

(2012) 10 MAD CK 0040

In the Madras High Court

Case No : Writ Petition No"s. 34957, 50067 of 2006

R. Balakrishnan and Others

APPELLANT

Vs

Tamil Nadu Public Service Commission and Others

RESPONDENT

Date of Decision : 18-10-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 166, 226, 320(4)

Citation : (2012) 8 MLJ 393

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : N. Subramaniam and S. Subbiah, for the Appellant; C.N.G. Niraimathi, Standing Counsel, E. Sampath Kumar, Special Government Pleader, R. Gururaj, P. Wilson, G. Baskar and A.S. Rajakumar Vadivel, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—W.P. No. 34957 of 2006 was initially filed by five petitioners, seeking to challenge G.O. Ms. No. 104 Highways

Department dated 19.6.2000 insofar as assigning higher ranks to candidates belonging to a particular class of Backward class who scored lesser

marks than the candidates of same group and same class of Backward class who secured higher marks and after setting aside the same seeks for a

consequential direction to TNPSC to prepare the revised list of candidates to be appointed as Assistant Engineers in Highways Department for the

year 1997-99 and communicate the revised list to all the selected candidates with marks of all candidates and also to direct respondents 2 and 3 to

pass consequential orders including revision of seniority list of Assistant Engineers as on 1.1.2004 published by the third respondent Chief Engineer

(General), Highways Department dated 29.4.2004. The writ petition was

admitted on 10.1.2007. Subsequently, the original prayer was amended to the effect that the D.O. Letter dated 20.8.1998 sent by the second respondent to the first respondent Tamil Nadu Public Service Commission also to be set aside. Subsequently, an application under Rule 2(b) was filed to defend the respondents in a representative capacity and that application was ordered and petitioners 6 to 21 were impleaded as parties.

2. With an identical prayer, W.P. No. 50067 of 2006 was filed by one petitioner and similarly another petitioner has filed W.P. No. 29356 of

2007. Even in that writ petition, respondents were directed to be sued in a representative capacity by filing an application under Rule 2(b).

3. In W.P. No. 46868 of 2006, similar challenge is to the list of selected candidates published for the post of Assistant Engineers, Public Works

Department for the year 1997-98 dated 16.11.1999 and after setting aside the same to revise the seniority list of the selectees. Counter affidavit

was also filed. The petitioners have taken out an application under Rule 2(b) to sue the respondents in a representative capacity.

4. W.P. No. 1447 of 2005 was filed by one petitioner seeking to challenge a rejection letter given by the TNPSC dated 24.12.2004 refusing to

revise the seniority list in respect of the post of Assistant Engineer, Rural Development in Panchayat Union for which selections were made during

the year 1997. Pending the writ petition, it was stated that any promotion made on the basis of the existing seniority will be subject to the result of

the writ petition. Counter affidavit has also been filed.

5. Since in all the five writ petitions, the contentions raised are identical, they were grouped together and directed to be posted before this Court by

orders of the Hon"ble Chief Justice vide order dated 7.6.2012.

6. Heard both sides.

7. The case of the petitioners was that on 31.12.1997, a notification was issued for selection of candidates for appointment to the post of Assistant

Engineers in Pubic Works Department. Before the year 1998, selection list of candidates was prepared by TNPSC from the list of candidates who

have undergone oral test arranged in the descending order of merit on one side and the reservation roster on the other side (without carving out the

number of candidates as 31% for GT; 30% for BC; 20% for MBC; 19% for SC/ST). Thereafter candidates were fitted in the reservation roster

as per Rule 22(c) of the General Rules. General Turn was filled from all candidates irrespective of caste purely based on merit. A reserved

category turn either BC or MBC filled with the top ranker of the respective community. In this process, the reserved category is selected either as

GT or Reserved Category turn whichever comes first, so that he gets filled in a more advantageous position. By the said old practice, the

reservation policy of 35% for GT; 30% for BC; 20% for MBC and 19% for SC/ST were satisfied fully and there is no discrimination either among

General Turn or other reserved categories. This procedure was followed upto 1998 without any challenge. But in the selection made for the

selection of candidates called for vide notification dated 31.12.1997, TNPSC adopted a ratio laid down by the Supreme Court in P.S. Ghalaut

Vs. State of Haryana and Others, In that case, a passing observation is made to the effect that a reserved category candidate with more merit

having been selected in the General category there after cannot complaint against the placing of persons who have scored lesser marks in the

reserved category placed senior to him.

8. Without any justification, the Chairman of the TNPSC sent proposal to the State Government to amend Rule 22(c) of the General Rules without

any necessity and with the sole aim to increase the intake of reserved categories. The State Government by their order dated 26.9.1997 rejected

the proposal clarifying that Rule 22(c) should be read conjointly. However, TNPSC ignored the old practice of the selection process following

General Rule 22(c) and selected first top meritorious 31% candidates as General Turn candidates (which included meritorious candidates

belonging to BC/MBC/SC/ST) and distributed their names to the GT turns throughout the length of the roster. From out of the remaining

candidates, reservation quota were filled and allotted in the respective reserved turns. The selection list was sent to the Government and

appointments were made accordingly. The petitioners also joined the service pursuant to the appointment order. The marks assigned to each

candidate were also sent individually to the candidates. By this process, the petitioners, who also belong to reserved category with higher marks,

more merit, were distributed to the bottom most GT turn whereas the same community reserved category candidate with less marks got reserved

turns at the top.

9. Similarly, on 10.7.1999, TNPSC advertised 269 vacancies for selecting candidates for appointments to the post of Assistant Engineer

(Highways Department). In that notification, the new procedure was disclosed in selecting the candidates by select list dated 16.11.1999. The

TNPSC sent communication to individuals only the marks obtained by them. The Assistant Engineers in Public Works Department were appointed

in the year 1999 and the Assistant Engineers in Highways Department joined the service in the year 2000, Publication of results disclosing the

names and marks of the candidates were not done. The appointment orders contain only the selection list but without marks, Therefore, the

candidates were not in a position to know as to how arrangements of candidates were made in the selection list. Only in the year 2006, the

petitioners came to know about the illegalities adopted by TNPSC and came to this Court challenging the selection process.

10. The contention of the petitioners was that though the selection was made during the year 1997 and 1999, the petitioners came to know the

illegality only in the year 2006 and have immediately filed the writ petitions. The same is not denied by the respondents and hence, there is no

question of delay or laches. Neither the impugned letter dated 20.8.1998 nor the revised procedure was notified by the notification of TNPSC and

it was kept as a secret. Hence, the question of limitation will start only from the date of knowledge. The selection procedure has been changed by

incompetent authorities in violation of Article 320(4) and Article 166 of the Constitution of India. For proceedings under Article 226, strict rules of

limitation will not apply and technical pleas of delay or laches cannot be allowed to defeat the justice to perpetuate illegality. The impugned orders,

being the result of fraud can be challenged at any time. No third party rights have crept in as the issue relates to inter se seniority within the same

batch of Assistant Engineers. The petitioners in this connection placed reliance on the following judgments:

(i) ILR 1991 Kar 2704

(ii) Shankara Co-op Housing Society Ltd. Vs. M. Prabhakar and Others,

(iii) A.V. Papayya Sastry and Others Vs. Government of A.P. and Others,

(iv)(1992) Suppl 2 SCC 217

11. Apart from the preliminary objection, the petitioners have stated that the impugned letter dated 20.8.1998 was issued by the Secretary to Government without any authority of law and hence void ab initio and unenforceable. It was not issued in the name of the Governor of Tamil Nadu as mandated under Article 166 of the Constitution of India. The impugned letter also contravenes Rule 22(c) of Tamil Nadu State and Subordinate Service Rules, according to which, selection for appointment shall be made in the order of rotation in the roster prescribed. The impugned letter having been issued on the ratio laid down in the judgment in P.S. Ghalaut v. State of Haryana (supra) ignoring the ratio laid down in the judgment of the Supreme Court in State of Bihar and Others Vs. M. Neethi Chandra and Others, It is a well settled law that an order which is not communicated cannot be enforced. The clarification in the impugned letter is against the efficiency of the Public Administration and violative of Article 335 of the Constitution. The letter has been issued without getting the orders from the Chief Minister, who is in charge of P & AR Department and who is the competent authority to dispose of the business of the Government. The impugned letter has been issued under the influence of the then Chairman of TNPSC and such a move is barred under Article 320(4) of the Constitution. The impugned selection procedure resulting placement of a candidate with higher marks at lower rank than a candidate with lesser mark belonging to same community and same sex is violative of Rule of equality guaranteed under Articles 14 and 16 of the Constitution of India. The impugned selection procedure merits the de-merited candidates and de-merits the merited candidates belonging to same sex and same community. The meritorious reserved categories are placed at lower levels, and less meritorious candidates are placed at higher levels. There was no necessity to deviate from the earlier procedure followed. Further, the respondents' reliance upon P.S. Ghalaut v. State of Haryana (supra) is no longer valid as the said judgment has been overruled by the Supreme Court in the judgment Bimlesh Tanwar Vs. State of Haryana and Others, Therefore, reliance placed by the respondents on the ruling of overruled judgment may not be valid. The entire correspondence between the then Chairman of the TNPSC and Secretary to the Government of India would show that both officers have committed fraud on the constitution of India. The age old practice followed in preparation

of selection list prior to 1998 is in consonance with Rule 22(c) of the General Rules and satisfies the rule of equality. Hence, the impugned letter dated 20.8.1998 and the consequential selection lists are liable to be quashed.

12. In the counter affidavit filed by the first respondent in W.P. No. 46868 of 2006, reliance was placed on the judgment of the Supreme Court in

PS. Ghalaut v. State of Haryana (supra) as the reason for arranging the list of seniority. This was sent by the Government vide D.O. Letter dated

20.8.1998 and when vacancies were filled up by TNPSC, they were arranged according to the said circular. Selections were made by the

Commission as per the procedure envisaged under General Rule 22 and as per the guidelines of the State Government. Selection was made during

the year 1997-98 and list was drawn in line with the guidelines as existed then. Overruling of the same arose long thereafter. Serious exception was

also taken to the belated challenge to the select list.

13. Before going into the merits of the case, it must be noted that while selection process had taken place in the year 1997-1999 and the

petitioners were also appointed pursuant to the selection, they have chosen to challenge the arrangement of seniority only in the year 2006 viz.,

after a period of 7 to 8 years. Though the petitioners contended that there was no delay because they were not aware of the select list cannot be

accepted.

14. In this context, it is necessary to refer to Rule 4 of the Tamil Nadu State and Subordinate Service Rules, Part II, General Rules, which is as

follows:

4. Approved candidates - (a) All first appointments to a service or class of category or grade thereof State or Subordinate, whether by direct

recruitment or by recruitment by transfer or by promotion, shall be made by the appointing authority from a list of approved candidates. All

appointments made by transfer, from one class to another class and from one category to another category, in the same service carrying identical

scale of pay shall be made by the appointing authority from a list of approved candidates. Such list shall be prepared in the prescribed manner by

the appointing authority or any other authority empowered in the Special rules in that behalf and shall be displayed in the Notice Board in the

Office of the appointing authority. The list shall also be communicated to all

persons concerned by Registered Post whose names are found in the list as well as to persons senior to the Junior most person included in the list whose names have not been included in the list. Where the candidates in such list are arranged in their order of preference appointments to the service shall be made in such order.

15. A reading of the Rule only makes the selecting authority to publish the list in the Notice Board and communicate the same to all persons

concerned whose names are found in the list as well as to persons senior to the Junior most person included in the list. It is also stated where

candidates in the list are arranged in their order of preference appointments to the service shall be made in that order.

16. Insofar as seniority of a candidate is concerned, it is necessary to refer to Rule 35(a), which is as follows:

35(a) The seniority of a person in a service, class or category or grade shall unless he has been reduced to a lower rank as a punishment be

determined by the rank obtained by him in the list of approved candidates drawn up by the Tamil Nadu Public Service Commission or other

Appointing Authority, as the case may be, subject to the rule of reservation where it applies. The date of commencement of his probation shall be

the date on which he joins duty irrespective of his seniority.

17. Therefore, the petitioners having been selected during the year 1997-1999 and joined service subsequently cannot make any grievance that the

seniority assigned by TNPSC was known to them only after a period of 6 to 7 years and thereafter come to this Court for re-fixation of seniority

on any ground whatsoever.

18. In this context, it is necessary to refer to the judgment of the Supreme Court Shiba Shankar Mohapatra and Others Vs. State of Orissa and

Others, In paragraphs 31,32 and 35, the Supreme Court held as follows:

31. The Tribunal ought to have dismissed the case of Parsuram Sahu only on the ground of delay and the laches, as the applicant approached the

Tribunal at the verge of his retirement and after getting two promotions while the other parties have got three promotions. In the said case, the

private respondents have not considered it proper to contest the case because both of them were likely to superannuate just thereafter on attaining

the age of retirement. Undoubtedly, the said judgment and order has not been

challenged by anybody and it attained finality but that remained the judgment in personam. More so, there is nothing on record to show as to whether the said applicant Parsuram Sahu could ever get any relief from the State Government.

32. The OA filed by Shri Sudhir Chandra Ray, had similar facts as in Parsuram Sahu case. While deciding the said application the Tribunal itself had taken note of the facts that promotions had been made 8-9 years ago prior to issuance of the combined gradation list in 1999. It is evident from the impugned judgment that Shri Sudhir Chandra Ray joined as SI (G) on 4.1.1973. He was promoted to the rank of Inspector with effect from 12.3.1991. We are of the considered opinion that the said application ought to have been rejected by the Tribunal only on the ground of delay and laches. The High Court has also not dealt with this issue, however, it goes to the root of the cause. Such an inordinate delay cannot be ignored particularly when the issue of delay has been pressed in service before this Court.

35. The other original application filed in Sudhir Chandra Ray case was liable to be dismissed only on the ground of delay and laches and we dismiss the same. The High Court has set aside the direction issued by the Tribunal directing the State authorities to prepare the gradation list of SI (St) and SI (G) in accordance with the dates of passing out of the Sub-Inspector training course. This part of the order has not been challenged by anybody and thus, this part of the order has attained finality, therefore, the said part of the order does not require any interference in either of these appeals. So far as the appeals arising out of Writ Petitions Nos. 1233, 2878, 3424 and 5637 of 2006 are concerned, stand allowed to that extent and the remaining part of the direction contained in para 9 of the judgment stands set aside.

19. Therefore, whatever may be the legal justification of the petitioners case, they were guilty of laches and delay. The writ petitions are liable to be dismissed on this short ground.

20. It is also stated that respondents were not correct in following the judgment of the Supreme Court in P.S. Ghalaut v. State of Haryana (supra)

which was overruled. In paragraph 4, the Supreme Court held as follows:

4....It is true that Rule 13 of the Rules envisages that the seniority inter se of

members of the service shall be determined by the length of continuous service on any post in the service provided further that in the case of two or more members appointed by direct recruitment, the order of merit determined by the Commission shall not be disturbed in fixing the seniority. In other words, where the inter se merit has been determined by the Public Service Commission or the Selection Committee, as the case may be, and recommended to the Government for appointment, while accepting the recommendations so made, the Government do require to maintain the order of merit determined by the Public Service Commission/Committee. But the question is whether the merit list prepared gets disturbed, then the roster has been maintained and the placement of the candidates in the order specified in the roster when filled up and is it illegal, arbitrary or unconstitutional. It is seen that when the roster is maintained to give effect to the constitutional policy of reservation to render socio-economic justice to the Sections concerned, respective places assigned to the candidates belonging to them, general candidates, Backward Classes or Scheduled Castes or Scheduled Tribes, as the case may be, the change in the order of merit inevitably gets affected. If the original order of merit prepared by the Public Service Commission or Selection Committee remains unaffected, roster becomes redundant and always remains unimplemented. The reserved candidates always remain at the bottom of the select list unless selected as general candidates in the order of merit. To relieve such injustice and hardship, roster is maintained and vacancies are filled up in the order maintained therein. The placement of candidates shall be to the respective points fixed in the roster. Take for instance Vacancies Nos. 1 and 6, as pointed out in the Chief Secretary's letter have admittedly been reserved for Scheduled Castes. Suppose recruitment was made to fill up ten vacancies, three candidates from Scheduled Castes were selected. The first one as general and second and third were selected on the basis of reserved quota. The question is whether the first candidate will be put in the quota allotted to the Scheduled Castes in the roster. Having been selected as a general candidate, though he is more meritorious than the second and third candidates, he will not get the placement in the roster, reserved for Scheduled Castes i.e. Nos. 1 and 6 points. Consequently candidates Nos. 2 and 3 will get the

placement at Nos. 1 and 6 and the first candidate will get the placement in the order of merit along with the general candidates according to the order of merit maintained by the Selection Committee or the Public Service Commission. He cannot complain that having been selected in the merit, he must be placed in the placement reserved for Scheduled Castes at Point No. 1 in the roster. Equally, though general candidate is more meritorious in the order of merit prepared by the Public Service Commission or the Selection Committee, when the appointments are made and the vacancies are filled up according to the roster, necessarily and inevitably the reserved candidates though less meritorious in the order of merit maintained by the Public Service Commission would occupy the respective places assigned in the roster. Thereby they steal a march over some of the general candidates and get seniority over the general candidates. This scheme is, therefore, constitutional, valid and is not arbitrary.

21. Though the petitioners contended that at the relevant time, the Supreme Court had given judgment in *State of Bihar v. Neethi Chandra* (supra), it must be noted that the judgment related to admission of students in post graduate medical course and that may not have any bearing in fixation of seniority in service.

22. It is only when the Supreme Court reversed the judgment in *P. S. Ghalaut v. State of Haryana* (supra) case in *Bimlesh Tanwar v. State of*

Haryana (supra), it ceased to have any legal validity. In that judgment, the Supreme Court in paragraph 37 disagreed with the view in *P.S. Ghalaut*

v. State of Haryana (supra) case. In that case itself, in paragraph 54, the Supreme Court had observed as follows:

54. Furthermore, it is now well settled that a settled seniority position should not be unsettled. The respondents had already been posted to the post of Additional District Judge. As would appear from the report of the Sub-Committee that the seniority list was published in the year 1992.

Representations were, however, made only in the year 1997 which was rejected by the High Court on 22.8.1997. The writ petition was filed in

March 1998 which was dismissed by reason of the impugned judgment dated 18.8.1999.

23. If the petitioners had kept the issue alive right from the date of selection, the subsequent pronouncement of the Supreme Court would have a

bearing in deciding the matter but the petitioners cannot make a challenge after seeing the subsequent judgment. They came to challenge the seniority long after the issue was decided by the TNPSC. Since the petitioners have filed the writ petitions long after publication of the seniority list and after the decision of the Supreme Court in *Bimlesh Tanwar v. State of Haryana* (supra), this Court is not inclined to entertain the writ petitions though the petitioners had raised some valid points. In view of the above, all the writ petitions will stand dismissed. No costs. Connected miscellaneous petitions are closed.