

# SUPREME COURT OF INDIA

State of Mysore

Vs.

K. N. Chandrasekhara

C.A.Nos.960 to 968 and 533 to 538 of 1963

(P. B. Gajendragadkar, C.J.I., M. Hidayatullah, J. C. Shah, Raghubar Dayal and S. M. Sikri, JJ.)

31.07.1964

## JUDGEMENT

### SHAH, J.:

1. The appellants in the two groups of appeals are the State of Mysore and the Mysore Public Service Commission. In the first group of appeals (C.As. Nos. 960 to 968 of 1963) the appellants challenge the order of the High Court of Mysore dated September 4, 1961, quashing a notification dated May 22, 1961, issued by the Public Service Commission announcing the list of candidates declared successful at the competitive examination held in 1961 for recruitment to the cadre of Munsiffs in the Judicial Service of the State. Appeals in the second group (C.As. Nos. 533 to 538 of 1963) are preferred against the order of the High Court dated December 19, 1962 quashing the list of successful candidates at the examination held for recruitment to the cadre of Munsiffs in the State of Mysore published on July 12, 1962 by the Public Service Commission.

2. By Writ Petitions Nos. 61, 62 and 152 of 1963 certain persons who were candidates for promotion to the cadre of Munsiffs prayed for orders quashing the list of successful candidates declared under Rule 9(2) of the Mysore State (Recruitment) Rules, 1958, and for direction appointing the applicants as Munsiffs.

3. Recruitment to the cadre of Munsiffs in the Mysore State Judicial Service is regulated by the Mysore Munsiffs (Recruitment) Rules, 1958 (for the sake of brevity hereinafter called "the recruitment rules") framed by the Governor of Mysore in exercise of powers conferred by Art. 234 and the proviso to Art. 309 of the Constitution of India. By cl. (1) of R. 3 of the recruitment rules, two methods of recruitment to the cadre are prescribed - by competitive examination and by promotion of persons in service in the High Court and the Courts subordinate to the High Court. Clause (2) of Rule 3 provides that out of every six vacancies, five shall be filled by candidates selected in a competitive examination and the sixth by a candidate selected for promotion. Rule 5 sets out the conditions of eligibility for appointment. The candidate must have reached the prescribed age and must hold a degree in law of any University established by law in India, or possess a qualification recognised as equivalent by the Government. By an amendment made on August 3, 1960, it is provided that the applicant must have practised in Civil or Criminal Courts in India for a period of not less than four years immediately before the last date fixed for submission of the application or must be a stationary Sub-Magistrate, or Magistrate of the First Class, or a Police Prosecutor or Assistant Prosecutor in any of the Criminal Courts in the State, or a ministerial employee of the High Court or of any Court subordinate to the High Court or in the Law

Department of the Mysore Government Secretariat the total period of service and the period of practice, if any, together being not less than four years immediately before the last date fixed for submission of the application. A shorter qualifying period is prescribed in respect of candidates belonging to the scheduled castes and scheduled tribes. R. 6(1) provides that the competitive examination shall be conducted by the Public Service Commission and shall consist of a written examination to test the candidates' knowledge of law and languages and a viva voce test. The syllabus for the competitive examination is to be as specified in the schedule to the Rules, and the eligibility of a candidate for appointment as a Munsiff is to be determined by the commission on the basis of the aggregate marks obtained in the written examination and the viva voce test. Clause (4) of R. 6 provides that in the viva voce test the Secretary to Government, Law Department, or any other officer nominated by the Government, shall be associated with the Commission. Rule 9 sets out the procedure for selection by promotion. By cl.(1) it is prescribed that the candidates for promotion as Munsiffs shall be selected on grounds of merit and suitability in all respects, from among the candidates possessing the prescribed qualifications. Clause (2) provides that the Public Service Commission shall call for applications from candidates possessing the prescribed qualifications for promotion, and after interviewing such of the candidates, as it deems fit, a list of the candidates suitable for appointment by promotion shall be prepared and arranged in the order of seniority of the candidates in service. Rule 12 provides that a list of candidates declared successful at the competitive examination shall be published in the Mysore Gazette in order of merit and appointments shall be made in the order in which their names appear in the list. The candidates selected for promotion are to be so interposed in the common list of eligibility that out of every six vacancies to be filled, five will be filled by candidates selected at the competitive examination and the sixth by the candidate selected for promotion. For the competitive examination, according to the schedule to the Rules, a candidate "has to appear" for the paper in Languages, two papers in Law and a viva voce test directed to ascertain the candidate's general knowledge and grasp of principles of law.

4. Notifications inviting applications from candidates for the competitive examination and also from persons who desired to be considered for promotion were published on August 30, 1960. In response to these notifications certain persons who were serving in the administrative branches in the High Court and in the subordinate Courts and the Police Prosecutors applied for recruitment by competitive examination and also by promotion. Others belonging to those cadres applied for recruitment by promotion alone. The candidates who had applied for recruitment by promotion were to be interviewed by the Public Service Commission for ascertaining their suitability for promotion. Those who had applied for recruitment both by competitive examination and by promotion were permitted to undergo written examination and also the viva voce test. They were however not called for interview, but their performance at the viva voce test was taken into consideration in adjudging their suitability for promotion. Written tests of the candidates for the competitive examination were held in December 1960. These were followed by viva voce tests which continued till March 10, 1961. On May 19, 1961, the Public Service Commission took a decision fixing 45% of the marks for the viva voce test as qualifying marks for candidates belonging to scheduled castes and 55% for other candidates. On May 22, 1961 the Public Service Commission published a list of 52 candidates who were declared successful at the competitive examination. The Commission also prepared a list of 10 candidates who, in the opinion of the Commission, were suitable for promotion. This list of ten candidates was sent to the Government of Mysore but was not published.

5. Thereafter petitions were filed in the High Court of Mysore by certain aspirants to enter into the cadre of Munsiffs for the issue of writs of certiorari or other writs or orders quashing the list published on May 22, 1961, announcing the names of candidates declared successful at the

competitive examination and for the issue of writs of prohibition restraining the Government of Mysore from making appointments to the cadre of Munsiffs from out of the approved lists. Diverse grounds were set up in support of the challenge to the validity of the lists of which the following were the principal grounds :

(1) That the Commission by its decision dated May 19, 1961 had adopted a criterion for declaring candidates successful at the examination which was not found in the Rules, and which the Commission had no power to adopt. It was submitted that the Governor alone had the power conferred upon him by Art. 234 and proviso to Article 309 of the Constitution to prescribe the qualifications for appointment of Munsiffs, and that the power to prescribe the qualifications could not be delegated to the Commission and was not in fact delegated to the Commission and on that account declaration of the list of successful candidates was invalid, being in violation of the Rules.

(3) That in the viva voce test under the Rules, the Public Service Commission had to test as set out in the schedule to the Recruitment Rules, the general knowledge and grasp of principles of law, but the Commission had also considered the "personality of the candidates" and their "suitability" to be appointed as Munsiffs. Reliance in this behalf was placed upon the notification inviting applications which recited that at the viva voce test the matters to be taken into consideration by the Commission will be the candidate's general knowledge, his grasp of principles of law, his personality and suitability. This, the Commission had no power to do, and the assessment of marks based on "personality and suitability" affected the result of assessment of marks at the viva voce test.

3. That a body of examiners consisting of the Public Service Commission and the Law Secretary was especially created under R. 6(4), but at the viva voce test of some of the candidates, one of the members of the Commission was not present and assessment of marks by a body which did not consist of the entire personnel of the examining body set up by the Rules, vitiated the assessment of marks and the proceeding of the body was not saved by the Mysore Public Service Commission (Conduct of Business and Additional Functions) Act (Act 20 of 1959) which by S. 8 provided that the proceeding of the Commission shall not be invalidated by any vacancy or by the absence of a member.

The High Court upheld the contentions raised by the petitioners. In the view of the High Court, determination of qualifying marks is one of the important matter regarding which the Governor is under a duty to make rules and that Art. 234 imposes a special duty and responsibility upon the Governor to make a rule in that behalf, which cannot be delegated to any other body. The High Court further held that in fact there was no delegation to the Commission of the power to fix qualifying marks, and that though the State was competent under Art. 16(4) of the Constitution to make reservation of appointments and posts for members of the scheduled castes or scheduled tribes or other backward classes, such a reservation could not be made by the Governor enacting rules under the proviso to Art. 309 or under Art. 234. In any event the High Court held, in fixing a smaller percentage of marks for certain classes of candidates appearing for the competitive examination the Public Service Commission did not purport to reserve posts in any sense of the term under Art. 16(4).

6. On the second contention, the High Court held that there was discrepancy between the notification calling for applications and the schedule to the Recruitment Rules. The High Court pointed out that the notification was obviously published under the authority of the Commission and it was plain that the Commission did intend when it called for applications by that notification to hold a viva voce test in respect of all the four matters enumerated therein, and what it avowedly

intended to do it must be presumed it did. The High Court therefore held that the Commission having considered, apart from the general knowledge and the grasp of principles of law, certain other qualities described as "personality and suitability" and having awarded marks on a consideration of all those qualities, the viva voce test was not conducted in accordance with the Recruitment Rules.

7. On the third question also the High Court held in favour of one of the petitioners. The High Court held that the examining body was, in holding the viva voce test, not performing "a constitutional function". In the body constituted for holding the viva voce test a person who was not a member of the Commission being included, the provisions of the Mysore Public Service Commission (Conduct of Business and Additional Functions) Act 20 of 1959 had no application, and as all the members of the examining body did not participate in the viva voce test of some of the candidates the list prepared by the Commission was without the authority of law. The High Court on these findings held that the assessment of marks at the viva voce test must be discarded, because it could not on the materials placed before it decide what the result would have been, if irregularities and illegalities in the conduct of the examination had not been committed. The High Court however suggested that it was open to the Governor of the State to make a new rule determining the qualifying marks and for the Commission to conduct another viva voce test according to the rules, and if the rules were so amended the aggregate of the marks secured by a candidate in the written examination already conducted in 1961 and in the viva voce test to be conducted according to the amended rules may form the basis for determining the eligibility of the candidates for selection, and that the examining body was not obliged to hold another written test. The Governor of Mysore adopted the suggestion made by the High Court and amended the Rules, and incorporated a Rule prescribing the percentage of the qualifying marks at the viva voce test for the candidates belonging to the scheduled castes and tribes and for other candidates.

8. Fresh viva voce tests were then held in the month of June 1962. At the viva voce test held in June 1962 only those candidates who had applied for direct recruitment and those candidates who had applied both for appearing at the competitive examination and for promotion were invited to appear, but candidates who had applied only for promotion were not so invited. Suitability for promotion of those candidates who had applied for entry into the cadre of Munsiffs by promotion alone was regarded as finally determined by the result of the interviews held in March 1961.

8a. After the fresh viva test was held, a list of 62 persons was prepared by the Commission. This consisted of 52 persons who were declared successful at the competitive examination and 10 persons to be promoted under Rule 9(2). Out of the 10 candidates who were selected for promotion, 5 candidates had submitted to the competitive examination and had also sought promotion under Rule 9. The remaining 5 had sought only promotion. The list was challenged in a petition filed in the High Court of Mysore by one Kulkarni who was a candidate for promotion, but his petition was dismissed. After consultation with the High Court, the Governor of Mysore by notification dated August 22, 1962 appointed 62 persons - 52 selected for direct recruitment through the competitive examination and 10 selected for promotion as Munsiffs in the judicial service of the State of Mysore.

9. Thereafter another batch of six petitions was filed in the High Court of Mysore challenging the appointment of the ten candidates selected for promotion. Some of the petitioners in those petitions had submitted to the competitive examination and had also applied for promotion : others had applied for promotion alone. The High Court by its order dated December 19, 1962 issued a writ of mandamus directing the Public Service Commission to include the names of the six petitioners in

the list prepared by the Commission under Rule 9(2) of the Rules for appointment to the cadre of Munsiffs. In the view of the High Court the appointment of ten candidates whose names were included in the list under R. 9(2) as fit for promotion could not be disturbed, yet the six applicants should be added to the list and appointments should be made out of that list. The High Court observed :

"Fortunately for respondents 4 to 13, the learned advocates for the petitioners state that they would not insist on quo warranto if the petitioners are also now appointed. After the bestowal of my most careful thought over the matter, I have reached the conclusion that the ends of justice would be sufficiently met if a direction is issued to the Commission that it should now do what it could not have omitted to do had it made a proper selection in conformity with R. 9(2). The Commission should now include the names of the petitioners in the list already prepared by it and the composite list after such inclusion shall be considered at the list prepared under the provisions of R. 9(2) of the rules. The Commission should next forward under the provisions of R. 9(3) that part of the list containing the names of the six petitioners before us to the Government. A direction is made accordingly."

The reasons which persuaded the High Court in holding that the inclusion of the ten persons who were recommended for promotion was irregular may be briefly set out :

(1). That in August 1962 five persons were selected for promotion on the basis of the viva voce test that was held in June 1962 and the remaining five persons were selected on the basis of interviews held in March 1961, and a composite list consisting of ten persons found suitable for promotion was made. But the interviews conducted in 1961 of all the candidates who sought promotion were conducted by the Examining Body consisting of three members-one of whom was not available at the viva voce test conducted in June 1962 which was "treated as interview" for the purpose of the viva voce test. There could be no uniformity of approach in the selection for promotion of candidates when they were selected at different times by different bodies. Comparison between the candidates who had been selected on their performance at the interviews and the candidates who were selected on the basis of their performance in the viva voce test was therefore impossible.

(2). Some of the petitioners who were not selected had secured a higher percentage of marks than the candidates selected in the viva voce test held for the competitive examination which was also treated as an interview for the purpose for promotion, and on the basis adopted by the Public Service Commission, candidates who had secured a higher percentage of marks at the viva voce test could not be excluded.

3. That the Body which interviewed five of the candidates selected for promotion was different in its composition from the Examining Body which included their names in the list in June 1962 and it was difficult to appreciate how that Examining Body found it possible to pick out five persons whom it had never interviewed and to include them in the list of successful candidates.

The High Court summarised its conclusion as follows :

"It is thus perfectly manifest that the inclusion of both these groups of persons in the list prepared by the Commission is open to more than one challenge. Firstly, the petitioners in Writ Petitions 1080 and 1446 of 1962 were entitled to claim inclusion in the list to the exclusion of respondents 4, 5, 6 and 9 each of whom secured less marks than those two petitioners. Likewise, the petitioner in Writ Petition 1461 of 1962 was entitled to be so included in preference to respondents 5 and 9 who

secured less marks than this petitioner. It is equally clear that the selection of respondents 7, 8, 11, 12 and 13 to the exclusion of any of the six petitioners in these six cases in the absence of any basis for such preference was impossible."

Against the order passed by the High Court with special leave, the State of Mysore and the Public Service Commission have appealed to this Court.

10. It may at once be observed that the order passed by the High Court cannot in any view of the case be sustained. The High Court could, if it held that the notification issued by the Commission and the appointments made by the State pursuant thereto were made in violation of the statutory rules, quash the list but the High Court could not direct that the names of six persons merely because they had applied for setting wide the list of candidates selected for promotion be incorporated in that list. The direction made by the High Court was in the nature of mandamus. Such a direction could be issued against a person or body to compel the performance of a public duty imposed upon it by law - statutory or common. The commission is undoubtedly a body constituted pursuant to the provisions of the Constitution and has to exercise powers and perform functions entrusted to it by the Rules framed under Art 309. But the order which the High Court made was not for compelling performance of its duty imposed upon the Commission by statute or common law. If the High Court came to the conclusion that the proceeding of the Commission was vitiated on account of some irregularity or illegality, it could declare the proceeding void. The High Court however held that the orders including respondents 4 to 18 to the petitions in the list of persons eligible for appointment should be allowed to stand, because the petitioners in the petitions before it did not insist on the issue of a writ of quo warranto. If the High Court was satisfied on an application specifically made in that behalf that the persons who were occupying posts to which they were appointed contrary to the rules governing the appointment and consequently were not competent to occupy the posts, it is difficult to appreciate the ground on which the High Court would be justified in declining to pass appropriate orders. Either the High Court could set aside the proceeding of the Commission and direct preparation of a fresh list according to law, or the High Court could dismiss the petitions because in its view the list was regularly prepared. But the order passed by the High Court maintaining the inclusion of respondents 4 to 13 in the list and then directing the Commission to include the names of the six petitioners in the list merely because they had applied to the High Court is without authority.

11. That again is not the only infirmity in the judgment of the High Court. The High Court has also fallen into another error. It may be recalled that in the first set of petitions filed before the High Court of Mysore the applicants challenged the validity of the list of candidates declared successful at the competitive examination under the notification issued by the Commission on May 22, 1961. The list of ten candidates who were selected for promotion was not published and no relief was claimed in the petitions challenging the validity of the list. The names of the ten candidates selected for promotion were not even known to the petitioners and the averments made in the petitions clearly show that no attempt was made to obtain a decision of the High Court about any invalidity in the selection for promotion of any of those candidates. The High Court in the order which it passed also did not purport to set aside the selection of any candidate for promotion. The High Court directed that a fresh viva voce test of the candidates for the purpose of selection of successful candidates at the competitive examination be held, and made no direction about the candidates selected for promotion. It is true that some of the candidates for promotion had also appeared at the competitive examination, and that at the first examination held in the month of March 1961 performance of those candidates at the viva voce test was taken into account in assessing marks at the competitive examination, and also for assessing their suitability for promotion as if that test

served the purpose of an interview as well. For candidates who had only applied for promotion, there was no viva voce test, but the assessment of suitability was made on the result of the interviews then held. At the second viva voce test no candidate who had applied for promotion alone was called. The second test was strictly a viva voce test : it was not intended to serve as an interview. It is clear that for the purpose of selection for promotion the Commission had arrived at its decision in March 1961 and the list of ten candidates selected for promotion was sent to the Government and that list was accepted by the Government. In June 1962, the viva voce tests were held pursuant to the directions given by the High Court according to the modified Rule. It is true that the personnel of the examining body had changed since March 1961, because of the death of one of its members but since no interviews were held in June 1962 it would be wrong to hold that the promotion of candidates was made by different bodies and was based on different standards. Selection of those candidates for promotion was made by the Public Service Commission with which was associated the Law Secretary to the Government of Mysore and the list prepared by that body was given effect to in making appointments after the list of candidates successful at the competitive examination was finalised. It must be noticed that in Rule 3(2) every sixth post of Munsiff had to be allotted to the candidates to be promoted. Unless therefore there was a finalised list of candidates successful at the competitive examination, it was impossible to give effect to the list prepared in 1961 of candidates found fit for promotion. That presumably is the reason why the list of candidates found fit for promotion was not given effect to immediately after it was prepared. Appointment of all those candidates was made on the basis of interviews in 1961 and not on the basis of marks obtained by them at the viva voce test either in the year 1961 or in the year 1962. It is true that five of the candidates who had submitted to the competitive examination and had also applied for promotion had undergone the viva voce test in March 1961 and June 1962. The viva voce test of 1961 has been declared ineffective and all candidates for the qualifying test including those who had applied for promotion alone had to submit to the viva voce test in 1962, because the candidates who sought admission to the cadre through the qualifying examination as well as promotion were entitled under the Rule to compete with the other examinees at the competitive examination and if they secured a higher percentage of marks, to claim to be absorbed in the list of candidates successful at the examination. The fact that five candidates who were already selected for promotion were called for interview again in June 1962 does not lead to the inference that their selection was made on the basis of marks obtained by them at the viva voce test. The selection of these candidates has been made as a result of the interviews held in 1961 and not on the marks secured by them at the competitive examination.

12. The argument that the body which selected five out of the ten candidates for promotion is different from the Body which selected the remaining five and declined to consider the claims of the petitioners, has therefore no force. From the judgment it appears that the High Court fell into an error because of certain inconclusive statements made at the Bar by the Advocate General for the State of Mysore. It appears that the Advocate-General made a statement before the Court that the second viva voce test which was held in June 1962 after the Governor amended the Rules after the pronouncement of the judgment of the High Court in the earlier set of cases was treated as the interview for the purpose of Rule 9(2). In making this statement before the Court, it appears the Advocate-General misconceived the effect of the evidence. The Chairman of the Public Service Commission has stated clearly in his affidavit dated October 24, 1962 (paragraph-5) :

"The list of candidates selected for promotion was sent by the Public Service Commission to the Government. But it was not published by the Public Service Commission". In making this statement the Chairman of the Public Service Commission K. N. Padmanabhaiah was dealing with the list prepared in March 1961. He has also stated in paragraph 9 of his affidavit :

"In the cases of candidates who were qualified for being selected by promotion, and who also appeared for the examination for direct recruitment, the result of the interview held in the year 1961 for direct recruitment was taken for the purpose of selection for promotion, it was considered not necessary to require such candidates to appear again for interview."

There is no evidence to the contrary on the record of this case. It is true that for candidates who had applied for appointment by selection at the competitive examination and also for promotion, there was only one test in 1961 which served a dual purpose of assessing their suitability for selection at the qualifying test and for promotion. But it appears that their performance was tested in the light of the Rules for the purpose of the viva voce test and marks were awarded to them and their general suitability for promotion was also determined from that test. Even though the same test did duty for assessing their marks at the examination and selection for promotion, it cannot be assumed that the assessment of marks at the viva voce test was determinative of suitability for promotion. That is clear from the affidavit of S. D. Nayak, Under Secretary to the Government of Mysore in the Home Deptt., who in his affidavit dated December 10, 1962 has stated in paragraph 3

"Even if certain candidates are called for interview, their performance in the interview need not be the sole basis for the Selection. Though the performance of the candidates in the interview may be one of the factors to be taken into account, Government is required to take into account other factors like the record of service of the candidate and the opinion expressed by the Hon'ble High Court whether candidate is suitable for selection."

The assumption made by the High Court that because persons who had obtained a smaller percentage of marks at the viva voce test in the year 1962 were selected out of the candidates who had applied for the competitive examination and for promotion and the persons who had obtained a larger number of marks were omitted, the Rules were infringed, is not substantiated. For selection at the competitive examination marks obtained at the viva voce test together with the marks obtained at the written examination were undoubtedly the sole test, but for the purpose of promotion the Public Service Commission had to take into account the assessment of suitability for promotion in the light of the general record of the candidates appearing from the record of service and the opinion expressed by the High Court under whom the candidate had served. It may once again be observed that what the Commission considered in recommending for promotion candidates who had applied for promotion was performance at the interview held in the year 1961 in the light of their general record and the opinion expressed by the High Court, and not their performance at the viva voce test held in June 1962.

13. The order of the High Court issuing writs directing the inclusion of the six petitioners before them in the list prepared by the Commission for selection of the appointees to the cadre of Munsiff in the Mysore State Judicial Service cannot therefore be sustained and must be set aside.

14. We therefore allow appeals Nos. 533 to 538 of 1963 and vacate the order passed by the High Court and order that the petitions be dismissed. As the judgment of the High Court shows, its decision was largely vitiated by the concession made by the Advocate General, which was contrary to the record, we think there should be no order as to costs in appeals Nos. 533-538 of 1963.

15. Correctness of the view taken by the High Court in appeals Nos. 960 to 968 of 1963 has not been challenged by the Attorney-General appearing in this Court and the question having become academic, we direct that those appeals be dismissed. The State will pay costs in those appeals to the respondents.

16. By writ petitions 61, 62 and 152 of 1963 the petitioners challenge the validity of the appointment of ten candidates selected for promotion on the ground that the appointment infringes the fundamental right of the petitioners under Art, 16. For reasons already set out in dealing with the first group of appeals petition No. 62 of 1963 must fail. There will be no order as to costs in that writ petition. Petitioners in writ petitions Nos. 61 and 152 of 1963 desire to withdraw their petitions.

Order accordingly.

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