

**Ajayan Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Jul-13-2006

**Reported in :** 2006(3)KLT854

**Judge :** J.B. Koshy and; M. Sasidharan Nambiar, JJ.

**Acts :** Kerala Public Service Commission Rules of Procedure, 1976 - Rules 3, 4, 5, 13, 14 and 113; Jammu and Kashmir Medical (Gazetted) Service Recruitment Rules, 1979 - Rule 133; [Constitution of India](#) - Articles 309 and 320; ;Jammu and Kashmir Constitution - Sections 124

**Appeal No. :** W.P. (C) No. 19567 of 2003

**Appellant :** Ajayan

**Respondent :** State of Kerala

**Advocate for Def. :** P.C. Sasidharan, Adv. and; Roy Chacko, Sr. Government Pleader

**Advocate for Pet/Ap. :** S. Ramesh Babu, Adv.

**Judgement :**

**J.B. Koshy, J.**

1. Common question to be considered in these cases is whether Public Service Commission can prescribe cut off marks and shortlist the candidates in the absence of such a provision in the Rules and notification. The learned single Judge noticed that in view of the decision of the Supreme Court in *State of Punjab and Ors. v. Manjit Singh and Ors.* AIR 2003 SC 4580, it is not open for the PSC to prescribe any cut off mark. The learned Judge also noticed that Division Bench of this Court in *Indulekha v. State of Kerala* (2001 (1) KLT 951) has approved the stand of the PSC that it has power to fix cut off marks. The learned Judge was of the view that after the decision of the Supreme Court in *Manjit Singh's* case, earlier decision of this Court may not be good law. Hence, the matter was referred to the Division Bench.

2. Before answering the question, we may refer to the facts in W.P.(C) No. 10751 of 2004. Petitioners, two in number, applied in pursuance of the notification issued by the Public Service Commission for the post of Medical Officers in Homoeopathy Department. They fully possessed educational qualification and other criteria as per the notification. Therefore, they were called for written test and after the written test, they were called for an interview. Ext.P2 dated 30-5-2003 is the interview card issued to the first petitioner. It is stated that they were interviewed in June, 2003 and they were waiting for the advice of the PSC. While so, a show cause notice dated 15-12-2003 was issued to the petitioners by the respondent informing the petitioners that on rechecking of the answer scripts, they found that inaccuracies had crept in while counting marks and they scored only 64 marks whereas cut off mark was 65 and, therefore, their names will be deleted from the shortlist of candidates being called for interview as can be seen from Ext.P3. Petitioners replied the show cause notice by Ext.P4. Petitioners also approached this Court by filing W.P. (C) No. 76 of 2004 and Ext. P5 interim order was passed directing that select list should not be finalised till disposal of Ext.P4. Personal hearing was conducted on 11-3-2004 as directed in the Writ Petition as per the direction of this Court. Final rank list (Ext.P9) was published on 15-3-2004 before passing orders on Ext.P4 as directed by this Court. Petitioners were informed by Exts. PIO (a) and P10 (b) dated 14-5-2004 that their representations were rejected. It is contended by the petitioners that fixation of cut off marks at 65 is highly illegal and, in any event, publication of the list before rejecting the

representation is not only illegal, but also, in violation of the order of this Court. Ext. P9 rank list is effective from 15-3-2004 and is valid for three years. So, it is effective till 15-3-2007. Rank list is prepared not only on the basis of the existing vacancies reported at the time of preparation of the rank list, but also, considering the fact that rank list will be valid for a particular period and anticipated vacancies are also to be taken into account. Circular of the Commission dated 1-12-2003 reads as follows:

1. The number of candidates to be included in the short lists and ranked lists should not be decided mechanically. Commission will decide the number to be included in each case considering the number of vacancies reported, number of candidates advised from the previous list, nature of the post and chances of occurrence of vacancies.

3. Rule 14 of the Kerala Public Service Commission Rules of Procedure (hereinafter referred to as 'the Rules') reads as follows:

14. The Commission shall advise candidates for all the vacancies reported and pending before , them and the vacancies which may be reported to them for the period during which the ranked lists are kept alive in the order of priority, if any, and in the order of merit subject to the rules of reservation and rotation, wherever they are applicable:

Provided that the advice of candidates by the Commission from the ranked lists kept alive under the fifth proviso to Rule 13, shall be confined to the vacancies that actually arose during the normal period of validity of the ranked lists under Rule 13 and certified to be as such by the appointing authorities reporting vacancies to the Public Service Commission. Note: The prolongation under the fifth proviso to Rule 13 shall not be deemed to be part of the normal period of validity of the ranked list under Rule 13.

Therefore, it is the duty of the PSC to consider the number of vacancies arising during the currency of the rank list. In other words, list has to be prepared considering the anticipated vacancies that may arise during the period for which ranked lists are kept alive and not considering the vacancies reported at the time

of publishing the notification only. Rule 5 provides for shortlisting of candidates when oral test alone is conducted. When written examination is conducted, the procedure to be followed is prescribed in Rule 4, Rule 3 provides that the Commission is entitled to provide written examination, practical test, physical efficiency test, oral test or any other test or examination which the Commission may deem fit to hold.

4. Rules 4 and 5 of the Rules are as follows:

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:

(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. (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

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

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:

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.

5. Where an oral test (interview) lone is to be conducted by the Commission for recruitment to a service or post the Commission shall:

(i) announce the qualification and other conditions including the required number of candidates and the number of vacancies to be filled up:

Provided that when 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, consider all applications so received and interview the candidates whose applications are found to be in order:

Provided that where the number of qualified applicants is unduly large having regard to the number of vacancies the Commission may restrict the number of candidates to be called for the oral test (interview) to such extent as they may decide after conducting any examination as they deem fit:

Provided further that the Commission may also restrict the number of candidates to be called for oral test (interview) on the basis of any one or more of the following criteria:

(a) Higher qualification

(b) Higher marks.

Admittedly, the notification published in this case, did not say that there is any cut off mark prescribed for the written examination. It is also submitted that the number of vacancies originally reported were 43, but, by the time rank list was published 100 vacancies were reported. Total number of candidates included in the main list was 136. It is the submission of the petitioners that there are several vacancies existing now also and if all the vacancies were reported, the list will be

exhausted and there will be still vacancies to be filled up and deletion of their names in the short list was illegal. In the counter affidavit dated 3-8-2000 it is stated as follows:

4. It is submitted that at the time of finalisation of the ranked list 43 vacancies were reported and pending with the Commission for direct recruitment and the number of candidates included in the ranked list was 136 in the main list with necessary number of candidates in the supplementary list as well.

On these facts, we will consider the question of law referred to us.

5. The Apex Court in *State of Punjab and Ors. v. Manjit Singh and Ors.* : AIR 2003 SC4580 held as follows:

6. Now adverting to the point under consideration, it may be observed that so far the powers and functions of the Commission in shortlisting of candidates is concerned, there can certainly be no doubt about it. Say for example, 10,000 candidates apply for recruitment to 100 posts, it would obviously not be possible to take full test/examination and interview of such large number of applicants, though eligible. In that event, shortlisting of the candidates by screening out those, in respect of whom it would serve no purpose to call them for further test, may be excluded by adopting the method of screening test. Generally speaking a ratio of 3:5 candidates for one post is normally accepted depending upon the number of seats. Therefore, for 100 posts the selecting body may in order of merit take out about first 500 candidates for further tests/interview. The rest of the candidates would be screened out. No candidate excluded by adopting such a method for shortlisting can raise any grievance whatsoever.

7. But for such shortlisting as indicated above, it is not necessary to fix any minimum qualifying marks. Any candidate on the top of the list at number 1 down upto 500 would obviously constitute the shortlisted zone of consideration for selection. For the purpose of elaboration it may be observed that in case some cut off marks is fixed in the name of shortlisting of the candidates and the number of candidates obtaining such minimum marks, suppose is less than 100 in that event screening test itself will amount to a selection by excluding those who though

possess the prescribed qualification and are eligible for consideration but they would be out of the field of consideration by reason of not crossing the cut-off marks as may be fixed by the recruiting body. This would not be a case of shortlisting. In shortlisting, as observed above, any number of candidates required in certain proportion of the number of vacancies, they may be shortlisted in order of merit from serial No. 1 up to the number of candidates required.

xx xx xx9. As observed earlier, for the purpose of shortlisting it would not at all be necessary to provide cut off marks. Any number of given candidates could be taken out from the top of the list up to the number of the candidates required in order of merit. For example, there may be a situation where more than required number of candidates may obtain marks above the cut off marks say for example out of 10,000 if 8,000 or 6,000 candidates obtain 45% marks then all of them may have to be called for further tests and interview etc. It would in that event not serve the purpose of shortlisting by this method to obtain the given ratio of candidates, and the vacancy available. For 100 vacancies at the most 500 candidates need be called. If that is so any candidate who is otherwise eligible up to the 500th position whatever be the percentage above or below the fixed percentage would be eligible to be called for further tests. Thus the purpose of shortlisting would be achieved without prescribing any minimum cut off marks.

10. In the case in hand, it was not for the Commission to have fixed any cut off marks in respect of reserved category candidates, the result has evidently been that candidates otherwise qualified for interview stand rejected on the basis of merit say, they do not have the up to the mark merit, as prescribed by the Commission. The selection was by interview of the eligible candidates. It is certainly the responsibility of the Commission to make the selection of efficient people amongst those who are eligible for consideration. The unsuitable candidates could well be rejected in the selection by interview. It is not the question of subservience but there are certain matters of policies, on which the decision is to be taken by the Government. The Commission derives its powers under Article 320 of the Constitution as well as its limits too. Independent and fair working of the Commission is of utmost importance. It is also not supposed to function under any pressure of the Government, as submitted on behalf of the appellant-

Commission. But at the same time it has to conform to the provisions of the law and has also to abide by the rules and regulations on the subject and to take into account the policy decisions which are within the domain of the State Government. It cannot impose its own policy decision in a matter beyond its purview.

(underlining for emphasis)

It is true that when number of vacancies are very large, PSC can make a procedure for screening for eliminating undeserving candidates and taking into account the number of vacancies to be filled up. In the absence of fixation of cut off marks in the notification and in the rules, fixation of cut off marks cannot be made as a criteria, especially as was done in this case. Here, the short list was prepared as can be seen from Ext.P9 and petitioners' names were not included as they obtained only 64% marks. We also agree that in order to improve the quality of service, PSC will be entitled to fix cut off marks in the written examination or in the oral examination to weed out incompetent candidates provided the PSC shall make it clear in the notification itself. But, cut off marks cannot be prescribed without mentioning it in the notification or in the procedure. Averments will show that PSC decided about the cut off marks after written examination was over. To avoid interviewing large number of candidates and as held in Manjit Singh's case, screening can be done by eliminating persons in the lower rank. If 100 vacancies are there, PSC can eliminate all candidates below 300 or 500 in the ranking in written examination. But, there should be some rationale. The counter affidavit in this case shows that 100 Vacancies were advised before 15-3-2005 and the list will continue for another two years. If anticipated vacancies also are taken into account, 139 candidates selected will not be sufficient and cut off marks prescribed after written examination was over considering the number of candidates required is against the norms mentioned by the Supreme Court.

6. We also note that Manjit Singh's case was later quoted with approval by another three-member Bench decision of the Supreme Court in Inder Parkash Gupta v. State of Jammu and Kashmir and Ors. AIR 2004 SC 2523 wherein it was held as follows:

28. Rule 133 of the Jammu and Kashmir Medical (Gazetted) Service Recruitment Rules, 1979 admittedly were issued under Section 124 of the Jammu and Kashmir Constitution which is in pari materia with Article 309 of the [Constitution of India](#). The said Rules are statutory in nature. Public Service Commission is a body created under the Constitution. Each State constitutes its own Public Service Commission to meet the constitutional requirement for the purpose of discharging its duties under the Constitution. Appointment to service in a State must be in consonance with the constitutional provisions and in conformity with the autonomy and freedom of executive action. Article 133 of the Constitution imposes duty upon the State to conduct examination for appointment to the services of the State. The Public Service Commission is also required to be consulted on the matters enumerated under Section 133. While going through the selection process the Commission, however, must scrupulously follow the statutory rules operating in the field. It may be that for certain purposes, for example, for the purpose of shortlisting, it can lay down its own procedure. The Commission, however, must lay down the procedure strictly in consonance with the statutory rules. It cannot take any action which per se would be violative of the statutory rules or makes the same inoperative for all intent and purport. Even for the purpose of short-listing, the Commission cannot fix any kind of cut-off marks. (See : State of Punjab and Ors. v. Manjit Singh and Ors. : AIR 2003 SC4580 .

So, shortlisting should not be done in an arbitrary manner and it should relate not only to the existing vacancies, but also, to the anticipated vacancies and it is always better to prescribe the manner why shortlisting is done before the selection process starts.

7. The latest decision on this point is the Apex Court's decision in Siraj v. High Court of Kerala 2006 (2) KLT 923 SC. The question was regarding fixation of cut off marks in the selection to the post of Munsiffs. In that case, the notification prescribed that there should be a written examination in four papers carrying 100 marks each and there will be an oral examination and only candidates who secured not less than 35% marks in each of the papers of the written examination with an overall minimum of 45% of the written examination and 30% of the marks for the oral examination shall be eligible for appointment. The Hon 'ble Supreme

Court held that since in view of the Rules and notification prescribing cut off marks in the written examination and oral examination, the procedure adopted is correct. Here, such cut off marks were not prescribed in the Rules or in the notification. Therefore, we are of the view that in view of the Apex Court decision in Manjit Singh's case even though a screening can be done to avoid large number of candidates, cut off marks cannot be made in an arbitrary manner. Here, considering the number of vacancies and considering the fact that this is a case where petitioners were already called for interview and list was published violating the interim orders of this Court and also considering the number of vacancies that arose, we are of the view that elimination of the petitioners from the short list was not correct. Their interview was already over. They should be considered if there are vacancies reported during the currency of the list. Since the candidates who are already selected were not made parties in the writ petition, petitioners' case may be considered only after exhausting the existing list. Ext.P9 short list was published in 2004. Those who have not challenged the list so far, even if similarly placed, will not be entitled to the benefits as they have slept over the matter for years.

8. With regard to W.P. (C) No. 19567 of 2003, petitioner is a Hindu-Nadar and he applied for the post of Medical Officer (Ayurveda). As per the Rules then in force, both Hindu-Nadar and Christian-Nadar included in SIUC are entitled to reservation of 2% vacancies are provided. A Division Bench of this Court held that Christian-Nadars cannot claim that benefit. Thereafter, the Government amended the Rules and Christian-Nadars are clubbed with reservation with other categories and Hindu Nadars clubbed with other backward classes. In view of the amendment of the rule, appeal filed before the Supreme Court and the appeal filed from the above decision has become infructuous. The case of the petitioner is that in view of the Division Bench decision appointments given to Christian-Nadars were set aside and, therefore, he should be selected in the vacancy of Hindu Nadar. Validity of the rank list was already over. Again fresh selection was conducted and fresh ranked list was published. Petitioner, though applied in the fresh selection, was unable to get a place in the ranked list. In view of the fact that fresh process of selection was made and period of earlier ranked list was over, petitioner in W.P.(C) No. 19567 of 2003 is not entitled to any relief.

9. With regard to other Writ Petitions, namely, W.P.(C) Nos. 21300,21840,22080, 23382, 25576, 25577, 27540 and 27706 of 2005, they applied for the post of HSA (English) in various districts. Posts of HSA are filled on district-wise selection. Earlier, English was taught in High Schools by teachers in other subjects. However, rule was changed and now it is insisted that English should be taught by the teachers who were having degree in English with B. Ed. In the above circumstances, applications were called for appointment of English teachers. The applicants applied for the post of HSA English and the petitioners were having the required qualification having passed B.A. in English literature and B. Ed in English. They were called for written test, but, they were not called for interview as they did not get the cut off marks in the written test. A reading of the counter affidavit will show that cut off marks were fixed differently in different districts depending on the number of vacancies. For example, cut off marks in Thrissur district was 43 whereas it was 28 in Ernakulam and 32 in Kottayam. According to the PSC, such a different cut off marks were taken because number of vacancies in each district were different. Hence, cut off marks were fixed only to shorten the list. It is the contention of the petitioners that anticipated vacancies were not taken into account. According to the petitioners, even if all the persons shortlisted are appointed, there will be further vacancies. For example, ranked list was published on 17-10-2005 for Malappuram district. 125 persons were in the main list and already 148 vacancies were reported and the rank list was exhausted. Even now there are vacancies to be reported. Still, there are vacancies to be filled up. Therefore, it is very clear that three to five times of the number of vacancies which may occur during the currency of the list as mentioned in Manjit Singh's case were not considered while shortlisting the candidates. Therefore, we direct the PSC to consider anticipated vacancies also and then refix the number of persons to be called for interview on the basis of the directions in Manjit Singh's case. Admittedly, in all the districts even three times of the vacancies that may arise during the currency of the list were not considered while shortlisting the candidates. PSC is directed to assess the vacancies that may arise during the currency of the list in a reasonable manner within one month from today and shortlist the candidates at least three times the number of vacancies in the order of merit without fixing cut off marks and complete the formalities and publish

additional list within two months from today and advise candidates for the vacancies reported during the currency of the list. However, we make it clear that petitioners, even if were shortlisted, will not be entitled to get any seniority over the persons who were already listed. All the Writ Petitions are disposed.

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