.

D The supplementary list was only in respect of reservation categories. There was no supplementary list prepared in relation to open competition merit candidates for the reason that where the last of the candidates has been advised from the rank list in the open competition, there was no further scope for drawing on the supplementary list or advising from that list, as all the advice hitherto was on the basis of one open competition followed by reservation, thereby keeping the balance of 50:50. If any more candidates are advised from the supplementary list, the number of reservation candidates will go up and the 50:50 rule will be violated.

F The KPSC was therefore always of the view that once main rank list got exhausted by advising the last of the candidates therein, the supplementary list also ceased to be in force as there was no scope for advising any more candidates therefrom without violating the 50:50 rule.

G All this is explained in the Writ Appeal filed by the KPSC as also the counter affidavit filed in this Court.

H In the case on hand, the appellant-Society is seeking to enforce the rule of reservation to limit the same upto 50% in order to maintain the balance. The KPSC even stated that under Rule 15, the 50% rule of reservation should be observed in a selection year of the ranked list. The Rules clearly safeguards the interest of the backward communities by providing that if no candidate

was available to a particular community in a particular year, it should be restored at the earliest after having passed over by adjusting the post of another community, which derived extra benefit. But in a case of open competition candidate there is no right for restoration as set out by the KPSC in its counter. A

A rejoinder affidavit was filed on behalf of the appellant-Society. Para 7 of the rejoinder affidavit is reproduced hereunder: B

“In Para 3 of its counter, the commission itself admits that the vacancy created as a result of ‘non joining duty’ of a candidate must be made by advising the candidates belonging to the same group such as O.C. or B.C. But for this the ranked list should be valid. This is evident from the following: C

As the turns in the rotation are continuous, the ‘non joining duty’ (NJD) of a candidate, results in the break of the chain in the cycle of rotation. The break in the chain is mended by advising a candidate, belonging to the group concerned. This being the position, the turns becoming available due to ‘Not Joining Duty’ of candidates is filled up first and only after filling up the ‘not joining duty’ turn the remaining vacancies are filled up following the turns in the rotation from where it ended last time. Candidates can be advised against the vacancies caused due to the ‘Not Joining Duty’ only from a valid ranked list. So Not Joining Duty vacancy resulting from the failure of candidates must be filled up by advising candidates. Otherwise, the principles contained in Rule 14 to 17 KS & SSR will be defeated. D E

Further in annexure R1, at page 176, it is stated as follows: F

According to the above judgment, vacancies arising by reason of failure of candidates to join duty must be filled up by advising candidates belonging to the same group O.C. or reserved. As per the procedure now followed by the Commission, if a candidate fails to join duty in a particular post, that advice is cancelled and another candidate is advised to fill up the above vacancy continuing the rotation from where it previously ended. As this procedure is against the spirit of the above judgment, the Commission order that hereafter the vacancies arising due to not joining duty of the candidates already advised, have to be filled up by the candidates belonging to the same group. G H

A This will apply to all requisitions (both for special and general recruitment) received on and after 6.11.1981.

B The Commission supported the case of the petitioner Society, in its affidavit in paras 4 and 5 also. The Annexures R1 and R2 also support the case of the Petitioner including that once the ranked list expired the supplementary list also gets exhausted and that it should not be acted upon.”

C However, in spite of the averments made as above, the KPSC decided to implement the Order of the High Court thereby failed to protect the interests of the Open Category candidates by announcing the General Circular No. 25/97 dated 22.12.1997. The said circular is stated to be retrospective in nature and to be acted upon w.e.f. 13.02.1997.

D As already noticed, the Government of Kerala issued a Circular on 22.12.1997 only because the KPSC had to comply with the judgment of the High Court. Now that we have clarified the correct position of law as canvassed by the counsel appearing for parties, the Circular dated 22.12.1997 will have no effect.

Article 16 of the Constitution of India deals with equality of opportunity in matters of public employment. The said Article reads thus:

E “Article 16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

F (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

G (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within a State or Union territory, any requirement as to residence within that State or Union territory, prior to such employment or appointment.

H (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of

any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. A

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State. B

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year. (5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination." C D

Clause (4) only permits reservation for 'backward classes of citizens' who are not, in the opinion of the State, adequately represented in the services of the State. It does not permit reservation for any person who does not belong to the category of 'backward classes', nor does it enable the State to reserve posts on communal lines. E

This Court in the case of *Indra Sawhney etc. etc. v. Union of India and Ors.*, etc. etc. reported in AIR (1993) SC 477, held that the reservation of more than 50% of the vacancies as they arise in any year or a carry forward Rule will be outside the protection of Art. 16(4). A normal Rule is that the reservation under Art. 16(4) should not exceed 50% of the appointments or posts to be made in a particular year. This Court has also observed that the Rule of 50% a year will be taken as the unit and not the entire strength of the cadre or service as the case may be (paragraph 96). If suitable candidates are not available in the year to fill the reserved seats, the reserved quota should not be carried forward to the next year, so as to exceed the 50% limit for reservation (paragraphs 98-99). F G H

A The reserved vacancies should not be carried forward beyond the period of three years at the end of which they lapse and cannot be revived and filled retrospectively by applying the relaxed norms. *State Bank of India Scheduled Caste/Tribe Employees' Welfare Association and Anr. v. State Bank of India and Ors.*, [1996] 4 SCC 119.

B It is also observed in the said judgment that Article 16(4) speaks of class protection and not the protection of individuals.

C We are, therefore, of the opinion that the High Court is not correct in its conclusion that the respondents would be entitled to appointment based on the supplementary list. Question No.1 is answered in the negative. Likewise, it is not open to the High Court to exceed percentage of reservation beyond 50% against the statutory protection. This question is also answered in the negative. We, therefore, held that once the main list is exhausted, the supplementary list has no survival of its own.

D With these observations, the appeals stand disposed of. No costs.

**S.B. SINHA, J.** The mode and manner of selection and method of appointment to the post of Sub-Engineer (Civil) in the Kerala State Electricity Board as also the terms and conditions thereof indisputably are governed by Kerala State and Subordinate Service Rules, 1958 ('the rules'). The Rules also provide for reservation being governed by Rules 14 to 17 thereof. Rule 14(c) provides for the manner in which the order of rotation shall be worked out. In terms of Rule 15, it is provided that if a suitable candidate is not available for selection from any particular community or group of communities specified in the Annexure, the said community or group shall be passed over and the post shall be filled up by a suitable candidate from the community or group of communities immediately next to the passed over community or group in the said Annexure, as the case may be, in the order of rotation. In the Annexure appended to Rule 15 for direct recruitment to the posts other than those included in the Kerala Last Grade Service, a 100 point roster is given. Once, however, the benefit of the turn in terms of rule 15 is forfeited to a particular community or a group of community having been passed over, the same shall be restored to it at the earliest possible opportunity, if a suitable candidate from the particular community or group is available for selection upon making adjustment therefor against the claims of that community or group, as the case may be. The proviso appended to the said Rule in no uncertain terms restricts reservation including carrying forward vacancy to a category of posts in the year of recruitment in question not exceeding 50%

of the total number of vacancies.

By reason of a note appended to Rule 15, it is provided that for purposes of application of the proviso to Rule 15 limiting the number of vacancies to be reserved in a year as 50 per cent in respect of a category of post, the period of one year shall commence on and from the day on which the ranked list of candidates prepared by the Commission in respect of that post comes into force. The matter relating to reservation is governed thereunder and the Public Service Commission was under a statutory duty to follow the principles laid down in the said rules.

The Public Service Commission of the State of Kerala framed the Kerala Public Service Commission Rules of Procedure which is non-statutory in nature. Rule 2(g) of the said Rules defined "Ranked List" as:

"Ranked List" means list of candidates arranged in the order of merit, either on the basis of the interview or examination or by both;

Rule 4 of the said Rules which is material for the purpose of determining the issues raised in this matter reads thus:

"Where a written examination and/ or a practical test is conducted by the Commission for recruitment to a service or post, the Commission shall -

(i) announce:

- (a) the qualifications required of the candidates for the examination,
- (b) the conditions of admission to the examination including the fees,
- (c) the subjects, scheme or syllabus of the examination, and
- (d) the number of vacancies to be filled from among the candidates for the examination;

Provided that where the exact number of vacancies to be filled is not ascertainable, the Commission may either announce the approximate number of vacancies to be filled or state that the number of vacancies has not been estimated.

- A (ii) invite applications and consider all the applications so received,
- (iii) make all arrangements for the conduct of the examination for the candidates whose applications are found to be in order, and

- B (iv) prepare a list in the order of merit of such number of candidates as the Commission may determine from time to time;

- C Provided that the Commission may also prepare separate ranked lists in the order of merit of candidates coming under separate groups in accordance with the qualifications or other conditions as stipulated in the notification;

- D Provided further that for the purpose of satisfying the rules of reservation of appointment to Scheduled Castes, Scheduled Tribes and other Backward Classes also the Commission may prepare such supplementary lists as found necessary from time to time in the order of merit of the candidates belonging to such classes.”

Relevant part of Rules 12 and 13 of the said Rules read as under:

- E “12. All the candidates interviewed and who obtained not less than the minimum marks fixed by the commission shall be included in the ranked list prepared in the order of merit;

- F Provided where the candidates have been called for interview for the purpose of satisfying the rules of reservation alone such candidates who have got not less than the prescribed minimum marks in the interview shall be included in the supplementary list or lists arranged in the order of merit among the candidates belonging to each class;

- G Provided further that the Commission may also prepare list or lists of such categories of candidates who have got not less than the prescribed minimum marks in the interview and who are entitled to priority according to the terms of the notification inviting applications;

- H Provided further that the Commission may also prepare lists of averaged candidates who have secured not less than the prescribed minimum marks in the interview and who are eligible to be considered

for appointment in the absence of candidates who conform to the rules regarding age limits... A

13. The ranked lists published by the Commission shall remain in force for a period one year from the date on which it was brought into force provided that the said list will continue to be in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of three years whichever is earlier....;" B

The Kerala Public Service Commission under a misconception prepared a supplementary list only in relation to the reserved category of candidates and did not prepare such list in terms of the open category candidates. A bare perusal of the two provisos appended to both Rules 4 and 12 clearly show that two separate ranked lists were required to be prepared, one for the open category candidates and another for the reserved category candidates. The purport and object of preparing such separate ranked lists is absolutely clear and unambiguous. Such list should be in the nature of waiting list so that the vacancies arising during the period when such list is prepared till the publication of a new list as envisaged in Rule 13 can be filled up. In other words, in terms of the aforementioned rules what was required to prepare was a main list a separate ranked list for open category candidates as also a supplementary list for the purpose of satisfying the rules of reservation of appointment of reserved category candidates. Non-Statutory Rules framed by the Commission must be read in such a manner which would fulfill the reservation criteria contained in the Statutory Rules. C  
D  
E

Preparation of only one supplementary list for filling up the vacancies by the some candidates not joining their posts, only from the reserved category of candidates, therefore, would be illegal, as thereby the relevant provision relating to the percentage of reservation contained in Rule 15 of the statutory rule would stand infringed. F

Both the lists viz for the open category of candidates as also the reserved category of candidates were necessary, thus required to be prepared in terms of the said Rules for maintaining the ratio of 50-50. G

The respondents herein filed a writ petition before the High Court for giving effect to the said purported supplementary list wherein the following prayers were made:

" (i) to issue a writ of *mandamus* or any other appropriate writ order H

**A** or direction commanding the 1st respondent to advise candidates against the non-joining duty vacancies of Muslim candidates advised on 20.8.1994 from Ext. P1 list and also to such vacancies of candidates, advised on 21.12.1981.

**B** (ii) to direct the 2nd respondent to report non-joining duty among 89 candidates advised from Ext. P1 list on 21.12.1994."

**C** The High Court by reason of the impugned judgment granted the said prayer *inter alia* holding that the rule of reservation is not affected as the vacancies created by reason of non-joining of the posts belonging to open category candidates may be filled up in the later year. The hardship created to one category of candidates in terms of Rule 13 had not been considered by the High Court inasmuch as such vacancies may not be filled up for a period of three years. Furthermore, by reason thereof, the reservation policy of the State as contained in the Kerala State and Subordinate Service Rules, 1958 has been violated. This Court in a large number of decisions has clearly

**D** held that for the purpose of making the reservation policy a reasonable one the extent thereof should not exceed 50% save in exceptional situation. The statutory rules also contain such a prohibition. Article 16 (4B) of the Constitution of India is also a pointer to the said fact in terms whereof an enabling provision has been created whereby and whereunder the State may

**E** consider to fill up the unfilled vacancies of a year which are reserved for being filled up in that year in accordance with the provisions made under Clause (4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on total number of that year.

**F** The judgment of the High Court, if implemented, would thus be violative of Article 16 (4B) of the Constitution as also the statutory rules.

**G** The High Court, therefore, committed an illegality in passing the impugned judgment insofar as it failed to take into consideration that in the event the same is given effect to, more than 50% of the vacancies in a particular year will be filled up from amongst the reserved category candidates. We, however, having regard to the facts and circumstances of the case do not intend to set aside the appointments made in favour of the private respondents herein only on the ground that the judgment of the High Court

**H**

has been acted upon.

A

For the reasons aforementioned, I agree that the appeals shall be allowed to the extent as directed by my learned Brother Dr. Lakshmanan, J. in his judgment.

N.J.

Appeal disposed. B