

(1996) 11 KL CK 0020

In the High Court Of Kerala

Case No : O.P. No's. 13328/92 J, 3541 and 11350 etc. of 1993, 14262 and 15877 etc. of 1994, 744 and 2748 etc. of 1995 and 470 and 715 etc. of 1996

Neelakanda Kurup and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 22-11-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1), 309
Kerala Secretariat Subordinate Service Rules, 1967 — Rule 3, 4, 4(4), 9
Public Service Commission Rules — Rule 13

Citation : (1996) 11 KL CK 0020

Hon'ble Judges : T.V. Ramakrishnan, J; J.B. Koshy, J

Bench : Division Bench

Advocate : P. Santhalingam, N.S. Aravindakshan and John Thomas, for the Appellant; Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

J.B. Koshy, J.—All the above Writ Petitions relate to the appointment to the post of Legal Assistant Grade II in the Kerala Secretariat Subordinate Service. As agreed by all the parties, all the above Writ Petitions were heard together and are being disposed off by this common judgment.

2. Legal Assistant Grade II is a post borne on the Kerala Secretariat Subordinate Service. It is category 7 in the Special Rules for the said Service. There are four methods of appointment prescribed for the post by Rule 4(a) of the Special Rules. The four methods are:

(i) Direct recruitment; or

(ii) Appointment from Assistant Tamil Translators and Assistant Kannada Translators; or

(iii) Appointment or promotion from any other category in Kerala Secretariat

Subordinate Service; or

(iv) Transfer from any category in any Department under the Government or in the service of the High Court of Kerala.

50 per cent of the vacancies are reserved for appointment through direct recruitment and appointment from Assistant Tamil Translators and Assistant Kannada Translators items (i) and (ii) and 50 percent of the vacancies are to be filled up by the methods specified in items (iii) and (iv) in the ratio of 3:2. Methods of recruitment provided for items (i) and (ii) are not a matter of controversy in these Writ Petitions. Legal Assistants Grade II were originally appointed only through direct recruitment through Public Service Commission. Thereafter, direct recruitment was restricted by 50 per cent among items (i) and (ii) and balance 50 per cent has to be shared by items (iii) and (iv) in the ratio of 3:2. Rule 4(a) of the Special Rules provides methods of appointment to the post of Legal Assistant Grade II (category 7) and Rule 9 prescribes qualifications for the post. The rotation cycle by which appointment is made is incorporated in the Note to Rule 4(a) of the Special Rules by G.O. (P) No. 161/77/GAD, dated 2nd June 1977. As per the Note, out of every ten vacancies, the odd numbers (50 per cent) will go to items (i) and (ii) while the even numbers (50 per cent) will be shared by items (iii) and (iv) in the ratio of 3:2 and first three vacancies will go to item (iii) and only last two of even number appointments can be claimed by category (iv), that is, other department candidates. Rule 4(a) of the Special Rules provides as follows:

4. Appointment.- (a) Appointment to the several categories shall be made as follows:

Categories Method of appointment

* * *

7. Legal Assistants Grade II (1) Direct recruitment; or

(ii) Appointment from Assistant Tamil Translators and Assistant Kannada Translators; or

(iii) Appointment or promotion from any other category in Kerala Secretariat Subordinate Service; or

(iv) Transfer from any category in any Departments under the Government or in the service of the High Court of Kerala.

Note: Fifty per cent of the vacancies shall be filled up by direct recruitment and appointment from Assistant Tamil Translators and Assistant Kannada Translators. The other fifty per cent of the vacancies shall be filled up by the methods specified in items (iii) and (iv) above in the ratio of 3:2.

The following shall be the rotation by which appointments by the different methods shall be made in a cycle of ten vacancies:

1st vacancy?By the method specified in item (i) or (ii) of the method of appointment

2nd vacancy?By the method specified in item (iii) of the method of appointment

3rd vacancy?By the method specified in item (i) or (ii) of the method of appointment

4th vacancy?By the method specified in item (iii) of the method of appointment

5th vacancy?By the method specified in item (i) or (ii) of the method of appointment

6th vacancy?By the method specified in item (iii) of the method of appointment

7th vacancy?By the method specified in item (i) or (ii) of the method of appointment

8th vacancy?By the method specified in item (iv) of the method of appointment

9th vacancy?By the method specified in item (i) or (ii) of the method of appointment

10th vacancy?By the method specified in item (iv) of the method of appointment

In the absence of qualified persons for appointment by the method specified in item (iii) of the method of appointment. Such vacancies shall be filled up by the method specified in item (iv) of the method of appointment and vice versa. If qualified persons are not available for appointment by the method specified in items (iii) and (iv) of the methods of appointment, such vacancies shall be filled up by direct recruitment.

* * * * 3. By Ext. P-1 Notification dated 5th April 1989 (produced in O.P. No. 11584 of 1993), the Appointing Authority, namely, the Law Secretary has circulated a letter to all departments calling for applications from candidates possessing the prescribed qualifications for appointment to the post of Legal Assistant Grade II by the method of appointment specified under Rule 4(a) category 7 item Nos. (iii) and (iv) of the Special Rules. According to the above letter, applications had to be submitted before 15th May 1989. Thereafter, Government issued an order dated 8th August 1989 (Ext. P-2 in O.P. No. 11584 of 1993) entrusting the conduct of written examination by the Commissioner for Entrance Examinations and sanctioning funds for the same. On the basis of the above, written test was conducted. There was no cut off marks. All the persons appeared were ranked and a merit list was published. A copy of the merit list of candidates for appointment as Legal Assistant Grade II on the basis of the written examination conducted as per Government Order dated 8th August 1989 is seen produced as Annexure I along with C.M.P. No. 9238/95 filed in O.P. No. 11.584/93-D. 2nd Petitioner in O.P. No. 11584/93 made a representation to the Government by letter dated 10th December 1992 (Ext. P-3) stating that he is a rank holder and complaining about his non-appointment. By Ext. P-4 dated 13th

January 1993 in O.P. No. 11584/93 the Law Secretary informed that the rank list in question had expired and that there is no vacancy of Legal Assistant Grade II in the department. It appears from the files produced by the Government that a decision has been taken to terminate the list prepared and finalised in 1989. After expiry of three years from the date of publication of that list, on 15th December 1992 Government called for fresh applications by initiating new appointment process. Ext. P-5 dated 15th December 1992 (O.P. No. 11584/93) was issued calling for applications from employees working in other department for filling up the posts vacant and due to items (iii) and (iv) of Rule 4(a), that is, from Secretariat and from other departments. Applications were to be submitted before 15th February 1993. In Ext. P-5 dated 15th December 1992 calling for applications, it was specifically stated that the rank list of candidates will be valid for a period of three years from the date of its publication. Meanwhile, C.M.P. No. 24076 of 1992 in O.P. No. 13328 of 1992 was filed and by interim order this Court directed the Respondents to appoint provisionally the Petitioners whose names are in the merit list published in 1989 subject to the result of the O.P. Thereafter, it appears that no further steps were taken in accordance with Ext. P-5 memorandum dated 15th December 1992 till 1995. Thereafter, this Court directed the Respondents to conduct the test in accordance with Ext. P-5 memorandum and the test was conducted in 1995. Merit list published with effect from 6th October 1995 from category (iii), that is, Secretariat Subordinate Service, is produced as Ext. R-8 (b) in C.M.P. No. 32156/95 in O.P. No. 13328/92-J. Merit list published from 6th October 1995 from category (iv), that is, other departments, is also produced along with the above C.M.P. In view of the various interim orders passed in various Original Petitions, all vacancies were filled up provisionally appointing candidates from the 1989 list which expired with effect from 22nd October 1992 and none from the 1995 list were appointed.

4. In the following Original Petition, names of the Petitioners were in the 1989 merit list and all of them belong to item (iv):

(1) O.P. No. 13328/92 (2) O.P. No. 3541/93 (3) O.P. No. 11350/93 (4) O.P. No. 11584/93 (5) O.P. No. 11595/93 (6) O.P. No. 15629/93 (7) O.P. No. 14262/94 (8) O.P. No. 18355/94 (9) O.P. No. 744/95 (10) O.P. No. 3489/95 (11) O.P. No. 715/96 and (12) O.P. No. 3456/96

It is contended in these Original Petitions that Ext. P-1 Memorandum calling for applications shows that it is for "all existing and future vacancies". When the list was published also, there was no mention that the list will expire after the expiry of three years of its publication. Therefore, it is the contention of the Petitioners that only after all the persons whose names were contained in the merit list are appointed, appointment can be made from the new list. Before exhausting the 1989 list, new list cannot be prepared and Ext. P-5 notification in 1992 calling for applications for preparing fresh list itself is illegal. Alternatively, it was contended that there was no proper termination and, therefore, all the vacancies should be filled up from the 1989 merit list till the publication of the new list. It is the

further contention that candidates belonging to items (iii) and (iv) appeared for the same test. Therefore, there should not have been two lists and there should not have any discrimination between them. It is further pointed out that the ratio of 3:2 fixed for candidates from items (iii) and (iv) is wrong. The number of employees working in the Secretariat service is around 2000 whereas in other Departments, it is in lakhs. Therefore, the ratio of 3:2 between Secretariat employees and other Department employees is palpably wrong and unjustifiable. It is the further contention that even if the ratio is correct, the rotation mentioned in the Note to the rule is arbitrary as only after appointing all the three persons from item (iii), the next two persons will be given appointment from item (iv). There is no rational basis for the same. If there are only seven vacancies, none of the category (iv) employees could be appointed.

5. The following are the petitions filed by persons whose names are mentioned in the 1995 merit list:

(1) O.P. No. 15877/94 (2) O.P. No. 2749/95 (3) O.P. No. 16737/95 (4) O.P. No. 18196/95 and (5) O.P. No. 2009/96

It is contended by them that a merit list prepared cannot be for ever. There should be a time limit and three years time limit fixed by the appointing authority cannot be stated to be arbitrary or unreasonable. It is also contended that the persons who got provisional appointment as per the interim orders have no right to continue after the termination of 1989 list. All the existing and future vacancies till the expiry of the 1995 list should be filled up from the 1995 list alone. They also questioned the ratio of 3:2 fixed for items (iii) and (iv) as well as the rotation fixed by introducing Note to Sub-rule 4 (a). In O.P. No. 16737 of 1995, merit lists prepared in 1995 with marks in respect of items (iii) and (iv) are produced as Exts. P-6 and P-7 respectively. It is contended that no cut off marks were fixed for preparing merit list. This is only to enable the unmeritorious Secretariat candidates to get appointment. Only 11 persons from item (iii), namely, Secretariat Subordinate Service, appeared in the test. No. 9 in that merit list Shri Nizamudeen A. got only 245 marks out of 1200, that is, only 20 per cent. Sl. No. 10. Shri M.N Sasikumar, got only 219 marks which is only 18 per cent and No. 11, Smt. C.R. Jayakumari, got only 192 marks which is only 16 per cent. If the present ratio and rotation are to continue, only if all 11 persons in Ext. P-6 list are appointed, 7th person in Ext. P-7 list who got 504 marks has a chance of appointment. Even the last person in Ext. P-7 list (Sl. No. 41 in the list) has got 420 marks. As per rule, if item No. (iii) candidates are not there, appointment can be made from item (iv). Cut off marks was not mentioned so that unmeritorious persons can be promoted or appointed ignoring the claims of the meritorious persons who got higher marks in the same examination.

6. O.P. No. 470 of 1996 was filed by an Advocate who aspires to enter the State Service as Legal Assistant Grade II. According to the Petitioner, 50 per cent of the vacancies of Legal Assistants Grade II should be filled up by direct recruitment and appointment from Assistant Tamil Translators and Assistant

Kannada Translators. Before 1967, entire vacancies were to be filled up by direct recruitment. Even though there were several vacancies in the direct recruitment quota, they were not filled up and by connivance of the Respondents mainly item (iii) candidates were appointed and by interim orders of the Court some persons from item (iv) were also appointed provisionally. A Notification was issued for direct recruitment in 1993. He applied for the same. But, no appointments were made. It is submitted by the Petitioner that unless direct recruits are appointed for the quota fixed for them, no further appointments should be made. The earlier direct recruitment list expired in 1991. Thereafter, no effective steps were taken. When they filed representation, they were informed by Ext. P-6 that at present there are no vacancies and all vacancies were filled up as per the interim orders of the Court provisionally. Government have reported the vacancies to the Public Service Commission and the Commission is being reminded to prepare the rank list as early as possible. The P.S.C. filed a statement in O.P. No. 470 of 1996 where in it is mentioned that the Government have reported only one vacancy by letter dated 27th January 1992 and it was notified in the Gazette dated 17th August 1993 and a written test is to be conducted on 20th April 1996. What happened thereafter is not reported to the Court and Counsel for the Public Service Commission when asked also stated that he is not aware of the further developments.

7. First, we may examine the contention that no new appointments can be made from items (iii) and (iv) until 1989 merit list is exhausted. It is the contention of these Petitioners that in Ext. P-1 memorandum inviting applications, it is very clear that the above memorandum was issued inviting applications for all existing and future vacancies. When the merit list was published, there, was no mention that the list will expire after a period of three years. In Ext. P-2 Government Order directing the Commissioner for Entrance Examinations to conduct the test for preparing merit list also, time limit of three years is not mentioned. Further, there is no proper termination, of the above list and even if there is termination the Law Secretary who terminated the list has no authority for the same.

8. In the decision reported in *Union of India and Ors. v. Ishwar Singh Khatri and Ors.* 1992 Supp. (3) S.C.C. 84 it was held that vacancies notified should be filled up from the select list and the Board have prepared the panel containing 1492 candidates, the selected candidates have a right to get appointment. Based on the above decision, it was argued that the persons whose names are in the merit list should be considered for appointment and until all of them are appointed no fresh appointments should be made. Now, we may look into the facts of the case in the decision reported in 1992 Supp. (3) S.C.C. 84. In the above case, in the year 1982-83, Delhi Administration notified 654 vacancies of trained graduate teachers and asked the Employment Exchange to sponsor names of suitable candidates. The Employment Exchange sponsored 4,000 candidates by June 1984. The Staff Selection Board prepared a panel of 1492 candidates after test and interview. The panels were displayed on the notice board stating specifically that "the appointment will be made from the select list till the last candidate is

appointed". It was also stated in the minutes of the meetings of the Staff Selection Board that "the life of the panels of selected candidates will be valid for indefinite period". It is also stated that the panel of selected candidates will remain valid till all the candidates are offered appointments. Delhi Administration, in the first instance, appointed-527 candidates from the select list and, later on, they appointed 127 more candidates. The remaining candidates were not appointed. After a long lapse of time, they approached the Court. The Supreme Court found that:

... Selection Board prepared the panels containing 1492 candidates as against the then available vacancies. In view of this conclusion, it goes without saying that the selected candidates have a right to get appointment.

Therefore, this case will not be of any help to these Petitioners. In Ext. P-1 Notification even though applications were called for to fill up the existing and future vacancies, there was no mention that the list will continue for indefinite period or panel of selected candidates will remain valid till all the candidates are offered appointment. Merely a merit list was prepared. There was no cut off marks. All the persons who applied and appeared for the test were considered and their names were mentioned in the list. On the facts of the case reported in 1992 Supp. (3) S.C.C. 84, the Supreme Court held that there were 1492 vacancies at the time when the select list was prepared and the select list was prepared by none other than the Director of Education himself, who knows the vacancies. Here, it is not the case that there were vacancies of Legal Assistants at the time when the Notification was issued or at the time when merit list was published to accommodate all the persons whose names were included in the merit list. Therefore, Petitioners cannot get any assistance from the above decision.

9. The next case cited is the decision reported in N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, wherein it was held that a candidate has a vested right to be considered for appointment in accordance with the terms and conditions set out in the advertisement as his rights crystalize on the date of publication of advertisement. In Ext. P-1 Notification it was not stated that persons whose names appeared in the merit list or all persons who will apply and come for the test will get appointment. Therefore, merely because all the persons who appeared for the test as per Ext. P-1 Notification are included in the merit list, they are not entitled to automatic appointment.

10. In the decision reported in Shankarsan Dash Vs. Union of India, it was held by the Apex Court that inclusion of a candidate's name in a merit list does not confer any right to be selected unless the relevant recruitment rules so indicate. It is also stated that unless there are provisions in the Rules, the State is under no legal duty to fill up all or any of the vacancies even though State cannot act in an arbitrary manner.

11. In the decision reported in Babita Prasad and Others Vs. State of Bihar and

Others, the Supreme Court considered whether life-long panel can be prepared. In the State of Bihar, there was a Scheme for appointment of primary teachers on the basis of residence of the candidates in a particular district. Minimum educational qualification was prescribed as matriculation. Thereafter, they should undergo two years' training in Primary Teachers' Training College. The training programme was followed by a written test and viva-voce. After successful completion of the training, names of candidates were arranged year-wise according to their merit and appointments were made out of this list without any further selection process. Appointments of all those who had already been appointed saved; but the panel was abandoned by the State. When this was questioned in the above case, the Supreme Court held as follows:

We find force in the submission of Mr. Sibal that the purpose of the panel prepared in the instant case was only to finalise a list of eligible candidates for appointment. The panel in the instant case was too long and was intended to last indefinitely barring the future generations for decades from being considered in the vacancies arising much later. In fact, the future generations would have been kept out for a very long period had the panel been permitted to remain effective till exhausted. A panel of the type prepared in the present case cannot be equated with a panel which is prepared having co-relation to the existing vacancies or anticipated vacancies arising in the near future and for a fixed time and prepared as a result of some selection process. As is apparent, the names of some of the teachers in the panel have existed for more than 16 years. A panel of this nature, in our opinion, cannot be treated as conferring any vested or indefeasible right to the teachers to be appointed as laid down by the Constitution Bench in *Shankarsan Dash's* case. (para 25)

Even though the candidates were sent for training, the panel was like an eligibility list. Here also, all the persons who appeared for the test are mentioned in the rank list in the order of merit. They are only eligible candidates and it cannot be stated that they have got a right of appointment automatically and the panel should last life-long till all the names are exhausted by appointment and cannot be accepted in view of the decision of the Apex Court in *Babita Prasad and Others Vs. State of Bihar and Others*, referred to above.

12. In the decision reported in *Union Territory of Chandigarh Vs. Dilbagh Singh and others*, it was held as follows:

If we have regard to the above enunciation that a candidate who finds a place in the select list as a candidate selected for appointment to a civil post, does not acquire an indefeasible right to be appointed in such post in the absence of any specific rule entitling him for such appointment and he could be aggrieved by his non-appointment only when the Administration does so either arbitrarily or for no bona fide reasons, it follows as a necessary concomitant that such candidate even if has a legitimate expectation of being appointed in such posts due to his name finding a place in the select list of candidates, cannot claim to have a right to be heard before such select list is cancelled for bona fide and valid reasons

and not arbitrarily.(Para 12)

13. In the decision reported in Travancore Devaswom Board v. Savithri 1989 (1) KLT 301 a Division Bench of this Court held that the object of selection is to secure the best talent for the services. Another principle to be borne in mind is that there should be equality of opportunity. If the life of the list is not limited to a certain period, it would mean that other persons who become eligible during the subsequent years will be deprived of the right to offer themselves as candidates. The Court held as follows:

The basic question for examination is as to whether the fixation of the life of the list as one year is arbitrary and therefore violative of Article 14 of the Constitution. If the life of the select list is not limited, it would remain in force for an indefinite length of time, may be for several years. One of the principles to be borne in mind in this behalf is that the object of selection is to secure the best talent for the services. Another principle to be borne in mind is of giving equality of opportunity in the matter of appointment to all those who possess eligibility for such appointment. If the life of the list is not limited to a certain period, it would mean that other persons who become eligible during the subsequent years will be deprived of the right to offer themselves as candidates and the authorities would also be denied the opportunity of making a choice of the best talent available during the subsequent years. That is why in the realm of service law, fixation of the life of select list has been consistently recognised. The Supreme Court which had occasion to examine this aspect of the matter has observed in AIR 1987 S.C. 847 between Nagar Mahapalika, Kanpur and Vinod Kumar Srivastava and Ors. as follows:

The reason underlying the limitation of the period of a list for one year is obviously to ensure that other qualified persons are not deprived of their chances of applying for the posts in the succeeding years and being selected for appointment. It follows from this observation of the Supreme Court that there is good reason for limiting the period of the list to one year. In the absence of any statutory limitation, as the Devaswom Board has been conferred with the power of making selection for appointment to the various services of the Board, it must be presumed that it possesses incidental power of fixing the life of the select list prepared for appointment to various services. (Para 3)

14. In the decision reported in State of Haryana v. Subash Chander Marwaha and Ors. (1974) 1 S.C.R. 365 Court considered a case where it was advertised that the Public Service Commission would hold an examination of candidates for 15 vacancies. 40 candidates qualified by securing 45 per cent or more marks. Appellant selected the first seven who secured more than 55 per cent marks. Respondents who got below 50 per cent marks and ranked 8 downward were not selected. It was held by the Supreme Court that there is no constraint on the Government against fixing a higher score of marks for the purpose of selection with a view to maintain a high standard. There was nothing arbitrary in fixing 55 per cent marks for the purpose of selection. It was further held that even though

all the candidates who secured 55 per cent or more marks were included in the select list, Government is under no legal obligation to appoint them merely because there are vacancies or a list had been prepared. So long as a list has been prepared, the State Government shall not make appointments by traveling outside the list the State Government shall make the selection for appointment strictly according to the order in the list. The fact that in the advertisement it was stated that there are 15 vacancies did not give the Respondents a right to be appointed as Government decided that only persons who secured more than 55 per cent marks need be appointed even though that was not mentioned in the advertisement. Here also, so long as the list stands the Government cannot appoint persons from outside the list and the appointment shall be from the order of ranking according to the ratio and rotation fixed in the rules. But, there is no bar in fixing a time limit for terminating the list and calling for applications for preparing a fresh list.

15. In the decision reported in *State of Bihar and others Vs. The Secretariat Assistant Successful Examinees Union 1986 and others*, also the Supreme Court held that person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is, at the best, a condition of eligibility for purposes of appointment and by itself does not amount to selection or create a vested right to be appointed unless relevant rules state to the contrary. In this case, select list was prepared on the basis of merit in the examination without any qualifying marks. All the persons who wrote the examination were ranked in the merit list and merely because a name is in the list because he wrote the examination will not give him a right for appointment.

Therefore, Petitioners in these Original Petitions cannot claim a right to get appointment. The decisions cited above would show that merely because the Petitioners' name appeared in the merit list, they cannot state that they have got a right of appointment and unless all of them are appointed and the list is exhausted, no fresh list can be prepared. The rank list was not prepared on the basis of a selection; but, all of them who appeared for the test were ranked in the order of merit without any qualifying minimum marks. There is no provision in the relevant Rules or in the notification giving any indefeasible right to the persons whose names are appearing in the list to get appointment as of a right. There is also no provision in the rule against the authorities in fixing a time limit.

16. The next contention of the Petitioners is that even if the validity of the period of the list can be terminated, there was no proper termination of the list in this case. Ext. P-1 Notification or Ext. P-2 Government Order or the merit list did not show that the list will expire on the expiry of three years from the date of publication of the list. Therefore, it is the contention that unless the list is properly terminated, the life of the list will continue beyond the three year period. In the decision reported in 1989 (1) KLT 301 referred to earlier, it was held by a Division Bench of this Court that in the absence of a statutory prohibition, the authorities can fix a time limit. The appointing authority for the

Legal Assistants Grade II in question is the Secretary to Government, Law Department as mentioned in Rule 3 of the Special Rules for the Kerala Secretariat Subordinate Service. Ext. P-1 Notification inviting applications was also signed by the Secretary to Government, Law Department. Government by Ext. P-2 order only directed the commissioner for Entrance Examinations to conduct the examination and sanctioned funds for the same. The merit list was published by the secretary to Government, Law Department. Therefore, the files show that the Secretary to Government, Law Department has taken a decision to terminate the list after the expiry of three years from the date of publication of the list. Since Secretary to Government, Law Department is the appointing authority, we are of the opinion that he is the competent authority and his decision as communicated by Ext. P-4 is the valid decision and, therefore, there is no merit in the contention that the 1989 list was not validly terminated. After the termination of the list, persons from 1989 list cannot have a legitimate expectation for appointment for any future appointments. Now, the only question left to be decided is whether fixing three year period for the validity of the list can be termed as unreasonable and arbitrary. In this connection, we may note that in the case of appointment for the Public Service Commission under Rule 13 of the P.S.C. Rules of Procedure, normally, the rank list will be for a period of one year and it can be extended for another one year. If no candidate is advised during the ad hoc period, the enforcement of the list can be extended upto three years from the date of publication of the list. Fixation of one year period was held to be reasonable by the Supreme Court in the decision reported in *Nagdr Mahapalika v. Vinod Kumar Srivastava* AIR 1987 S.C. 847 and the Division Bench decision of this Court in 1989 (1) KLT 30 L In fact, if the merit list is in force for an indefinite period of time especially considering the fact that number of vacancies arising in an year are very few and all the persons who appeared for the test are in the list, it will be denial of opportunity in the matter of appointment to all those who possess the prescribed qualification for such appointment subsequently. The Government also will be denied its right to get the best talent for the service. Therefore, if a period is not fixed for the list, it will be violative of Articles 14 and 16 of the Constitution. Fixation of the period of three years is not arbitrary or unreasonable and we hold that fixation of three year period for the list is neither arbitrary or unreasonable So as to invite the jurisdiction of this Court to strike down the period fixed by the competent authority.

17. The Petitioners whose names are in the 1989 list as well as in 1995 list question the fixation of ratio and rotation fixed in the rules. It is contended that the above ratio is incorrect when 50 per cent is reserved for internal selection and same test is being conducted for item (iii) Secretariat employees and item (iv) other Departmental employees and a common merit list should have been prepared as there is no reason for discrimination. The Secretariat Department is working for all other Departments and, therefore, the ratio of 3:2 fixed is unreasonable when lakhs of people are working in other Departments and only a

little above 2000 employees are working in the Secretariat. Therefore, the ratio of 3:2 between items (iii) and (iv) is unreasonable and is liable to be set aside. The quota fixed in the rule is also unreasonable and is only to help the Secretariat employees. If there are only seven vacancies, none of item (iv) employees will be appointed as only after appointing Secretariat candidates, item No. (iv) other Departmental candidates will be considered as per the Rules. Therefore, the rotation cycle introduced by the Note in Rule 4(d) is unreasonable and violative of Article 14 of the constitution and is liable to be set aside. Originally, Legal Assistants Grade II were appointed only by direct recruitment. Thereafter, direct recruitment was restricted to 50 per cent. Legal Assistants Grade II is a post attached to the Kerala Secretariat Subordinate Service. It is one of the categories of posts included in the above service. Method of appointment prescribed as per Rule 4(a)(iii) is promotion from any other category in the same service. It is actually a channel of promotion for the self-same service in the order of merit. Method of appointment prescribed as per Rule 4(a)(iv) is transfer from any category in any Department. This category of persons (Petitioners) belong to other services outside the Secretariat Service. Normally, such persons cannot aspire for a post borne on the cadre of the Secretariat Subordinate Service. Chances of promotion on appointment on the basis of merit will be limited to the post coming within their respective services.

Persons in the Secretariat Subordinate Service also cannot aspire promotion in the Departments outside the Secretariat Service. Therefore, Secretariat Service candidates can legitimately claim promotion or appointment to the post borne on the cadre of that service provided they are duly qualified for the post. Therefore, in fact, by getting a right for appointment at the ratio of 3:2 by other Departmental candidates, a right is obtained on the basis of the Rules. Therefore, they cannot say that the ratio of 3:2 fixed in the Rules is arbitrary and violative of Article 14 of the constitution as, normally, there will be no right for promotion to the Secretariat Subordinate Service. None of their rights are violated by introducing the Rules or ratio. In fact, the rules have created a right for them. By the ratio fixed on the basis of the Rules, they also get a right to aspire for the post by appointment by transfer on the basis of merit. Therefore, slightly higher percentage ratio provided for item (iii) (same Departmental Candidates) is reasonable and legal. The right to be considered for promotion on the basis of merit to a post borne on the cadre of a particular service to members belonging to that service are not the same as the right to be considered for transfer and appointment on the basis of merit to members of service who belong to different categories of other service and it stand on a different footing and the distinction cannot be held to be arbitrary or violative of Article 14 of the constitution. Members of the Secretariat Subordinate Service is a distinct class by themselves and they are covered by Special Rules. Higher percentage fixed for promotion for the self-same service cannot be questioned by the other Departmental candidates. The contention that it is not a case of appointment by P.S.C. but of a promotion to the other Departmental candidates also cannot be accepted for

other Departmental candidates it is only appointment by transfer on the basis of merit and not a promotion on the basis of merit. Even though they are writing the same test, until they are appointed to the post, there is no fusion. Separate rank list was prepared. Fusion takes place only when the two classes of employees commence their service as Legal Assistants Grade II in the Secretariat. Therefore, there is no discrimination against other Departmental candidates in the matter of fixing the ratio.

18. With regard to the rotation cycle and rotation, it can be seen that 50 per cent appointments are to be given to the direct recruits. Out of every ten vacancies, the odd numbers will go to items (i) and (ii) and even numbers will be shared by items (iii) and (iv) on a ratio of 3:2. The first three vacancies will go to the Secretariat candidates and the last two will go to the other Departmental candidates. It is the contention of the Petitioners that even if the ratio is correct, every alternate appointment should have been given between items (iii) and (iv). When the ratio is fixed as 3:2, if it is decided that after appointing three candidates from item (iii), appointments need be given to item (iv), the rotation fixed cannot be stated to be illegal even though another method is also possible by making alternate appointment. But, it cannot be stated that the present approach is arbitrary especially considering the fact that item (iii) belongs to self-same service and for them it is only appointment by promotion whereas to item (iv) they are coming from outside Departments. In their case, it is appointment by transfer. When appointments are made in accordance with the Rules, merely because above rotation cycle fixed may be slightly disadvantageous to item (iv) candidates who are from outside Departments it cannot be stated that the rotation cycle is totally illegal and arbitrary.

19. In the decision reported in *Govind Dattatray Kelkar and Others Vs. Chief Controller of Imports and Exports and Others*, it was held by the Supreme Court that when there are two source of recruitment and when the recruitment to certain posts is from different sources, what ratio would be adequate and equitable would depend upon the circumstances of each case and the requirements and needs of a particular post. Since the preferential treatment of one source was based on the differences between the two sources and the differences have a reasonable relation to the nature of the office to which recruitment was made, the said recruitment would legitimately be sustained on the basis of valid classification. In *Mervyn Coutindo and Others Vs. Collector of Customs, Bombay and Others*, also, the Apex Court accepted the validity of rotational system for recruitment to a cadre from two sources and held that such a system will not violate the principle of equal opportunity enshrined in Article 16(1) of the Constitution. Following the above decision, we also hold that the ratio as well as the rotation system fixed in the Rules are not unreasonable and violative of the constitutional provisions and it is not possible for this Court to strike it down.

20. In the decision reported in *A.K. Subraman and Others Vs. Union of India*

(UOI) and Others, also it was held as follows:

When recruitment is from two or several sources it should be observed that there is no inherent invalidity in introduction of quota system and to work it out by a rule of rotation. The existence of a quota and rotational rule, by itself will not violate Article 14 or Article 16 of the Constitution.(para 28)

21. In the decision reported in Tamil Nadu Education Department Ministerial and General Subordinate Services Association and Others Vs. State of Tamil Nadu and Others, it was held that if principle underlying the fixation of ratio between two wings of a service and the computation of length of service in determining common seniority is not found to be arbitrary, irrational and mala fide, mere hardship caused to some of the employees cannot be corrected by the Court. Mere fact that a few employees of one wing are superseded by those of the other wing are inconsequential. We quote paragraph 8 of the above judgment:

The feeble criticism that the promotional proportion between the two wings, in the process of interlacing and integration, is unsupported by any rational guideline is pointless. The State's case is that when two sources merge it is not uncommon to resort to the quota rule for promotion, although after getting into the common pool further "apartheid" shall be interdicted save in a limited class with which we are not concerned here. Of course, even if the quota rule is an administrative device to inject justice into the integrating process, the ratio cannot be arbitrary nor based on extraneous factors. None such is averred nor established. The onus is on the challenger and, here, the ratio is moderately related to the numbers on both sides and we see nothing going "berserk", nothing bizarre, nothing which makes you rub your eyes to query what strange thing is this Government doing? Counsel for the Respondents explain that when equated groups from different sources are brought together quota-rota expedients are practical devices familiar in the field. Bearing in mind the strength of the District Board Staff to be inducted, the ratio is rational. May be, a better formula could be evolved, but the Court cannot substitute its wisdom for Government's, save to see that unreasonable perversity, mala fide manipulation, indefensible arbitrariness and like infirmities do not defile the equation for integration. We decline to demolish the order on this ground. Curial therapeutics can heal only the pathology of unconstitutionality, not every injury.

In this case, by fixation of special quota and rotation, it cannot be stated that the Government acted arbitrarily as employees belonging to item (iii) are employees from the same Department whereas item (iv) is coming from outside Departments to the Secretariat Service. So, it cannot be stated that the ratio and rotation is arbitrary or based on extraneous considerations.

22. It is contended by the Petitioners that even if they have no right to be appointed since they were appointed on the basis of the Court's order provisionally, those who were appointed already on the basis of the interim orders of the Court should be allowed to continue on considerations of equity. A

recent decision of the Supreme Court reported in Ashok Kumar and Others Vs. Chairman, Banking Service Recruitment Board and Others, was cited in support of the above contention. There, the Court held that appointment to vacancies arising subsequently without notifying vacancies is violative of Article 14 of the Constitution. Articles 14 and 16 of the Constitution enshrine fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified and appointment without notification of the vacancies is a denial and deprivation of the constitutional right. Therefore, appointments made from the waiting list by the respective Board are held to be illegal. But, the Court refused to interfere or set aside all the appointments already made. Same equitable consideration, it was urged to be considered here. Considering the facts of this case, we are of the opinion that after the expiry of the 1989 list, Petitioners are not entitled to continue merely because they were appointed provisionally and were acting as Legal Assistants on the basis of the interim orders of the Court. The facts in the case considered by the Supreme Court and in this case are entirely different. Here, applications for preparation of a fresh list were invited by Ext. P-5. Thereafter, Writ Petitions were filed. When interim orders were made it was specifically mentioned by this Court that appointments will be provisional and subject to the result of the original Petition. One of the grounds stated by the Supreme Court in not setting aside the earlier selection is that they were not made parties to the case. Here, the Petitioners in the O.P. were the persons who were appointed provisionally subject to the result of the final disposal of the O.P. Since they are parties to the O.P. and it was known to them that their appointments are provisional subject to the result of the O.P. their case cannot be considered as equal with that of the persons who were allowed to continue by the Supreme Court in Ashok Kumar and Others Vs. Chairman, Banking Service Recruitment Board and Others, referred to earlier. Facts and nature of appointments are also different. Those Petitioners who were appointed on the basis of the interim orders will not get better rights than the provisional hands and the employees who were given provisional appointment has to vacate their posts when regular appointments are made. They cannot claim any equitable right merely because they approached this Court and obtained interim orders subject to final result of O.P.

23. In Surendra Kumar Gyani Vs. State of Rajasthan and Another, the Supreme Court has categorically taken the view that services of the provisional employees are to be terminated on the availability of properly recruited persons. In Dr M.A. Haque and Others Vs. Union of India (UOI) and Others, . Their Lordships observed:

We are also conscious of the fact that candidates in service have a disadvantage as against the fresh candidates in the tests particularly when they face the tests after a long lapse of time. As against this, however, we cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules arid the

bypassing of the Public Service Commissions are permitted, it will open a back door for illegal recruitment without limit. In fact, this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provisions requiring recruitment to the services through the Public Service Commission. It appears that since this Court has in some case permitted regularisation of the irregularly recruited employees, some Governments and authorities have been increasingly resorting to irregular recruitment. The result has been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidates dictated by various considerations are being recruited as a matter of course.

The 1995 merit list is now available. Names are included in the list on the basis of merit in the examination conducted by the Commissioner for Entrance Examinations. All appointments after the expiry of the earlier list should be made from the 1995 list till the expiry of that list. When such candidates are available, there is no need to continue the service of the provisional employees even though they were appointed on the basis of the interim orders of this Court which has specifically stated that such appointments are provisional. According to us the observations made by their Lordships in the above case apply in the instant case and persons who got appointment provisionally on the basis of the interim orders of the Court cannot continue in service. After the expiry of 1989 list their names are not at all in the rank list or in the merit list and they are not eligible for appointment after the expiry of the list.

24. The Petitioners have also cited the decision of a Division Bench of this Court in *Ajet Kumar and Ors. v. K.V. Sunil Kumar and Anr.* ILR 1993 Ker 765 wherein it was found that the select list was not valid. Single Judge set aside the select list as there was no proper assessment of merit. The Division Bench held that there is no proof that the members of the selection committee had any mala fide intention and selections made in 1987 and 1988 need not be set aside on such allegations which were not proved at this distance of time. There, the Court found that the decision of the Single Judge is not correct and it would be inequitable to set aside the select list at a distance of time especially when there is no plea or proof of any mala fides. It has no relation to the facts of the case here. Here, 1989 list was over in 1992. Petitioners were appointed on a provisional basis pursuant to the interim orders of this Court which has specifically stated that it will be subject to the final disposal of the O.P. Because of the specific provision made in the interim order, Petitioners were also aware that their appointment was only subject to the result of the O.P. Therefore, merely because they got appointment on the basis of the interim orders of this Court, they will not get any equitable right to continue in service. Persons from 1989 list, after the expiry of the list, cannot claim any equitable right in future appointments merely on the basis of the interim orders of the Court and the above plea, if accepted, will deprive the rights of the selected candidates in 1995 list some of whom have also filed writ petitions. Further, the 1989 list was prepared including all the names who appeared in the examination as there was

no qualifying marks or cut off marks fixed and their continuation, if allowed, will amount to discrimination and it will be unreasonable. Therefore, we are of the view that on equitable consideration also they are not entitled to appointment. Even though they were appointed on the basis of the interim orders of this Court, if that is set aside, they will not become jobless as they can go back to their parent Departments. We make it clear that those who got transfer and appointment on provisional basis can go back to their parent Departments retaining their seniority in the parent Departments and they will lose any of their normal right. But, they have no equitable right to continue as Legal Assistants merely because their names were there in the 1989 list which expired in 1992 and they cannot be appointed in any post after the expiry of the 1989 list.

25. The learned Advocate appearing in O.P. No. 16737 of 1995 again pointed out that non-fixation of any qualifying marks or cut off marks while merit list was published is incorrect. It was pointed out by him that SI. No. 11, the last person, in the merit list for item (iii)-Secretariat Subordinate Service has got only 192 marks (16 per cent) whereas SI. No. 11 in the merit list for item (iv)-Other Departments has got 489 marks and the last person (SI. No. 41) has got 420 marks in the same examination. It is their contention that cut off marks or qualifying marks should be fixed. It is true that the examination was conducted by the Commissioner for Entrance Examinations as directed by the Government so that meritorious candidates can be appointed. The post of Legal Assistant Grade II is a responsible post and meritorious candidates should be appointed. Therefore, it would have been more fair if qualifying marks or cut off marks were fixed. We leave the matter to the Government to fix a qualifying mark so that more efficient persons can be appointed to this post. The Government has directed that the test should be conducted by the Commissioner for Entrance Examinations so that merit can be assessed properly. We are not considering non-fixation of cut off mark as a ground for setting aside the rank list as appointments are to be made only in the order of merit and vacancies are few. What is prepared is only a merit list or rank list and not a select list. As far as item (iii) Secretariat candidates, it is a source of promotion also. There is also no prayer to interfere in the list on that ground. But, it is argued to show that favouritism is shown to Secretariat candidates. But, it is always advisable for the Government to fix a cut off mark. Therefore, in future, while calling for applications for preparing a list, Government should fix a minimum mark or qualifying mark and only those who obtain more than the minimum marks need be included in the merit list. However, such a list also will not give the selected candidates an indefeasible right. Only if there are vacancies and appointments are made during the currency of the list those persons will get a right of appointment.

26. It is the contention in O.P. No. 470 of 1996 that no direct recruitment is made even though 50 per cent of the vacancies should be made from direct recruitment. Rules also provide that in the absence of qualified persons for

appointment from item (iii) Secretariat Subordinate Service, vacancies can be filled up by item (iv) and if qualified persons are not available for appointment from items (iii) and (iv), such vacancies shall be filled up by direct recruitment. Earlier, the entire vacancies were filled up by direct recruitment. But, now, the Government is not filling and no effective steps are being taken to fill up the vacancies through direct recruitment. On going through the Rules, it is clear that it is imperative on the part of the Government that 50 per cent of the vacancies should be filled up by direct recruitment. If direct recruitment are not made under the Rules, there is no provision to fill up those posts from either of the categories. In fact, if qualified persons are not available for items (iii) and (iv), that can be filled up by direct recruitment; but, not otherwise. The interim appointments made as per the interim orders of the Court and the affidavit filed by the Government show that there were vacancies; but, those vacancies were not reported to the Public Service Commission. The statement filed by the P.S.C. who is a party to the Writ Petitions shows that direct recruitment to the post is being made by the Commission and on 27th January 1992 Government has reported a vacancy of Legal Assistant Grade II and it was advertised in the Gazette dated 17th August 1993 and a written test was conducted on 20th April 1996. Unfortunately, the learned Advocate for the P.S.C. is not aware as to what happened after that and he was unable to inform the Court whether a list has been published or not. The Supreme Court has expressed unhappiness over such incidents repeatedly. Even when notification was published in 1993, examination was conducted only in 1996. The earlier rank list for direct recruitment was over by the end of 1991 and the vacancy was reported in 1992. Here, notification was published in 1993. But, the examination was conducted in 1996 and so far we are not informed that the list is published or not.

27. In *State of Bihar and others Vs. The Secretariat Assistant Successful Examinees Union 1986 and others*, the Supreme Court observed as follows:

Since no examination has been held since 1987, persons who became eligible to compete for appointments were denied the opportunity to take the examination and the direction of the High Court would prejudicially affect them for no fault of theirs. At the same time, due to the callousness of the State in holding the examination in 1987 for the vacancies advertised in 1985 and declaring the result almost three years later in 1990 has caused great hardship to the successful candidates. The State was expected not to act in such a leisurely manner and treat the matter of selection for appointment to services in such a casual manner. We must record our unhappiness on this state of affairs. There is no justification for holding the examination two years after the publication of advertisement and declare the result almost three years after the holding of the examination and not issuing any fresh advertisement between 1985 and 1991 or holding examination for making selections. We expect the State Government to act in a better manner, at least, hereinafter and since Mr. Rao, the learned senior Counsel has shared our concern and assured us of advising the State Government accordingly. We say no more on that aspect at this stage. (Para 11)

We also express our unhappiness over the situation. Since the examination is already conducted, the Public Service Commission should publish the rank list before 31st December 1996, if it is not already published. 50 percent of all vacancies should be filled up by direct recruitment (items (i) and (ii)) strictly according to the ratio and rotation as per the Rules. Candidates belonging to items (iii) and (iv) should also be appointed in the order of merit as per the 1995 list published as per the Rules during the currency of the list. Vacancies earmarked for direct recruitment cannot be filled up from items (iii) and (iv) and persons whose names contained in the 1989 list cannot be appointed after the expiry of the period of the above list.

28. Accordingly, O.P. Nos. 13328 of 1992, 3541, 11350, 11584, 11595 and 15629 of 1993, 14262, 18355 of 1994, 744, and 3489 of 1995, 715 and 3456 of 1996 are dismissed and O.P. Nos. 15877 of 1994, 2749, 16737 and 18196 of 1995 and 470 and 2009 of 1996 are allowed to the extent indicated earlier.

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