SUPREME COURT OF INDIA

K.Lakshmi

Vs.

State of Kerala

C.A.No.2511 of 2012

(T.S. Thakur and Gyan Sudha Misra JJ.)

27.02.2012

JUDGMENT

T.S. THAKUR, J.

1. Leave granted.

2. Recruitment to public services often gets embroiled in legal complications and resultant litigation consequently delaying the process of filling up of the vacancies, a feature hardly conducive to public interest. What is disturbing is that recruitment process for appointment to the District Judiciary in the States is also not immune to this phenomenon no matter recruitments are made in consultation with the High Court on the administrative side and at times monitored by them. The present appeal that arises out of an order passed by the High Court of Kerala is one such case where the recruitment process for the post of District and Sessions Judges in the Kerala State Higher Judicial Service was the subject-matter of multiple rounds of litigation. The genesis of the present lis lies in a notification issued by the High Court of Kerala for appointment to the six vacancies in the cadre of District and Sessions Judges by direct recruitment from the Bar. Notification dated 16th April, 2007 inviting applications against those vacancies was followed by a written examination conducted in October 2007 in which as against 960 candidates who applied, only 443 candidates actually took the written examination conducted between 27th to 29th October, 2007. Surprisingly enough only seven candidates qualified in the written examination by securing the minimum qualifying marks specified in paragraph 4 of the recruitment Notification. Out of the seven, one belonged to Scheduled Castes category, three to OBCs and the remaining candidates were from the open merit category.

3. Looking to the number of candidates who had qualified for interview, the Recruitment Committee comprising five senior-most Judges of the High Court was of the view that sufficient number of candidates may not be available to fill up the notified vacancies. The Committee, therefore, resolved to award 20 marks by way of moderation in all the three papers of the written examination to all the candidates who appeared for the examination so that a larger number of candidates qualified in the written examination and became eligible for consideration. Merit list after giving such benefit was prepared and approved by the Recruitment Committee. The result was that against the seven candidates who had previously qualified, 45 candidates became eligible for the viva-voce examination. Two of these candidates namely, Muhammed Raees M and Minu Mathews were, however, excluded from the selection process on the ground that they had secured employment during the interregnum. The exclusion was successfully challenged by the said candidates who were then permitted to participate in the viva-voce examination as well.

4. Interviews for the eligible candidates were held in December 2008 and based on the merit so determined, the High Court published a final selection list containing the names of 29 candidates. The select list was prepared by excluding candidates who were less than 35 years of age or more than 45 years as on 1st January, 2007. The age bar, it is noteworthy, was introduced by the amending Kerala Sate Higher Judicial Services Rules which amendment came in June 2008 i.e. after the selection process has commenced. Those who were excluded from consideration on the basis of the amended rules challenged their exclusion in Writ Petition(C) No.2021 of 2009 and connected petitions which were allowed by a Division Bench of the High Court of Kerala with a direction that the selection process be conducted in accordance with the rules as the same were on the date of the issue of the notification inviting applications from the eligible candidates. A revised merit list was accordingly issued comprising 45 names.

5. The Recruitment Committee considered the revised merit list and found that two open category candidates and one reserved category candidate who stood appointed shall have to be elbowed out of service in view of the revised select list. The Committee appears to have suggested a solution that would avoid such a situation. The High Court on the basis of the recommendations made by the Committee recommended to the Government to invoke its power under Rule 39 of the K.S. S.S.R. to protect the said three candidates whose services were otherwise very satisfactory. The recommendation suggested utilisation of four vacancies that had occurred subsequent to the issue of the recruitment Notification in addition to

the six already notified. The recommendation sent to the State Government accordingly contained names of nine candidates while one was kept unfilled in view of the pendency of Special Leave Petition (C) No.4203 of 2009. With the dismissal of the Special Leave Petition, the said slot was recommended to be filled up by appointing Muhammed Raees M. against 10th vacancy. Writ Petition (C) Nos.16206 of 2010 and 16207 of 2010 were then filed by C. Jayachandran and Minu Mathews whereby the award of grace marks by way of moderation to other three candidates included in the said list was challenged. The said petitions were finally allowed by the High Court of Kerala by its order dated 13th September, 2010 holding that the award of grace marks by way of moderation was not legally permissible and was contrary to the decision of this Court in Umesh Chandra Shukla v. Union of India and Ors. (1985) 3 SCC 721. The High Court observed: ..... The present two writ petitioners were among the seven successful candidates in the written examination who secured the cut off marks in each of the papers as stipulated by the notification. In view of the decision of the selection committee to award moderation though the writ petitioners still continued to be the successful candidates in the written examination, many more candidates artificially became eligible for being called for the viva-voce resulting in a heavier competition for the petitioners at the second stage of selection process, i.e. viva-voce. In the above extracted passage of the judgment (1985) 3 SCC 721, the Supreme Court held that the candidates who secured the minimum qualifying marks in the written examination acquire the right to be included in the list of the candidates to be called for viva-voce examination and such a right cannot be defeated by enlarging the said list including certain other candidates who are otherwise ineligible.

6. The High Court accordingly declared the grant of moderation marks and all steps taken pursuant to the said decision bad in law. The High Court observed: In the result, we are of the opinion that the decision of the Selection Committee to grant moderation is unsustainable in law. Therefore, all further steps pursuant to the said decision would be unsustainable. The resultant situation is that only the seven candidates who were initially found eligible on the basis of their having secured the cut off marks in the examination should have been subjected to the viva- voce examination and an appropriate decision regarding their suitability to fill up the originally advertised 6 posts should have been taken by the 1st respondent in accordance with law.

7. In compliance with the above direction, the merit list was revised again and the appellant placed at serial no.6 in the open merit category. Since there were only three vacancies in the said category which had been allotted to three candidates

with higher merit than the appellant, the appellant could not be appointed. Out of three vacancies meant for reserved category candidates one was filled up while the remaining two vacancies meant for OBC candidates remained unfilled for want of candidates in the said category.

8. It was in the above backdrop that Writ Petition No. 20683 of 2009 filed by the appellant to challenge the selection process came up for hearing before a Single Bench of the High Court of Kerala and was dismissed by a short order stating that since the appellant was not one of the candidates who figured in the list of seven successful candidates qualified for consideration there was no question of issuing any direction for appointment. The learned Single Judge observed:

> .....The selection now stands narrowed down to only seven persons. The petitioners in these writ petitions are not among them. That being so, there is no point in considering these writ petitions on merits. Accordingly, they are closed leaving open the other contentions in these writ petitions, which have not been considered by the Division Bench in Jayachandran's case (supra) to be raised and agitated appropriately, if occasion arises in future.

9. Aggrieved by the above order the appellant filed a writ appeal before the Division Bench of the High Court which too failed and was dismissed by the High Court. The High Court was of the view that the contention urged in support of the challenge to the selection process did not have any foundation in the pleadings of the parties and even assuming that the challenge on the grounds urged before it was maintainable the fact that the writ petition had itself been filed nearly two years from the date of the issue of the notification was sufficient for the High Court to decline interference. The present appeal questions the correctness of the above order before us.

10. Appearing for the appellant Mr. P.U. Dinesh, learned counsel strenuously argued that the High Court had failed to consider the effect of the order passed by it in Writ Petition No.16206 of 2010 in Jayachandran's case. It was contended that the High Court had by the said decision clearly directed that ten vacancies had to be filled up from out of seven candidates found eligible in terms of the select list. Heavy reliance was, in support of that contention, placed by the learned counsel upon the following passage appearing in the said judgment:

> However, in view of the subsequent decision of the 1st respondent to fill up 10 posts, the 1st respondent may now proceed with the selection from out of

> the 7 abovementioned candidates in accordance with law by recasting the select list. In view of the fact that some of the 10 posts sought to be filled up are required to be filled up by candidates belonging to reserved categories, if on such an exercise any of the vacancies of the abovementioned 10 posts sought to be filled up cannot be filled up for lack of a suitable candidate, the respondents should now resort to the procedure contemplated under Rule 15(a) of the K.S. S.S.R. It goes without saying that it should be open to the respondents to prescribe such cut off marks as the minimum qualifying marks in such limited recruitment as they deem fit and proper in the circumstances. Both the writ petitions are allowed as above.

11. In as much as the High Court had remained oblivious of the above direction it had according to the learned counsel fallen in a palpable error that deserved to be corrected. Alternatively, it was contended that even if the number of vacancies to be filled up were restricted to only six the appellant was entitled to an appointment against one out of the two unfilled vacancies meant for the reserved category candidates having regard to the provisions of the Rules which according to the learned counsel entitled him to such an appointment by diversion of the unfilled vacancies to the open merit category.

12. Mr. P.P. Rao, learned counsel for the respondents, on the other hand, argued that the High Court was perfectly justified in dismissing the writ petition filed by the appellant as none of the grounds which were set out in the writ petition were found to have any merit. He drew our attention to the writ petition filed by the appellant and the grounds on which the selection process was challenged to contend that the challenge urged in support of the present appeal was never pressed into service or urged before the High Court. It was not, therefore, argued Mr. Rao, open to the appellant to make out a new case in his favour before this Court on which the High Court had no occasion to express any opinion. It was further contended that reliance upon the order passed by the High Court in Jayachandran's case was misplaced for the direction issued by the High Court was limited to filling up of the vacancies in accordance with law. This implied that no appointment against the available vacancies could be made if the same were not legally permissible. It was argued that subsequent to the judgment of the High Court in Jayachandran's case, the High Court had passed a Full Court resolution by which the recommendations made earlier to the Government for filling up of the four vacancies that had occurred after issue of the recruitment notification by resort to Rule 39 of the K.S. S.S.R. Rules was withdrawn. Copy of the said resolution in the consequent letter issued by the High Court was also placed on record by the learned counsel, in support of the submission that after the quashing of the

moderation in Jayachandran's case there was no room left for filling up of the four additional vacancies by taking resort to Rule 39 of the Rules mentioned above. That was so, for the obvious reason, that the candidates for whose benefit the said recommendation had been made had gone out of service as a consequence of the judgment of the High Court in Jayachandran's case. There was, therefore, neither any need nor any occasion for the Government to invoke this power under Rule 39 of the Rules as recommended by the High Court. The net result then was that the number of vacancies required to be filled up continued to be only six, three out of which were to go to open merit candidates while the remaining would go to the candidates in the reserved category.

13. The short question that falls for determination in the above backdrop is whether the number of vacancies to be filled up was six as claimed by the High Court or ten as claimed by the appellant. While it is not disputed that the initial notification confined itself to filling up of six vacancies only, confusion relating to the said number arose on account of the High Court recommending invocation of Rule 39 by the Government to avoid a situation where the candidates who had already been appointed pursuant to the selection process had to go out of service on account of the Court directing preparation of a revised merit list on the basis of the unamended Rules. It is common ground that the vacancies that had arisen after the issue of the Notification were sought to be filled up only with the solitary purpose of somehow saving the three candidates from ouster who were bound to lose their jobs on account of the re-casting of the merit list. All that the High Court intended to recommend to the Government was that four vacancies that were available in the cadre, though the same had arisen after the issue of the Recruitment Notification, could be utilised by the Government if it invoked its power under Rule 39. The candidates facing ouster could then be continued as an exception to the general rule. It is also beyond dispute that the said recommendations could not have been accepted once the award of additional marks by way of moderation was struck down by the High Court in Jayachandran's case. The inevitable consequence flowing from that judgment was that anyone who had found place in the merit list only because of the benefit of moderation would have to lose that place and go out of the list. Once that happened the question of retaining the services of the three candidates by invocation of powers vested in the Government under Rule 39 did not arise. The High Court was in the light of the subsequent development justified in recalling the recommendations made by it which in turn had the effect of limiting the number of vacancies to those originally notified. Mr. Rao was, therefore, right in contending that the proposed utilisation of four vacancies did not ipso facto add to the number of already notified. The addition was contingent upon the Government agreeing to exercise its power under Rules 39. Since the

Government did not and could not possibly exercise the said power as a result of the quashing of the marks awarded by way of moderation the proposed addition of the vacancies to the number already notified became clearly infructuous. The High Court could and had rightly recalled the recommendations in the light of the said subsequent development.

14. There is another aspect to which we may advert at this stage and that relates to the question whether the Government could at all exercise the powers vested in it under Rule 39 in a manner that would have had the effect of depriving candidates otherwise eligible for appointment against the said vacancies from competing for the same. Rule 39 reads as under:

> Notwithstanding anything contained in these rules or in the Special Rules or in any other Rules or Government Orders the Government shall have power to deal with the case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner a may appear to the Government to be just and equitable:
>
> Provided that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders.
>
> This amendment shall be deemed to have come into force with effect from 17.12.1958.

15. The legal position regarding the power of the Government to fill up vacancies that are not notified is settled by several decisions of this Court. Mr. Rao relied upon some of those decisions to which we shall briefly refer. In Rakhi Ray v. High Court of Delhi (2010) 2 SCC 637, this Court declared that the vacancies could not be filled up over and above the number of vacancies advertised as recruitment of the candidates in excess of the notified vacancies would amount to denial of equal opportunity to eligible candidates violative of Article 14 and 16(1) of the Constitution of India. This Court observed: It is settled law that vacancies cannot be filled up over and above the number of vacancies advertised as recruitment of the candidates in excess of the notified vacancies is a denial being violative of Articles 14 and 16(1) of the Constitution of India.

16. In Hoshiar Singh v. State of Haryana 1993 Supp 4) SCC 377, also this Court held that appointment to an additional post would deprive candidates who were not

eligible for appointment to the post on the last date of submission of the applications mentioned in the advertisement and who became eligible for appointment thereafter or the opportunity of being considered for such appointment. This Court observed:

> The appointment on the additional posts on the basis of such selection and recommendation would deprive candidates who were not eligible for appointment to the posts on the last date for submission of applications mentioned in the advertisement and who became eligible for appointment thereafter, of the opportunity of being considered for appointment on the additional posts.

17. In State of Haryana v. Subhash Chander Marwaha (1974) 3 SCC 220, this Court held that the Government had no constraint to make appointments either because there are vacancies or because a list of candidates has been prepared and is in existence. So, also this Court in Shankarsan Dash v. Union of India (1991) 3 SCC 47, UPSC v. Gaurav Dwivedi (1999) 5 SCC 180, All India SC ST Employees' Association v. A. Arthur Jeen (2001) 6 SCC 380 and Food Corporation of India v. Bhanu Lodh (2005) 3 SCC 618, held that mere inclusion of a name in the select list for appointment does not create a right to appointment even against existing vacancies and the State has no legal duty to fill up all or any of the vacancies.

18. In the light of the above pronouncements the power vested in the Government under Rule 39 (supra) could not have been invoked for filling up the vacancies which had not been advertised and which had occurred after the issue of the initial advertisement much less could that be done for purposes of protecting the service of someone who had found a place in the merit list on account of additional marks given to him and who was bound to lose that place by reasons of the judgment of the Court.

19. The upshot of the above discussion is that the number of vacancies notified for recruitment remained limited to six and did not get increased to ten as the condition precedent for such increase had failed not only because no decision was taken by the Government to invoke its power under Rule 39 but also because even if a decision had been taken the same would have had no effect in the face of the judgement in Jayachandran's case. Besides the power vested in the Government was not exercisable so as to utilise subsequent vacancies for the purpose of saving someone who had no legitimate right to continue even after being removed from the merit list.

20. In the light of the above discussion paragraph 33 of the judgment in Jayachandran's case does not come to the rescue of the appellant's to support his claim for appointment. We fail to see any legal or equitable right in favour of the appellant to claim one of the four vacancies that were proposed to be added in terms of the recommendation made by the High Court, even assuming that the appellant could urge before us a point which had never been urged before the High Court.

21. That brings us to the second limb of the submission of Mr. Dinesh that even if the number of vacancies is taken to be limited to six, he was entitled to be appointed against one of the unfilled vacancies meant for reserved category candidates. That submission, in our opinion, needs notice only to be rejected. Firstly, because there is no foundation laid in the writ petition filed by the appellant nor was any such point ever raised before the High Court. The result is that the unfilled vacancies meant for reserved category candidates and those that have become available in the merit category after the issue of the initial recruitment notification have already been notified. The appellant, it is not in dispute, has participated in the fresh selection process initiated by the High Court like many others who were eligible to apply against the vacancies in the open merit and the reserved category. It is, therefore, neither proper nor feasible at this stage for this Court to interfere with the ongoing selection process. The appellant it goes without saying would get a fair chance like every other eligible candidate to compete for an appointment. In the result this appeal fails and is hereby dismissed but in the circumstances without any orders as to costs.