

(2004) 04 KL CK 0023

In the High Court Of Kerala

Case No : O.P. No's. 16758, 16761 and 16762 of 1997

Administrator, U.T. of Lakshadweep

APPELLANT

Vs

Musthak

RESPONDENT

Date of Decision : 01-04-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2004) 2 KLT 880

Hon'ble Judges : K.A. Abdul Gafoor, J;J.M. James, J

Bench : Division Bench

Advocate : S. Radhakrishnan, for the Appellant; M.A. Shafeek, for the Respondent

Final Decision : Allowed

Judgement

K.A. Abdul Gafoor, J.—These Original Petitions were filed by the Administration of Union Territory of Lakshadweep impugning a common order passed by the Central Administrative Tribunal, Kochi Bench, Ext.P7. Few facts are necessary for disposal of these cases. Those are as follows:

2. There were 39 vacancies of L.D. Clerks in the service of the petitioner Administration. The vacancies were reported to the Employment Exchange in the Union Territory. The Employment Exchange recommended altogether 425 candidates. The recruitment process includes written and typing test. A minimum prescribed speed in typewriting was also essential for appointment. All the candidates were issued with intimations to participate in the said tests. All of them were subjected to both the tests. Those who had passed in the practical test as well as the written test were ranked in the top of the list. All others were also included in the list. Appointment orders were issued to 40 candidates altogether, two among them being physically handicapped candidates. There upon the contesting respondents in this cases who were sponsored by the Employment Exchange, but did not succeed in the typing test approached the Central Administrative Tribunal, contending that there was a list of altogether

164 candidates, who shall be appointed to the available, existing and ensuing vacancies. There was a dispute raised by the Administration that the list produced by the said respondents before the Tribunal in O.A.No. 1521/94 and connected cases was not the rank list. Any how, the said O.As were disposed of as per Ext.P4 with certain directions, considering the list produced by the said respondents containing 164 names, as the select list. The directions issued were as follows:

"We direct respondent:

- a) to treat A-1 in O. A.446/95 as the select list.
- b) to make appointments from that select list in the order in which the candidates are ranked or till the list is cancelled.
- c) not to make a fresh selection and make appointments unless A-1 in O.A.446/95 is exhausted or cancelled.

We further direct the Administration to publish the number of vacancies existing and anticipated in all cases in future so that rank arbitrariness or allegations of the rank are eliminated. We express our displeasure at the manner in which pleadings are drawn up and the manner in which two lists are maintained, calling one the select list and calling the other the rank list and making appointment from the rank list outside the select list, at once arguing that an appointment cannot be made except from the select list. We allow the application to the extent here-in-before mentioned."

3. The petitioner Administration attempted review application. It was also dismissed as seen from Ext.P5. There upon the Administration cancelled the list so that the list could not be operated in terms of Ext.P4 order of the Tribunal. This cancellation has been challenged again by the said respondents in Q.A.869/96 and connected cases, which were disposed of as per the impugned order Ext.P7. Ext.P7 directed the petitioner Administration as follows:

"In the light of the discussion above, we consider that there are two options available to the respondents, namely, either to cancel the select list A.2 in these applications in its entirety or to operate A-2 to the extent vacancies are available treating the entire A.2 list as the select list as directed by the Tribunal in O.A.1521/94. We accordingly allow these applications and quash A. 1 in these applications. We further declare that respondents shall not hold a fresh test for selection to the post of Lower Division Clerks and similar grades for the existing and future vacancies without exhausting the select list A.2. The period of validity of A2 will be fixed as three years as prayed for in prayer (iii) and all vacancies which have arisen before 18.4.97 in the Lower Division Clerk and similar grades will be filled by operating A.2 select list (since the select list was never published, the date of A.2 is not known), we are assuming the date of 18.4.94 for the select list which is the date on which appointment orders were issued to the first 34 persons in A.2 list. We also have taken into account the fact that no selections

have been held from 1993 till 18.4.1997 and so, no prospective applicants for the posts would be adversely affected, if the select list is operated upon till 18.4.1997."

4. It is contended that this direction could not have been issued by the Tribunal, as only 39 vacancies have been reported. Even if the list contained 164 candidates as contended by the said respondents, the administration did not have the liability to follow the list for the vacancies, over and above those notified to the Employment Exchange. It is further submitted that, even if one's name is included in the select list he does not acquire any right of appointment. Therefore, the direction of the Tribunal in Ext. P7 to follow the list and to effect appointment is bad. It is further submitted that any appointment in excess of the notified vacancies will result in deprivation of the rights guaranteed under Art. 14 and 16 of the Constitution of India, to other candidates who may aspire for the subsequent vacancies, that may arise in future. In this regard, the learned counsel for the petitioner cited the decisions reported in *Ashok Kumar and Others Vs. Chairman, Banking Service Recruitment Board and Others*, , *Sanjoy Bhattacharjee Vs. Union of India and others*, , *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, and *Kerala Agricultural University v. Gopinathan Unnithan* 1996 (1) KLT 344.

5. It is submitted by the counsel for the said respondents, the applicants before the tribunal below that, the administration cannot now put forth contentions as aforesaid in the light of the binding findings contained in Ext.P4 and dismissal of review application filed by them as per Ext.P5. It has been found by the Tribunal that the list prepared by the petitioner administration contained 164 candidates. Necessarily that list has to be followed. There is no evidence to show, that only 39 vacancies had been reported to the Employment Exchange. Even if that contention is taken as true, the administration themselves had appointed admittedly 40 candidates. Therefore, they cannot contend that they will stop the appointment with 40 and will not operate the list to the vacancies that had arisen later. The attempt of the administration to cancel the list which was found as to be followed in Ext.P4, has really the effect of avoiding the finding by a lawful authority. It is mala fide. So there is no reason for any interference from the hands of this court, they submit.

6. Ext.P4 discloses as follows:

"It is argued by applicants that here was no select list and that appointments have been made in an irregular manner. We called for the rank list and that was produced and it contains 164 names. Incidentally, applicants have produced a copy of the same list without authentication as A-1 in O.A.446/95. Besides the rank list, standing counsel for respondents produced a manuscript, of what is described as notification F.No. 12/13/94 - services signed by Secretary Administration bearing the date 9.3.94. It contains 39 names. We had also called for the communication to the Employment Exchange to ascertain the number of vacancies. The letters produced suggest that the notified vacancies were 39."

In the light of this finding relied on by the said respondents themselves, it cannot be contended that more vacancies were reported.

7. No provision has been brought to our notice by either side prescribing any period of validity of a list prepared for appointment. Necessarily, the list will be applicable only for the vacancies notified, for which the recruitment process commenced. In the decision reported in *Ashok Kumar and Others Vs. Chairman, Banking Service Recruitment Board and Others*, , the Apex court has clearly held that, operation of a select list prepared, after verifying the number of vacancies, to fill up more vacancies than notified will offend the rights of others under Art. 16 of the Constitution. In other words it will violate the equality clause enshrined in the Constitution. This court also had again considered that aspect with respect to the appointment in *Agricultural University in Kerala Agricultural University v. Gopinathan Unnithan* 1996 (1) KLT 344. Para 10 there of reads as follows:

"Learned Single Judge has issued a writ of mandamus directing the Agricultural University to appoint the petitioner as Professor in Agricultural Statistics. It is trite law that this court in exercise of the powers under Article 226 of the Constitution is not to issue a writ of mandamus directing the appointment of a candidate who is included in the select list. In *State of Kerala Vs. Smt. A. Lakshmikutty and others*, , Their Lordships after stating that a candidate who is included in the select list has no legal right to the post held that the High Court in exercise of the powers in Article 226 of the Constitution, cannot issue a writ of mandamus directing the authorities to make the appointment. In view of this statement of law, the learned single Judge was clearly in error in issuing a writ of mandamus directing the University to appoint the petitioner against the third vacancy of Professor in Agricultural Statistics, that arose on a subsequent date."

8. The dictum in *Ashok Kumar*'s case has been followed by this court and held that more vacancies than that notified cannot be filled up, enforcing the list so prepared, as it will offend the rights of others under Arts. 14 and 16 of the Constitution. In the decision reported in *Sanjoy Bhattacharjee Vs. Union of India and others*, the Supreme Court has also made it clear that the list prepared cannot be made operative for the vacancies that had arisen subsequently. The dictum laid down in the decision reported in *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, is also almost to the same effect.

9. When it is discernible from Ext. P4 order of the Tribunal quoted and relied on by the said respondents themselves that, only 39 vacancies alone had been notified to the employment Exchange, the Tribunal went in error in directing appointment to more vacancies than notified, from out of the select list made mention of in Ext. P4. The tribunal also cannot direct appointment of persons included in such list. Ext. P4 was found to be binding on the petitioner administration, to the effect that the list prepared by them contained 164 persons. Even then they did not have the liability to appoint more persons than the number of vacancies notified. Merely because they have appointed forty persons, for which they have the excuse that 40th person was also a physically

handicapped person, the said respondents cannot contend that such illegality, if any, shall always be perpetuated. If we do so, it will really violate the right of others who are aspiring for further appointment to the vacancies yet to be notified. Accordingly, we are of the view that the Tribunal went wrong in issuing direction as contained in para 10 of the impugned order, Ext.P7.

Accordingly, we set aside the impugned order. Original Petitions are allowed accordingly.