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Court : Kerala

Decided On : Apr-12-2011

Reported in : 2011(4)KLT910; 2011(4)ILR(Ker)954; 2012(1)KLJ63

Judge : T.R. Ramachandran Nair

Appeal No. : W.P.(C) Nos. 19525 of 2006-Y, 21143 of 2006-P, 26184 of 2006-P & 30941 of 2006-H

Appellant : SujathA. B.

Respondent : State of Kerala, Represented by Principal Secretary to Government Higher Education Department, Thiruvananthapuram and Others

Advocate for Pet/Ap. : Shri. Lal George

Judgement :

These writ petitions concern the filling up of posts of Lecturer in Islamic History. Ext.P4 in W.P.(C) No.19525/2006 is the rank list published by the Public Service Commission on 28.11.2003. A decision on the reliefs sought for in W.P.(C) No.19525/2006 will have impact in the connected writ petitions. Hence W.P.(C) No.19525/2006 is taken as the leading case.

2. The petitioner belongs to a Muslim family. The notification issued by the Public Service Commission is dated 18.12.2001 and applications were invited for the post of Lecturer in Islamic History. In Ext.P4 rank list, the petitioner is ranked No.5. After the rank list came into force, the first rank holder was advised on 3.2.2004 which arose in the first selection year, i.e. from 28.11.2003 to 27.11.2004. An open category candidate was appointed. The second rank holder (Ezhava community) and third rank holder (open quota) were also advised on 13.3.2004 during the same selection year, viz. 28.11.2003 to 27.11.2004. During the second selection year one vacancy arose and the 4th rank holder (open merit) was advised on 14.11.2005. During the third selection year a vacancy arose in the University College, Thiruvananthapuram due to retirement, on 1.6.2006. It is pointed out that the petitioner is entitled to be advised in the said vacancy which arose on 1.6.2006.

3. During this period, an amendment to the Kerala State and Subordinate Service Rules, 1958 was brought into effect by Ext.P5 Notification dated 8.3.2006 with retrospective effect from 2.2.2006. Based on the amendment, the Public Service Commission also issued a circular as per Ext.P6. Going by the amendment, there is only one selection year for a ranked list, i.e. the duration of its period. In the light of the amendment, the Public Service Commission took the view that the advice of candidates approved on or after 2.2.2006 shall be reviewed on the basis of progressive OC - BC turns. Going by the Note in the amended rules, the pending uncompensated turns will have to be compensated.

4. Shri Lal George, learned counsel for the petitioner in W.P.(C) No.19525/2006 submitted that the amendment cannot affect the right of the petitioner to be considered for the vacancy which arose on 1.6.2006. It is pointed out that the candidate has got a vested right to be considered for appointment in the light of the rules which were existing as on the date of notification and publication of the rank list. It is further pointed out that the selection was completed based on the unamended provisions contained in Rule 15 and four persons were already advised from the said list. It is therefore pointed out that the right of the petitioner for being considered on the basis of the unamended rule as on the date of advertisement, cannot be taken away by the retrospectivity of the rule. The

amendment is made effective from 2.2.2006, even though the amended rules were published in the Kerala Gazette dated 8.3.2006. Therefore, the effect of the amendment will have to be considered.

5. The stand taken by the Public Service Commission as evident from the counter affidavit is that the amended rules will apply. This is supported by the learned Govt. Pleader also.

6. Learned counsel for the petitioner invited my attention to a series of decisions of the Apex Court to contend for the position that the selection will have to be completed and appointments will have to be made in terms of the unamended rules. The following are the said decisions:

N.T. Devin Katti and others v. Karnataka Public Service Commission and others {(1990) 3 SCC 157}, P. Mahendran and others v. State of Karnataka (AIR 1990 SC 405), Gopal Krushna Rath v. M.A.A. Baig (Dead) by Lrs. and others {(1999) 1 SCC 544}, State of Uttaranchal and others v. Sidharth Srivastava and others [(2003) 9 SCC 336], Secretary, A.P. Public Service Commission v. B. Swapna and others [(2005) 4 SCC 154], Railway Board and others v. T. Vittal Rao and others {(2006) 2 SCC 467}, Marripati Nagaraja and others v. Government of Andhra Pradesh and others {(2007) 11 SCC 522} and Hemani Malhotra v. High Court of Delhi {2008) 7 SCC 11}.

7. Learned Govt. Pleader relied upon the decision of a Full Bench of this Court in Mohanan v. Director of Homeopathy (2006 (3) KLT 641 - FB).

8. The contention raised by Shri Lal George, relying upon N.T. Devin Katti's case {(1990) 3 SCC 157} is that the same lays down the principle that the selection process will have to be regulated by the existing rules and in terms of the advertisement published. Therein, the Apex Court laid down thus:

"Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and government orders and any amendment of the rules or the government order pending the selection should not affect the validity of the selection made by the selecting

authority or the Public Service Commission unless the amended Rules or the amended government orders, issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections."

It was laid down that "a statutory rule or government order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. If the recruitment rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended rules." In the light of the same, it is contended that the unamended Rule 15 will apply.

9. In P. Mahendran's case (AIR 1990 SC 405) also, the very same principle was laid down. It was laid down that "in the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure." Therein, the rules were amended only prospectively.

10. In Gopal Krushna Rath's case {(1999) 1 SCC 544}, the issue was with regard to the change of eligibility conditions and it was held that "when the selection process has actually commenced and the last date for inviting applications is over, any subsequent change in requirements regarding qualifications by the University Grants Commission will not affect the process of selection which has already commenced.

11. In Sidharth Srivastava's case {(2003) 9 SCC 336} actually a different issue arose for consideration. Therein, the selection was made by the U.P. Public Service Commission and the U.P. State was subsequently reorganised constituting the new State of Uttaranchal. The validity of the select list was the issue for consideration. It was held that the report of the U.P. Public Service Commission is not binding upon the State of Uttaranchal.

12. In B. Swapna's case {(2005) 4 SCC 154} also, it was held that the norms of selection cannot be altered after commencement of the selection process. It was specified that rules regarding qualification for appointment if amended during the continuance of the process of selection do not affect the same. Unless there are

words in the statute or in the rules showing the intention to affect existing rights the rule must be held to be prospective.

13. In the decision in Railway Board's case {(2006) 2 SCC 467} the matter was not in respect of the recruitment process, but payment of overtime allowance to Railway employees. Devin Katti's case (supra) and P. Mahendran's case (supra) were relied upon, while considering the retrospective nature of a Circular.

14. In Marripati Nagaraja's case {(2007) 11 SCC 522} the true tests were laid down thus:

"It is now a well-settled principle of law that the rules which would be applicable for selecting the candidates would be the one which were prevailing at the time of the notification for inviting applications for recruitment. It is also equally well settled that the State may, subject to constitutional limitations, amend the rule with retrospective effect."

In the above decision, on examination of facts, it was held that nobody has been deprived of his right of being considered. But in para 16, it was held that "ordinarily, in the absence of any rule and that too a rule which was expressly given a retrospective effect, the rules prevailing as on the date of the notification are to be applied. But if some rule has been given a retrospective effect which is within the domain of the State, unless the same is set aside as being unconstitutional, the consequences flowing therefrom shall ensue." The validity of the retrospective amendment was upheld. The above test is significant.

15. In Hemani Malhotra's case {(2008) 7 SCC 11}, the issue arose in the light of the prescription of minimum marks for viva voce after the written test was over. It was held that the same is not permissible.

16. Learned counsel for the petitioner, therefore, stressed the legal issue by pointing out that change of rules during the currency of the ranked list will not affect the rights of persons like the petitioner for appointment in terms of the unamended rule 15.

17. In fact, the impact of many of these decisions were considered by the Full Bench of this Court in Mohanan's case (2006 (3) KLT 641 - FB). Mention has also to be made to an earlier decision of a Division Bench of this Court in Mohammed Najim v. State of Kerala (1993 (2) KLT 721) wherein also, some of the judgments relied upon by Shri Lal George, were referred to and explained.

18. The Division Bench, in Mohammed Najim's case (1993 (2) KLT 721) was of the view that the only right for those included in the list was the right to be considered for selection in accordance with the rules as they existed as on the date of advertisement, of which again this could be deprived, by a retrospective amendment. Therein, the amendment was retrospective and therefore it was held that since the amendment was retrospective and since no constitutional rights of the petitioners are affected, they cannot be heard to say that they should be appointed from out of the select list ignoring the amendment. The above dictum laid down by the Division Bench goes against the contentions raised by the petitioner herein. In fact, the Division Bench therein considered the power of the Government under the Public Services Act, 1968 to bring in a retrospective amendment. It was held that "even if any right had vested in the petitioners, by the initiation of the selection process, that could be divested by a retrospective amendment provided it does not impinge upon any of their constitutional rights." (para 12).

19. The Full Bench decision in Mohanan's case (supra) reiterates the position explicitly. It was held thus:

"Simply because a person's name is included in the select list he does not automatically get a vested right for admission. The only right he gets is that of consideration for appointment in any vacancy that may arise. While agreeing with the said proposition, we are of opinion that that principle would apply with equal force to a select list actually in force at the time when amendment occurs, meaning thereby that in such cases also, the vacancies arising subsequent to such amendment can be filled up only in accordance with the amended recruitment rules notwithstanding the currency of the select list. It is worth noting that these decisions recognise a right in those persons who have applied pursuant to the

selection process initiated prior to the date of coming into force of the Special Rules, for being considered for selection in accordance with the rules in force at that time. By the same coin, an equally enforceable right has to be recognised in those persons who possess the new/amended qualifications as per the Special Rules to get recruitments made in accordance with the new/amended rules, in which they also can compete to the vacancies which have arisen subsequent to the coming into force of the new/amended rules. Apart from consistency in applying law, failure to concede such right would amount to violation of the fundamental right of those who have the new/amended qualifications, under Arts.14 and 16 of the Constitution of India. In other words, both the rights should mutually co-exist and in that view also our conclusion is perfectly in accord with the constitutional principles which cannot be negated to both sets of people. When the position that the Government is empowered to amend recruitment rules even retrospectively is unquestionable, it cannot also be forgotten that after the amended rules have come into force if appointments are allowed to be made from the list prepared in accordance with the unamended rules, notwithstanding the amendment, that would amount to postponing of the date of commencement of the amended rule itself, which no authority other than the Government can do. Once an amendment regarding qualifications and method of appointment etc., in respect of a particular post comes into force any vacancy which arises subsequent to the commencement of the amended rules can be filled up only in accordance with the amended rules notwithstanding the currency of any rank list published by the PSC, selection of which was initiated prior to the amendment of the rules."

20. The above dictum laid down by the Full Bench is a complete answer to the points raised by the petitioner herein. Going by the dictum laid down by the Full Bench, after the amendment of the rules, any vacancy which arises subsequent to the amendment, can be filled up only in accordance with the amended rules notwithstanding the fact that the selection was initiated prior to the amendment of the rules.

21. Learned counsel for the petitioner tried to explain away the said dictum by contending that the amendment considered therein was regarding the qualification. But the Full Bench considered the whole issue in the light of an

important aspect, viz. the date of occurrence of the vacancy.

22. Regarding the applicability of the amended provisions under Rule 15 of KS and SSR to the existing ranked lists, this Court has already taken the view, that the amendment will apply, in various decisions.

23. I will now refer to some of such decisions of this Court. In the judgment in W.P.(C) No.16557/2007 the said question was considered and it was held thus in para 4:

"It is true that the amendment to the Rule come into force after the list was published. I think the new Rules which say that if candidates are not available from a particular community, the candidates from other communities cannot be advised, will be applicable while making advices to various turns after the said rule came into force. In other words, the new Rules will apply to advice of candidates from the existing lists. Contentions to the contrary are untenable."

24. A Division Bench of this Court in the judgment in W.A. No.843/2008 held in para 2 as follows:

"But now it is well settled that the law applicable at the time of filling up the vacancies has to be taken into account and not the law prevailing when the rank list was published. In view of this well settled position, the claim of the appellant to ignore the amendment introduced to Rule 15 of Part II, KS and SSR, cannot be allowed."

The point was again considered by a learned Single Judge of this Court in the judgment in W.P.(C) No.21028/2006. Therein, in para 7, after relying upon the Division Bench judgments of this Court in W.A. Nos.2420/2007 and 843/2008, it was held thus:

"It has been held that the law prevailing at the time of filling up of the vacancies has to be applied for advising candidates and not the law prevailing at the time when the ranked list was published. Therefore, though, in the instant case, the ranked list was published and had ceased to be in force before 2.2.2006, rule 15(a) of the Rules as amended will necessarily have to be applied while advising

candidates against the 11 vacancies that remained unfilled as on the date of expiry of the ranked list."

I respectfully agree with the above view.

25. In that view of the matter, the amended rule 15(a) of KS and SSR will apply. With regard to the Note to Rule 15(a), I had occasion to consider the validity of the same and it was upheld in the decision in *Ranjith v. High Court of Kerala* (2009 (4) KLT 759). Going by the Note, all uncompensated turns of vacancies as on 2.2.2006 such as temporary passed over, no candidate available and non-joining duty, will have to be compensated.

26. In the light of the above legal position and in the light of the decision of the Full Bench in *Mohanan's case* (supra), and the decisions of the various other Benches of this Court as referred to above, it can be seen that the amended rules will apply as far as the rank list is concerned. Therefore, the contentions raised in W.P.(C) No.19525/2006 cannot be accepted.

27. In W.P.(C) No.30941/2006, the petitioner seeks for a direction to the respondents to compensate the vacancy of Scheduled Caste in which another candidate has already been appointed. She is a candidate included in the supplementary list.

28. In W.P.(C) No.26184/2006, the petitioner is a candidate belonging to Scheduled Caste Pulaya community and she is included in the main list itself. According to the said candidate, she is entitled to be appointed in the 4th vacancy of Lecturer in Islamic History. The Public Service Commission has filed a counter affidavit in the said case, opposing her pleas. It is pointed out that she is rank No.15 and her turn has not arisen.

29. In W.P.(C) No.21143/2006 the two petitioners are included in the rank list and they belong to Ezhava community. According to them, the carried forward vacancy will have to be filled up from Ezhava community.

30. In the light of the interim order passed by this Court in W.P.(C) No.19525/2006, the vacancy had not been filled up, but it was already reported to

the Public Service Commission, before the expiry of the rank list. It is upto the Public Service Commission to consider the rules and to advise the eligible candidate to fill up the vacancy in accordance with the Rules. This Court may not be justified in recognising the rights of any particular candidate in that regard as of now, even though learned Senior Counsel appearing for the petitioners in W.P.(C) No.21143/2006 asserted that the petitioners are liable to be considered and the learned counsel for the petitioner in W.P.(C) No.26184/2006 also submitted that his client is liable to be considered. Learned counsel appearing for additional respondent No.7 in W.P.(C) No.19525/2006 also submitted that her client is liable to be advised and appointed.

31. As far as additional respondent No.7 is concerned, advice memo was issued as per Annexure I, but it was withdrawn by the Public Service Commission in compliance with the interim order passed by this Court.

32. Therefore, W.P.(C) No.19525/2006 is dismissed. W.P.(C) Nos.21143/2006, 26184/2006 and 30941/2006 are disposed of directing the Public Service Commission to take a decision with regard to the advice of the eligible candidate for filling up of the vacancy which is actually reported before the expiry of the rank list, in terms of the amended rule 15(a) of KS and SSR. Appropriate action will be taken and the advice memo will be issued to the eligible candidate, within a period of one month from the date of receipt of a copy of this judgment. Thereafter, the appointing authority will make the appointment accordingly. No costs.

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