
(2016) 03 KL CK 0080

In the High Court Of Kerala

Case No : W.P. (C) Nos. 31433 of 2014 (D), 31796, 32039 of 2014, 18384, 18744, 19296, 19317, 22208, 22138 and 22627/2015

Syam K.V. and Others

APPELLANT

Vs

The Kerala State Electricity Board Ltd. and Others

RESPONDENT

Date of Decision : 11-03-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 16, Article 21
General Clauses Act, 1897 — Section 2(39), Section 23, Section 23(5)

Citation : (2016) 4 KLT 23 : (2016) 2 LLN 186

Hon'ble Judges : P.V. Asha, J.

Bench : Single Bench

Advocate : Elvin Peter P.J., T.G. Sunil and K.R. Ganesh, Advocates, for the Appellant; K.S. Anil, SC, for the Respondent

Final Decision : Allowed

Judgement

P.V. Asha, J.—1. All these Writ Petitions relate to appointment to the post of Sub Engineers by direct recruitment in the 10% quota for the employees of the Kerala State Electricity Board ("Board" for short). Hence these Writ Petitions were heard together and being disposed of by this common judgment. The parties and documents referred to in this judgment are as described in W.P.(C) No. 31433/2014, unless otherwise specified.

2. The petitioners in all these Writ Petitions are employees of the Board, who submitted applications pursuant to Ext. P19, a notification published in Kerala gazette dated 31.12.2011 issued by the Kerala Public Service Commission ("PSC" for short) as category No. 487/11, for appointment to the post of Sub Engineers by direct recruitment against vacancies in the 10% departmental quota. The method of appointment was notified as : direct recruitment (through departmental quota from the qualified employees who are working in KSEB). The qualification prescribed was: 1. S.S.L.C or its equivalent as General Educational qualification. Technical qualifications were: Diploma in Electrical Engineering of a

recognized institution after 3 years course of study or Diploma in Electrical and Communication of a recognized institution or a certificate in Electrical Engineering from any one of the recognized technical school mentioned therein with 5 years" service under the K.S.E.B or MGTE/KHTE in Electrical Lights and Power (Higher) with 5 years experience as Second Grade Overseer under the Board. 37 vacancies were notified. The candidates who had completed probation alone were eligible to apply and they were required to obtain and keep a service certificate to prove the length of their service in the respective category from the Board in the format given, to be produced as and when called for. Being fully qualified as per the notification, the petitioners submitted their applications. They appeared in the written/OMR test held on 20.7.2013. On 30.09.2014, PSC published Ext. P20 short list of candidates who were successful in written/OMR test. The register numbers of the petitioners were included in that short list. In Ext. P21 notification in the website PSC notified the dates for verification of certificates of the successful candidates included in the short list. Based on Ext. P21, the petitioners reported in the respective schools for certificate verification. In the Notice Board of the school, where they reported an erratum notification of Ext. P19 was seen pasted as contained in Ext. P22. By this erratum notification dated 18.09.2012, the eligibility of candidates for submitting applications pursuant to the notification dated 31.12.2011 i.e Ext P19, for appointment against the 10% departmental quota from among qualified employees working in the Board was corrected to be read as "Direct recruitment (10% of the vacancies by recruitment of persons who are in the service of the Board possessing the prescribed qualifications for direct recruitment and have put in not less than 3 years" service in the next lower category)". Seeing this notification, the petitioners immediately approached this Court as they were informed that in the absence of 3 years" service in the next lower category, their certificates would not be verified and they would not be considered for the selection.

3. On the basis of the interim orders passed by this Court, the certificate verification/interview in respect of all these petitioners was undertaken, subject to further orders from this Court.

4. The petitioners are challenging this erratum notification as well as the action of the P.S.C in insisting 3 years" service in the next lower category for selection and appointment under the 10% quota. It is pointed out that, the notification Ext. P19 did not contain any prescription regarding qualifying service or any prescription that the candidate should be in the next lower category, as eligibility for selection under the 10% quota. It is the case of the petitioners that the erratum notification was never published in Kerala gazette (extra ordinary) as in the case of the original notification. Such an alteration of qualification was never made known to the applicants, by any process known to law; the PSC cannot change the rules of the game in the midway and exclude candidates like the petitioners. There are serious allegations raised in these Writ Petitions that the issuance of such an erratum notification and the consequent exclusion of the candidates from the zone of consideration are with the ulterior motive to retain a

large number of provisional promotees who are continuing in the post of Sub Engineers for more than a year. It is also pointed out that, in the selections conducted from 1994 onwards, including the one in 2011, the P.S.C did not insist either 3 years service for the applicants or that they should be in the lower category, for the candidates for consideration under the 10% quota. Several candidates who did not have 3 years" service and who were not in the next lower category were appointed in the previous selections conducted and they are continuing in service even now.

5. The qualification and method of appointment to the post of First Grade Overseer (Electrical) [subsequently re-designated as Sub Engineer (Electrical)], was originally fixed as per Ext. P6 Board Order dated 28.12.1967, in consultation with the P.S.C. As per annexure to Ext. P6 order, the qualifications prescribed were as follows:

"1. Direct recruitment: "1)S.S.L.C or its equivalent

2. A. (a) Diploma in Electrical Engineering of a recognized institution after 3 years" study

or

(b) a certificate in Electrical Engineering in any one of the Technical Schools shown below with 5 years" service under the board

(i) xxxxx to (xi)

or

B. Certificate in Electrical Engineering from CNT Institute of Madras (one year course) with 5 years" service

Or

C. M.G.T.E in Electric Light and Power (Higher) with 5 years" service

2. By Promotion from II Grade Overseers in the ratio of 1:1 between direct recruits and promotees

General qualification as above

Technical qualification: Same as above

Or

2. Certificate in Electrical Engineering from CNT Institute, Madras (one year course) with 5 years" service

Or

3. M.G.T.E in Electric Light and Power (Higher) with 5 years" service

Or

4. Minimum experience as II Grade Overseer and lineman for 10 years under the Board possessing exceptional efficiency to be certified by competent authority.

Note: II Grade Overseers possessing the the technical qualification and having sufficient experience in the field as stated above for promotion to the cadre of I Grade Overseer be exempted from the general qualifications prescribed in the rules."

Thus appointments were to be made by direct recruitment and promotion in the ratio of 1:1. In the year 1971, Ext. P13 Board order dated 1.11.1971 was issued incorporating certain amendments to the 1967 order, whereby the 50% quota for direct recruitment was apportioned as 40% for candidates from open market and 10% for diploma-holders in the service of the Board in the categories of Overseer Gr II, Lineman, Clerk, etc. The reason for this amendment as seen from the introductory (1st) paragraph of the order is the following:

"The Board having considered the question of preserving certain percentage of vacancies of 1st Grade Overseer(Electrical) for appointment by direct recruitment of Diplomates in Electrical Engineering who are in the service of the Board, as 2nd Grade Overseer (Electrical), Lineman, Clerk etc, hereby orders, in consultation with the Kerala Public Service Commission, that 10% of the vacancies of 1st Grade Overseer (Electrical), will be reserved for direct recruitment of the diplomates in Electrical Engineering who are in the service of the Board. i.e 40% of the vacancies of 1st Gr Overseer in the Electricity Board will be filled up by direct recruitment of qualified candidates from the open market and 10% of the vacancies by direct recruitment of the Diplomates in Electrical Engineering who are in the service of the Board as 2nd Grade Overseer (Electrical), Lineman, Clerk etc. xxx"

By this order certain alternate qualifications were also added for appointment by promotion. Accordingly, a Note was added to the Annexure to the 1967 order. The provisions in the Note with respect to direct recruitment read as follows:

"Note :(1) (i) : Appointment to the post of 1st Gr. Overseer (Electrical) will be in the ratio of 1:1 between direct recruitment and promotions.

(ii) (a) In making appointment to this post by direct recruitment of diplomates in Electrical Engineering 40% of the vacancies will be filled up by direct recruitment of qualified candidates from open market and 10% of the vacancies by direct recruitment of the diplomates in Electrical Engineering who are in the service of the Board as II Gr Overseer (Electrical); Lineman, Clerk, etc.

(b) In case at any time qualified candidates do not become available for direct recruitment to the above mentioned quota, then the vacancies in this quota will also be filled up by direct recruitment of candidates from open market."

Thus, the 10% quota for Diplomates among Board employees working in various categories was introduced by Ext P13 order dated 1.11.1971, while maintaining the quota for promotion as 50% itself. In the year 1973 another amendment was

brought about, laying down revised qualification for promotion to the category of 1st grade Overseers appointed after 15.8.1971, as given in the annexure thereto i.e as per Ext P14 order dated 16.8.1973. A further amendment was brought about in 1975, as per Ext P15 order dated 18.4.1975, limiting the 10% quota to those in the immediate lower category of Overseer Gr II and Draftsman, that too having three years service, while excluding the categories of lineman, clerks, etc. The reason for this amendment was stated to be the advice tendered by PSC. Note (ii) (a) which was inserted by Ext P13 order of 1.11.1971, was thus substituted by Ext P15 Board order as follows:

"(ii)(a) In making appointment to this post by direct recruitment of diplomates in Electrical Engineering 40% of the vacancies will be filled up by direct recruitment of qualified candidates from open market and 10% of the vacancies by direct recruitment of persons who are in the service of the Board possessing the prescribed qualifications for direct recruitment and have put in 3 years service in the next lower category viz: II Gr Overseer (Electrical) (including Draftsman)"

6. Thereafter in Ext P31 long term settlement dated 25.11.1978, of the Board with recognised employees' union, it was decided to revive the 10% quota to the qualified Board employees in the categories of Overseer Gr II, Lineman, Clerk, etc,. As the PSC declined approval for the amendment based on this settlement, Board approached Govt, and thereafter Govt, after overruling the advice of PSC, brought about further amendment to the annexure by Ext P16 order dated 23.1.1981, enhancing the quota for promotion to 60% and reducing the quota for direct recruitment to 40%. 30% out of the 40% was earmarked for candidates from open market and 10% for qualified Board employees. In Ext. P16, it was ordered: "the method of appointment/recruitment prescribed in the Board order read as first paper above stand amended as specified in the annexure.

The provisions in the left hand side of annexure read as follows:

"40% of the vacancies will be filled up by direct recruitment and the rest by promotion.

1. All the vacancies of I Grade Overseer that will occur immediately on the implementation of revised work norms will be filled up in the following manner in relaxation of recruitment rules.

1. 80% by promotion from eligible II Grade Overseers;

2.) 20% from workmen in the lower categories possessing Degree/Diploma in Electrical Engineering based on length of service in the Board after acquisition of Diploma/Graduation and with minimum 3 years of service in the Board.

Vacancies arising thereafter will be filled up in the following manner

(i) 30% by direct recruitment through Public Service Commission;

(ii) 10% by appointment through Public Service Commission from among

qualified Board employees;

(iii) 60% by promotion from among eligible Second Grade Overseers."

Qualification was provided on the right hand side of the Annexure.

It is the case of the petitioners that, consequent to the long term settlement of 1978, the rules governing recruitment to the post of Overseer Grade I are those contained in Ext. P16 order of 1981 and not the 1975 order i.e the quota of 10% is revived and restored to the qualified Board employees without insisting any minimum qualifying service that too in the next lower category. Pointing out the provisions in the Ext P31 long term settlement of 1978, petitioners submit that the method of appointment including the categories of employees eligible for appointment under the 10% quota was restored to qualified Board employees, with the approval of Govt, overruling the advice of PSC, revising the orders Exts.P14 and P15. Ext P16 provides for the manner in which the vacancies which arise on account of the revised work norms, are to be filled up: 80% of such vacancies by promotion of II Gr overseers and 20% by promotion of qualified lower grade employees with Diploma/Degree in Engineering and 3 years service. In respect of the vacancies arising thereafter the apportionment prescribed is: 30% by direct recruitment from open market; 10% by direct recruitment from among the qualified Board employees and 60% by promotion. Therefore it is the case of the petitioners that 3 years service was no longer required for appointment under the 10% quota. It is also pointed out that the what was prescribed in 1975 order-Ext P15 was 3 years service in the next lower category of Overseer Gr II and Draftsman. The substitution of that provision is only by qualified Board employees without mentioning any minimum service. There is no Board order where 3 years service is separately prescribed as qualification. Thus Ext P15 order of 1971 is superseded by Ext P16.

7. The PSC filed a counter affidavit stating that the applications of the petitioners were rejected in terms of the erratum notification; the erratum notification was published as early as on 18.09.2012, whereas the Writ Petitions were filed only in November, 2014 and thereafter; these Original applications were therefore liable to be dismissed on the ground of delay itself; they cannot challenge the erratum notification independent of the original notification on the basis of which they submitted applications; It only clarified earlier notification with reference to the qualification prescribed for the post. According to the PSC, the 3 years service in next lower category, prescribed in Ext. P15, i.e by the amendment effected on 18.4.1975 is not taken away by way of any of the subsequent Board orders; amendment brought about by Ext P16 Board order of 23.1.1981, altered only the method of appointment and not qualification. Therefore, the 3 years service in next lower category prescribed in Ext. P15 stands and the petitioners who do not have the 3 years service in the lower category are not qualified.

8. The Board has filed a statement, according to which, the qualification prescribed for appointment in the 10% quota earmarked for service candidates"

insists 3 years service in the next lower category viz. Second Grade Overseer (Electrical) or Draftsman, as prescribed in Ext. P15. Thus those who have completed 3 years service in the next lower category alone are eligible for appointment under the 10% quota. According to them, revision was effected only with respect to the method of appointment to the post of Grade I Overseer. It is further stated that the method of appointment/recruitment to the cadre of First Grade Overseer (Electrical) was revised as per order dated 23.01.1981 on the basis of approval of Government, in compliance with the provisions of the long term settlement dated 27.11.1978, overruling the advice of the PSC. At the same time, the qualification of not less than 3 years" service in the next lower category, viz. Second Grade Overseer (Electrical) including Draftsman continue to hold the field.

9. Along with the reply affidavit, petitioners have produced Ext. P27 Gazette notification issued by the PSC on 21.06.1994, inviting applications for direct recruitment to the post of Sub Engineer (Electrical). Note 2 below clause 10 therein provided that, 10% of the vacancies would be filled up by direct recruitment from among the qualified employees as laid down in the Board order dated 23.1.81 (ie. Ext. P16). In this notification also, there was no prescription as to completion of 3 years. Ext. P28 is the copy of another notification of PSC, issued in the year 2003 as category No. 176 of 2003 for selection to the very same post. In this notification also, there was no stipulation regarding the completion of 3 years in any particular category as the eligibility criteria for appointment in 10% quota. Ext. P29 is the ranked list of candidates published by PSC on the basis of Ext. P28 notification of 2003. Referring to the case of one Sri Murugan, who was rank No. 26 in Ext P29 ranked list, the petitioners submit that he was not having 3 years service in the next lower category, when he submitted application, based on Ext P28. The petitioners have produced the incumbency details of Sri. Murugan, as maintained by the KSEB as Ext P30, which provides for all his service particulars. Ext P30 shows that he entered service in the Board as Mazdoor on 11.1.1997 and while working as such he was appointed as Lineman Grade II on 21.7.1998; He became Lineman Grade I on 16.3.2001 and worked as such till 23.2.2008 i.e till his appointment as Sub Engineer. Therefore it is submitted that at the time of his application pursuant to Ext P28 notification of 2003, he had not completed 3 years" service even as Lineman, which indicates that 3 years" service in the next lower category was not insisted after Ext P16 Board order.

10. The long term settlement of 2000 also was made available across the Bar pointing out that, on enforcement of each settlement, the rules are being amended. The petitioners have further referred to the Board orders Exts.P32 and P33, issued by the Board pursuant to directions of this court in certain writ petitions, in order to show the stand adopted by the Board that the 10% quota set apart was for the qualified Board employees. Ext. P32 dated 26.02.2009 is one issued pursuant to judgment in Writ Petition No. 6088/2009. It was stated that appointment/recruitment/promotion to the post of Sub Engineer (Electrical)

in K.S.E.B is governed by the terms and conditions of Board Order referring to the 10% quota. In Ext. P33 order dated 11.02.2010, though in a different context, and it was stated therein that diploma holders have the chance for selection for the post of Sub Engineer in the 10% quota and those having degree in Engineering have chance of getting chance of Assistant Engineer (Electrical). It was found therein that the method of appointment to the post of Sub Engineer, which was originally designated as First Grade Overseer is governed by the Board order dated 23.1.1981, according to which, 30% is earmarked for direct recruitment through PSC 10% by appointment through PSC and 60% by promotion from any eligible Second Grade Overseer. This order was issued while disposing of a complaint that applications of Overseer (Electrical) completed 5 years experience alone were being forwarded for appointment in the 10% quota. In view of those orders also, it is pointed out that the Board did never have a case that 3 years service was necessary for appointment in this quota.

11. The post of Overseer Grade I referred to in Ext. P31 settlement was later re-designated as Sub Engineer. In Ext. P31 it was provided that:

"1) all the vacancies of Overseer Gr.I (subsequently re-designated as Sub Engineer) that will occur immediately on implementation of the revised work norms were to be filled up by relaxing the recruitment rules filling up 80% of the vacancies by promotion of eligible Overseer Gr.II and 20% from workers in lower categories possessing degree/diploma in Electrical Engineering based on length of service in the Board after acquisition of Diploma/Graduation and have minimum 3 years" service in the Board

2) The vacancies arising thereafter were to be filled up as : 30% by direct recruitment through PSC; 10% by appointment through PSC from among qualified Board employees and 60% by promotion from among eligible Second Grade Overseers."

12. It is the common case of the petitioners that the actual reason behind the action of the PSC as well as the Board to insist 3 years" service in next lower category by issuing the erratum notification is to retain the temporary hands who are continuing in the Board by reducing the number of candidates under the direct recruitment.

13. The petitioners in W.P(c) No. 19317/2015 have produced Ext. P11 circular dated 24.11.1999 issued by the Board in which the qualification for appointment to the post of Sub Engineers in the 10% quota was shown as pass in SSLC or its equivalent, Diploma in Electrical Engineering from a recognised institution after 3 years" course of study or Diploma in Electronics and Communication of a recognised institution. Ext. P11 was issued for circulation in all the offices under the Board directing all heads of offices to obtain and forward applications from the employees drawing pay of and below the scale of pay of Sub Engineers who have completed the probation and possessing the said qualification. It is pointed

out that, no experience or minimum service was prescribed therein and all the employees below the post of Sub Engineer were stated to be eligible for submitting applications for the said appointment. According to them, the Board was not insisting any experience for appointments to the post of Assistant Engineer in the 10% quota of the Board employees, as can be seen from Ext. P13 issued on 29.11.2011. In Ext. P14 notification dated 7.8.2013 for selection and appointment to the post of Meter Readers or for appointment to the post of Lower Division Typist in the 5% quota from among Board employees, no experience is insisted. They have produced Ext. P16 order of the Board issued on 20.02.2014, by which the Board filled up the vacancies of Sub Engineers earmarked for in-service quota candidates by appointing Second Grade Overseers who were possessing the qualifications to act as Sub Engineers (Electrical) trainees and they are now permitted to occupy the post of Sub Engineers until regular hands were appointed through PSC. It is further stated that, more than 458 Second Grade Overseers were thus permitted to work in the post of Sub Engineers in the 10% quota vacancies initially for a period of one year, which was extended by Ext. P17 order on 19.03.2015 for a further period of one year.

14. The petitioners in W.P(c) No. 222081/2015 have filed I.A No. 17530/2015 seeking directions to the PSC not to advise any candidate from the rank list for the post of Sub Engineer (Electrical) by direct recruitment from open market brought into force w.e.f 1.12.2015, before publishing the rank list of departmental candidates. This I.A was filed on 3.12.2015 on coming to know that the rank list of the candidates for appointment by direct recruitment from open merit was published on 1.12.2015. It is pointed out that when selections are made for direct recruitment from different sources as in the present case, it is the usual practice that rank lists are published simultaneously and advices are also made simultaneously/with reference to the vacancies in the respective quota so that the interest of the candidates from either list can be protected as the seniority is determined on the basis of date of advice. But in this case, it is pointed out that the PSC has advised 303 candidates from the list of open market, on the basis of the selection conducted on the very same day pursuant to the notification published on the very same day as in the case of the candidates under the 10% quota. The earlier advice of those candidates will adversely affect the candidates who have already undergone the process of selection for appointment under the 10% quota, as the candidates from open market advised on an earlier date will steal a march over those in the 10% quota, even after undergoing the very same process of selection at the very same time. It is pointed out that the advices were made, subsequent to the filing of the I.A and at a time when the Writ Petition was heard in part and was adjourned for hearing of the PSC, causing serious prejudice to the candidates in 10% quota. It is further pointed out that the illegal method adopted by the PSC as well as the Board deviating from the prescribed norms and practice, after commencement of the process of selection by issuing an erratum notification

insisting 3 years" service in next lower category, which was never insisted subsequent to the issuance of Ext. P16 Board order of 1981, is evident from the notifications issued by the PSC and the circulars issued by the Board thereafter.

15. I heard the learned Senior Counsel Smt. V.P. Seemandini appearing for the petitioners in W.P(c) Nos. 19317/2015, 22138/2015 and 22208/2015, Sri Elvin Peter appearing for the petitioners in W.P (c) No. 31433/2014 as well as the learned counsel appearing for the petitioners in the other Writ Petitions, Sri P.C. Sasidharan the learned Standing Counsel for the PSC and Sri K.S. Anil appearing for the Electricity Board.

16. Smt. V.P. Seemandini pointed out that the PSC has not filed any counter affidavit in answer to the contentions raised by the petitioners in W.P(c) No. 19317/2015 that the erratum notification was not published in Gazette. Relying on Section 23 of the General Clauses Act, 1897, it was argued that the PSC ought to have published the notification in the extraordinary gazette of Kerala, as in the case of the original notification so that the candidates would have come to know about the notification. It was stated that notifications which are not published in the Gazette will not have the effect of a valid notification and in this case the candidates like the petitioners came to know about the erratum notification only when they reported in the schools for verification of their certificates on the basis of their inclusion in the short list, where it was seen in the notice board of the school. Relying on the judgments in R.K.V. Motors & Timbers (P) Ltd. V Regional Transport Officer: , 1982 KLT 166: AIR 1982 Ker. 156 it was asserted the erratum notification should have been published in the gazette published by Govt.

17. The learned Senior Counsel further argued that the PSC has changed the rule of the game in the midst of the process of selection, which cannot be permitted in the light of the judgments in K. Manjusree v. State of A.P [, (2008) 3 SCC 512], Yogesh Yadav v. Union of India & Ors. [(JT 2013 SC 178] and Duddilla Srinivasa Sharma & Ors. v. V. Chrysolite [, (2013) 16 SCC 702]. The learned Senior Counsel, relied on the judgment in Sobha Menon v. P.S.C [, 1994 (1) KLT 986] wherein it was held that power under Rule 13 (b) (i) has to be exercised at the time of inviting application and cannot be exercised during the process of selection. The judgments of the apex court in Hariharan v. Balachandran Nair [, 2000 (3) KLT 585 (SC)] and State of Jammu and Kashmir v. Mrs. Raj Dulari Razdan and others [, (1979) 1 SCC 461], were relied on to assert the competence of the State Government to overrule the advice of PSC, based on which Ext P16 was issued.

18. Referring to the Board Orders Sri. Elvin Peter pointed out that 3 years" service in next lower category was not required after the long term settlement of 1978, which resulted in Ext P16. Referring to Ext P27 to P33, notifications issued by the PSC for selection under the 10% quota, right from 1994 upto 2011 and the details of those appointed thereto and the proceedings of the Board, it was argued that the deviation in the present selection insisting 3 years service in next

lower category, for the first time after the issuance of Ext P16, is only to favour the provisional promotees. It was pointed out that neither the PSC nor the Board answer their contentions with respect to the earlier selections. Pointing out that the PSC did not choose to produce the notification if any published in gazette, it was contended that the plea of the PSC that it was published, cannot be accepted in the light of the judgment of the Apex Court in *Bharat Singh & others V State of Haryana & others* : , AIR 1988 S.C 2181.

19. The contention of Sri P.C. Sasidharan appearing for the PSC and that of Sri K.S. Anil appearing for the Board is that Ext P16 has not changed the qualification viz. 3 years" service in the next lower category, for appointment in 10% quota; amendment is only to method of appointment. The learned Standing Counsel for the PSC vehemently opposed the contentions raised by the petitioners with reference to the averments in the reply affidavit, pointing out that the contents of the reply affidavit do not form part of the pleadings as the petitioners have not incorporated the contents therein by amending the Writ Petition and therefore, the PSC is not liable to answer such contentions. Sri Elvin Peter opposed this contention relying on the judgment of the Apex Court in *Sri-la Sri Subramania Desika Gnanasambanda Pandarasannidi v. State of Madras*: , AIR 1965 SC 1578.

20. The learned Standing Counsel also pointed out that the judgment in W.P(c) No. 4564/2012 relied on by the petitioners (Ext. P23 in W.P (c) No. 31433/2014) was set aside by a Division Bench in its judgment dated 13.8.2013 in W.A No. 1913/2014 filed by the PSC and after referring to all the Board orders right from 1967 it was held therein that amendments brought to 1967 order by the orders issued in 1971 and thereafter were to be considered, which provided for the qualifications.

21. Having heard the contentions raised on either side, I find it necessary to have a look at each of the Board orders starting from 1967 and the effect of the amendments carried out from time to time with respect to the appointment to the 10% quota to the post of First Grade Overseer (Electrical) re-designated as Sub Engineer (Electrical) in the Board, by direct recruitment. According to PSC and the Board, the amendment effected by way of Ext P16 was only with respect to the method of appointment; 3 years service in the next lower category is the qualification prescribed and there is no amendment to the qualification. It is therefore necessary to examine the manner in which the 3 years" service was introduced for appointment in 10% quota, for which a careful analysis of the provisions with respect to the same in each of the relevant Board Orders is required, which can be seen from the following tables:

The amendments brought about in 1981, pursuant to Ext P31 long term settlement of 1975, the 10% quota was restored to qualified board employees in the following manner.

22. It is therefore clear that the 10% quota was introduced in 1971, as per Ext

P13 order, providing an opportunity to all the technically qualified hands in the Board like Overseer Gr II (Electrical), Linemen, Clerks, etc. for appointment as Overseer Gr I (Electrical). But when Ext. P13 was amended, based on advice by PSC, by Ext. P15 in 1975, the 10% quota was confined to the Overseer Gr II/ Draftsman in the next lower category with 3 years" service. But it is relevant to note the requirement therein- i.e in Ext P15 was: 3 years service in the next lower grade category, viz, Second Grade Overseer including Draftsman whereby the employees in the other categories like Lineman, Clerk, etc. provided in Ext. P13 were excluded. In Ext P16, the what was provided with respect to the 10% quota was : by appointment through PSC from qualified Board employees. 3 years" service was never provided against the column for qualification. When the the 3 years" service was prescribed for the 1st time by P15 order it was qualified by the expressions "in the next lower category viz. II Gr Overseer including Draftsman". There was no separate provision providing 3 years" service independent of those qualifying words or expressions or in the column for qualification in the Annexure. Therefore when the 10% quota was kept open for Board employees without confining it to the next lower category, by Ext P31 settlement and in Ext P16 in 1981, the respondents cannot be heard to contend that the the Board employees should have 3 years service in the next lower category, in order to be eligible for appointment in 10% quota, thereby defeating the very purpose and intent of that amendment in terms of Ext P31 settlement, which is clear from a reading of the 1st paragraph of the order Ext P13 and the provisions in clause 5 (b) under Article VIII (Appointment and allied matters;) of the memorandum of Ext P31 -long term settlement of the Board with recognized unions, as seen in page 61, therein. Ext P16 Board order refers to another order issued by the Board on 16.8.1973 and G.O(Ms) 210/80/PW&E dt. 4.12.1980. Relevant portion of this Board order reads as follows:

"Government has in the Government order read as second paper above communicated their approval to the changes effected by the Board in the method of appointment/recruitment to the cadre of I Grade Overseer (Elec) in compliance with the provisions of the long term settlement with the recognized unions on 25.11.78, overruling the advice of the Public Service Commission.

xxxxx"

24. Thus it is seen that there is no separate provision which insists completion of 3 years service as a qualification for appointment under the 10% quota. Therefore it cannot be said that only those employees who are having 3 years service in the next lower category can apply for the selection to the post of Sub Engineers. It is relevant to note that, in the annexure to Ext. P16, while providing for the method of appointment to the vacancies which were arising immediately on implementation of revised work norms, it was specifically provided in respect of the 20% that they should have minimum 3 years service in the lower categories and should possess Degree/Diploma in Electrical Engineering. On the other hand, when it came to the mode of filling up of the

vacancies arising thereafter, it did not mention that the employees should have 3 years service. On the other hand, it only provided :10% by appointment through PSC from among the qualified Board employees. Neither the PSC nor the Board can insist that the employees can be said to be qualified only if they are having 3 years service in so far as there is no Board order which prescribes 3 years service for the Board employees in the lower categories separately, apart from the order 1971 which specifically confines the quota to the Overseer Gr.II with 3 years service.

25. There is no provision in the long term settlement or in the Board Orders which insist for any minimum qualifying service for the employees in various categories in the Board for appointment in the 10% quota. There is no provision in Ext P16 which confines the 10% quota to those in the next lower category also. Therefore, the averments in the Writ Petition that in none of the earlier notifications starting from 1994 to 2011, this qualification of 3 years experience was insisted as well as the fact that innumerable temporary promotees are occupying the post of Sub Engineers, will only lead to the conclusion that there is substance in the contentions raised by the petitioners that the deviation in the present selection starting from the issuance of erratum notification is on extraneous considerations, which is vitiated by malice in law. The action of the Board which did not choose to answer any of such contentions raised by the petitioners, by filing only a statement and not a counter affidavit, also shows their indifference which also is equally vitiated by malice in law. The condition prescribed in the erratum notification is therefore unwarranted and illegal.

26. The contention of the petitioners that notification was not published in the Kerala Gazette as done in the case of the original notification cannot be brushed aside in so far as the PSC did not choose to file any counter affidavit in W.P(c) No. 19317/2015, where specific contentions to that effect were raised. It did not choose to produce the gazette notification along with the counter affidavit filed in W.P(C) No. 31433/2014 or even to make the same available at the time of hearing. There was no reason for not producing the Gazette notification, if any containing the erratum notification. This is also one of the factors which indicates that entire process of selection at least from the stage of erratum notification. PSC did not even state the date of the gazette which cannot in any circumstance be the same as the date on which PSC issued it. Therefore in the light of the judgment of the apex court in *Bharat Singh v. State of Haryana*, , (1988) 4 SCC 534, it can only be concluded that there was no such publication. In that case, the apex court, seeing that no material was produced by the petitioner in support of his plea in the writ petition challenging the proceedings for land acquisition, held in para 13 as follows:

"In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are

not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. So, the point that has been raised before us by the appellants is not entertainable."

27. It was contended that the issue arising in this case is covered by the judgment dated 13.8.2015, of the Division Bench in W.A. 1913/2014. I am unable to accept this contention,, because the issue which arose for consideration therein was whether the 10% quota was exclusively for diploma holders or in other words whether the certificate holders were outside the purview of 10% quota. On the other hand the issue arising in this case is whether 3 years service in the next lower category is a requisite qualification for appointment under the 10% quota. It is trite law that the judgment of a court should not be interpreted as a statute; the meaning of the words used in a judgment must be found out from the backdrop of the fact of each case. What would be binding is the ratio of the decision, which is to be arrived at upon entering into the merit of the issues involved in the case.

28. Yet another contention of Sri. P.C. Sasidharan on behalf of the PSC was that the averments pleaded and materials produced in the reply affidavit cannot be considered by this court, except after such pleadings are incorporated in the writ petition by way of amendment. But I find that the reply affidavit along with Ext P27 to 34 was filed as early as on 6.7.2015, with copy to respondents i.e even before the interim order was passed by this court directing the PSC to allow the petitioners to appear in the interview provisionally. The fact that respondents had sufficient notice of the same is evident from the interim order passed by this court on 8.7.2015, which refers to the Exts.P27 and P28. As rightly contended by Sri. Elvin Peter, the objection raised is only to be repelled in the light of the following observations of the apex court in para 17 of its judgment, Sri-la Sri Subramania Desika Gnanasambanda Pandarasannidi v. State of Madras: , AIR 1965 SC 1578.:

"17. xxx The first reason, as we have already indicated, is that the High Court thought that the plea in question had not been raised by the appellant in his writ petition. This reason is no doubt, technically right in the sense that this plea was not mentioned in the first affidavit filed by the appellant in support of his petition; but in the affidavit-in-rejoinder filed by the appellant, this plea has been expressly taken. This is not disputed by Mr. Chetty, and so, when the matter was argued before the High Court, the respondents had full notice of the fact that one of the grounds on which the appellant challenged the validity of the impugned Order was that he had not been given a chance to show cause why the said

notification should not be issued. We are, therefore, satisfied that the High Court was in error in assuming that the ground in question had not been taken at any stage by the appellant before the matter was argued before the High Court."

29. PSC has raised objections to the effect that there was delay on the part of the candidates in approaching the court saying that the erratum notification Ext P22 was issued on 18.9.2012 and the writ petition was filed on 24.11.14. But, in order to challenge the notification, the PSC should have made it known to public as done in the case of the original notification by publication in the Kerala Gazette. The statement of PSC that it was published in official gazette cannot be accepted for many reasons. First of all the gazette is not produced. Publication if any in the official gazette of PSC is not sufficient. The date on which the PSC issues the notification can never be the same for publication in the gazette. Even assuming that there was any such publication in the Kerala Gazette, the delay if any cannot defeat the petitioners, as they have approached this court before the finalisation of the selection. The respondents cannot be permitted to conduct the selection contrary to rules on the technical ground of delay. Section 23(5) of the General Clauses Act, 1897 provides that the publication in the Official Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye-laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made. Under Section 2(39) official gazette is defined as the State Gazette. Therefore the publication of the erratum notification in the State Gazette would have been a conclusive proof for its publication. The necessity of such publications was explained in detail in the judgment of Full Bench of this court in *R.K.V. Motors & Timbers (P) Ltd. V Regional Transport Officer*;, 1982 KLT 166. The principles laid down in para 65 in the decision of the apex court in *Akhil Bhartiya Upbhokta Congress v. State of M.P.*, , (2011) 5 SCC 29 : is also applicable to the PSC, which deals with public appointments. It was held that every action/decision of the State and/or its agencies/instrumentalities must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method. There the decision of the Government of Madhya Pradesh to allot 20 acres land to late Shri Kushabhau Thakre Memorial Trust without advertisement and without publication, was under challenge. At any rate PSC is not at all justified in raising the objection as to delay, as long as there is no such publication, which the PSC, being a constitutional body reposed with the bounden duty to select the meritorious candidates to the services of the State and its agencies, ought to have resorted to, when the procedure adopted by them affects the future and career of the candidates including the un-employed youth as well as departmental hands aspiring for appointment in higher posts under the State.

30. As I have already found that the erratum notification is illegal, I am not going into the contentions regarding the change in the rules of the game; as to competence of govt to overrule the advice of PSC, etc.

31. Having found that the erratum notification itself was baseless, it is relevant to note the subsequent developments in respect of the selection. The usual practice of PSC whenever a process of selection is undertaken for recruitment to a post from different sources/methods, is to publish all the ranked lists under the different sources/methods of appointment simultaneously and to make advice also from those lists simultaneously so that one set of candidates will not be put to prejudice. This practice was being followed in the interests of all the candidates included in the rank lists, because the seniority of candidates appointed by direct recruitment is governed by Rule 27(c) of KS&SSR with effect from the date of advice by the PSC. When PSC issued notification for selection under 10% quota, there was another notification for selection and appointment under the 30% quota for direct recruitment for open market. All the candidates underwent the same process of selection, as usual. When the eligibility of candidates like petitioners for inclusion in the rank list and for appointment under the 10% quota was under challenge in these writ petitions, it is seen that on 1.12.2015, the PSC published the ranked list of the candidates for direct recruitment from open market based on the very same test conducted on the very same day. On 1.2.2016, they advised 303 candidates, at a time when these writ petitions were pending consideration after hearing the petitioners, that too, when petitions seeking stay of advice from the other list of candidates were pending consideration. This has caused prejudice to candidates. The action of the PSC and that of the Board has resulted in negation of equality before law and equality of opportunity in matters relating to employment under the State in gross violation of the fundamental rights of the eligible candidates in the 10% quota, guaranteed under Article 14, 16 and 21 of the Constitution of India. Equity and fairness demands that the Board has to issue appropriate orders to undo the injustice caused to the candidates who were liable to be advised and appointed against the vacancies in the 10% quota along with those in the 30% quota for direct recruitment, but for the issuance of the illegal erratum notification with due support of the Board. The legitimate right of the candidates in the 10% quota is liable to be protected.

32. The petitioners herein have appeared in the interview provisionally on the basis of the interim order passed by this court. Now that I have found that the entire action right from the issuance of the erratum notification is illegal, it is declared that the Board employees like petitioners who applied for the 10% quota are eligible to be considered for selection for appointment as Sub Engineers under the 10% quota provided they are having the educational and technical qualifications without insisting any qualifying service in the next lower category of Sub Engineer, as contained in the erratum notification. PSC will treat their applications and participation in the process of selection on the basis of the interim orders passed by this court as regular and proceed to prepare and publish the ranked list accordingly without any further delay.

33. In these circumstances, I set aside the erratum notification Ext. P22 dated 18.09.2012 and the orders rejecting the applications of the petitioners and direct

the PSC to prepare and publish the rank list for appointment to the post of Sub Engineer (Electrical) in the KSEB, with reference to the eligibility of candidates as per the original notification Ext P19 dated 31.12.2011 i.e without insisting the conditions in Ext P22 erratum notification without any further delay.

34. It is made clear that, candidates who are getting advice and appointment on the basis of such inclusion in the ranked list based on Ext P19 notification will be free to work out their remedies, for seniority and other benefits if any available, in appropriate proceedings.

With the above directions, these Writ Petitions are allowed.