

DR. ASWATHY R. S. KARTHIKA & ORS.

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v.

DR. ARCHANA M. & ORS.

(Civil Appeal No. 2796 of 2020)

JULY 29, 2020

**[L. NAGESWARA RAO, HEMANT GUPTA AND
S. RAVINDRA BHAT, JJ.]**

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Service Law:

Reservation – Shortfall in – Adjustment of – ‘Hindu Nadar Community’ included in ‘Other Backward Classes’ in the State of Kerala by Circular dated 21.11.2009 – The decision was incorporated in State Subordinate Service Rules by Notification dated 3.8.2010 with retrospective effect from 21.11.2009 providing 1% reservation to Hindu Nadar Community – Public Service Commission by a Circular dated 31.8.2010 provided that the shortfall in reservation in the advices made during the period from 21.11.2009 to 31.8.2010 shall be adjusted in the future vacancies without disturbing the advices already made – In Annexure attached to Part II of Kerala State and Subordinate Service Rules, 1958, Explanation II was inserted whereby it was provided that shortfall in reservation occurred in the lists published by the Commission on or after 21.11.2009 during the period from 21.11.2009 till the date of publication of amendment to the Rules, to be adjusted in future vacancies – Applications invited for appointment to the post of Medical Officer (Homeo) by Notification dated 15.12.2012 – Pursuant to the Notification dated 15.12.2012, rank list published on 3.8.2012 – Appellants-candidates appearing at S. Nos. 3, 4, 5 and 6 of the list of Hindu Nadar Community – Application by appellants before State Administrative Tribunal taking the plea that shortfall in reservation of Hindu Nadar Community in the advices made by Service Commission on or after 21.11.2009 was required to be made good in future vacancies without disturbing the advices already made – Application was allowed by the Tribunal – High Court set aside the order of Tribunal – Appeal to Supreme Court – Held: The posts available for Hindu Nadar Community after 21.11.2009 are required to be provided to them – The Service Commission has rightly admitted that r.15(a) of Service Rules is inapplicable as it is neither a case of temporary passing over of

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- A *vacancies nor the case of non-availability of candidates – The rank list which was operative till 03.10.2013 did not reflect the policy of reservation – Order of the Tribunal is restored.*

Allowing the appeals, the Court

- B **HELD: 1. The Circular of the Commission and the Explanation II inserted by amending the Rules, provide that the shortfall in reservation in the advices made during the period from 21.11.2009 to the date of issue of the Circular were to be adjusted in future vacancies without disturbing the advices already made. It did not mean that the vacancies arising after the amendment were not required to be filled up as per the merit in the rank list. The posts available for the Hindu Nadar community after 21.11.2009 are required to be provided to them. The Commission has rightly admitted in the written submissions that Rule 15(a) of the Kerala State and Subordinate Service Rules, 1958 is inapplicable in the present case, as it is not a case of temporary passing over of vacancies nor the case of non-availability of candidates. Furthermore, the rank list was operative till 3.10.2013 and had to reflect the policy of reservation, but did not do so. [Para 22][965-E-G]**

- E **2. The entire submission on behalf of the private respondents are misconceived and untenable. The appellants are not claiming any right whatsoever on the basis of the rank list published on 27.7.2009. The claim of their appointment is in respect of the vacancies which arose after 21.11.2009 when the Rules were amended and reservations for the Hindu Nadar community was provided. The Commission has not taken into consideration, posts which have fallen vacant from the date of the amendment of the Rules till the date of the appointments advised from the rank list dated 3.8.2015. The Commission has advised only one candidate from the Hindu Nadar Community to be appointed following Roster Point No. 60 out of the 133 candidates who were advised for appointment. It did not take into consideration the vacancies which had arisen after the amendment of the Rules. Such vacancies could have been filled up only on the basis of rank list published in the year 2015. [Para 23][965-G-H; 966-A-B]**

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3. Therefore, the argument of delay or waiver has no basis either factually or legally, as the cause to invoke jurisdiction of the Tribunal arose when candidates were not appointed on the basis of rank list issued in 2015. Similarly, the argument that there is no challenge to the Circular dated 31.8.2010 is again misconceived. Explanation II is applicable only in respect of the advice given by the Commission from the rank list published on or after 21.11.2009 till the Rules were statutorily amended and notified. It is an admitted fact that no advice was issued by the Commission for appointing any candidate nor was any rank list published during the period specified by Explanation II. The Circular dated 31.8.2010, issued by the Commission is on the lines of Explanation II but neither such explanation nor the Circular of the Commission, deals with the shortfall of vacancies arising after the amendment of the Rules till the publication of the rank list on 03.08.2015. [Para 24][966-C-E]

P.S. Gopinathan v. State of Kerala and Others (2008) 7 SCC 70 : [2008] 8 SCR 65; *Dr. G. Sarana v. University of Lucknow and Others* (1976) 3 SCC 585 : [1977] 1 SCR 64; *Inderpreet Singh Kahlon and Others v. State of Punjab and Others* (2006) 11 SCC 356 : [2006] 1 Suppl. SCR 772 – held inapplicable.

Case Law Reference

[2008] 8 SCR 65	held inapplicable	Para 14	
[1977] 1 SCR 64	held inapplicable	Para 14	
[2006] 1 Suppl. SCR 772	held inapplicable	Para 14	F

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2796 of 2020.

From the Judgment and Order dated 28.06.2019 of the High Court of Kerala at Ernakulam in O.P. (KAT) No. 384 of 2018.

With

C.A. No. 2797/2020

Dr. K.P. Kylasanatha Pillay, Nidhesh Gupta, Sr. Advs., A. Venayagam Balan, Ms. V. S. Lakshmi, Ram Lal Roy, Karthik S.D.,

- A John Mathew, Nishe Rajen Shonker, Mrs. Anu K Joy, Alim Anvar and Ms. Nidhi, Advs. for the appearing parties.

The Judgment of the Court was delivered by

HEMANT GUPTA, J.

- B 1. The four appellants in these two appeals before us, were the original applicants before the Kerala Administrative Tribunal¹ who invoked its jurisdiction under Section 19 of the Administrative Tribunal Act, 1985. The Tribunal allowed the Original Application² filed by the appellants on 15th November, 2017 directing the Kerala Public Service Commission³ to make the shortfall in reservations from the succeeding rank list. It is the said order and the order passed in review by the Tribunal on 15th October, 2018 which were challenged before the High Court by the private respondents herein. The High Court set aside the order of the Tribunal and dismissed the OA filed by the appellants.

- D 2. The appellants belonged to the Hindu Nadar community, a category included in the Other Backward Classes⁴ in the State of Kerala vide Circular dated 21.11.2009. This decision was later incorporated in the Kerala State and Subordinate Service Rules, 1958⁵ vide Gazette Notification dated 3.8.2010 but with retrospective effect from 21.11.2009 and 1% reservation was provided to the Hindu Nadar Community. Thereafter, a Notification was published by the Commission on 15.12.2012, inviting applications for the post of Medical Officer (Homeo) in the Homeopathy Department of the Government of Kerala. Pursuant to such Notification, a rank list was published on 3.8.2015 wherein, the name of the appellants appeared at Sl. Nos. 3, 4, 5 and 6 in the list of Hindu Nadar community.

- F 3. Before we advert to the respective contentions of the learned counsel for the parties, relevant extracts from the Rules need to be reproduced. The Rules are in two parts. Rule 15 and the Annexure attached to Part II of the Rules are relevant for the purpose of the present appeals. Rule 15, reads thus:

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¹ for short, 'Tribunal'

² for short, 'OA'

³ for short, 'Commission'

⁴ for short, 'OBC'

H ⁵ for short, 'Rules'

“15 (a) The integrated cycle combining the rotation in clause (c) of rule 14 and the sub-rotation in sub-rule (2) of rule 17 shall be as specified in the Annexure to this Part. Notwithstanding anything contained in any other provisions of these rules or in the Special Rules if a suitable candidate is not available for selection from any particular community or group of communities specified in the Annexure, such vacancy shall be kept unfilled, notified separately for that community or group of communities for that selection year and shall be filled by direct recruitment exclusively from among that community or group of communities. If after re-notification, repeatedly for not less than two times, no suitable candidate is available for selection from the respective community or group of communities, the selection shall be made from available Other Backward Classes candidates. In the absence of Other Backward Classes candidates, the selection shall be made from available Scheduled Castes candidates and in their absence, the selection shall be made from available Scheduled Tribes candidates.

Explanation. – One ‘selection year’ for the purpose of this rule shall be the period from the date on which the rank list of candidates comes into force to the date on which it expires.

Note. – All pending uncompensated turns of vacancies such as temporarily passed over, no candidate available and non-joining duty as on the 2nd February, 2006, shall be compensated.”

4. In the Annexure attached to Part II of the Rules, an Explanation II was inserted in addition to the existing Explanation I, for two categories of posts – i.e. for direct recruitment in posts included in the Kerala Last Grade Service as well as for direct recruitment in posts other than those included in the Kerala Last Grade Service. Explanation II which in respect of both the categories is same, reads as under:

“Explanation II – The short fall in reservation for ‘Nadars included in SIUC’, and ‘Hindu Nadars’ occurred in the advice by the Commission from the ranked lists published by the Commission on or after the 21st day of November, 2009 during the period commencing on and from the 21st day of November, 2009 to the date of publication of the Kerala State and Subordinate Services (Amendment) Rules, 2010 in the Gazette, i.e. till the date of commencement of this Explanation, shall be adjusted in the future vacancies without disturbing the advices already made.”

A 5. The Commission issued a Circular on 31.8.2010 in respect of reservation for the communities of SIUC Nadars and Hindu Nadars. The Circular communicated as under:

B “The above will be applicable to all Ranked Lists published on or after 21.11.2009. The short fall in reservation in the advices made during the period from 21.11.2009 to the date of issue of this circular shall be adjusted in the future vacancies without disturbing the advices already made.”

C 6. The grievance of the appellants before the Tribunal was that there was no Hindu Nadar candidate in the main rank list containing 197 candidates for the post of Medical Officer (Homeo). It was submitted that the shortfall in reservation for Hindu Nadar community in the advices made by the Commission on or after 21.11.2009 i.e. the date of the commencement of the 1% reservation for the Hindu Nadar Community, was required to be made good in future vacancies without disturbing the advices already made. However, the Commission in its Circular dated
D 31.8.2010, restricted the implementation of the Rules to the rank list published on or after 21.11.2009. It was the stand of the appellants that the vacancies arising after 21.11.2009 were required to be filled up from amongst the candidates belonging to Hindu Nadar community on the basis of rank list published on 3.8.2015. It was submitted that previous
E rank list published on 27.7.2009, was valid up to 3.10.2013 but that was prior to the provision of the reservation. Therefore, said the Appellants that the rank list published on 3.8.2015 would form the basis of appointment in respect of vacancies which had arisen after 21.11.2009. It was contended that 249 candidates had been appointed by way of direct
F recruitment to the post of Medical Officer (Homeo) but none had been appointed from the Hindu Nadar community. Therefore, the shortfall in the quota of the Hindu Nadar community was required to be made good from amongst the candidates in the subsequent rank list dated 3.8.2015, as was directed by the Tribunal.

G 7. On the other hand, the stand of the Commission before the Tribunal was that in its Circular dated 31/10/2010, it was clearly stated that the Hindu Nadar community would be provided reservation from the rank list published on or after 21.11.2009. Thereafter, the rank list had only been published on 3.8.2015 after the amendment in the Rules. The Commission had thus issued advice by giving 1% reservation to the
H Hindu Nadar community on the basis of such succeeding rank list.

8. The Tribunal held that the above Circular of the Commission could not adversely affect the claim of the appellants. The Commission was bound to fill up the shortfall in the vacancies reserved for the Hindu Nadar Community. It was therefore directed to advise candidates from the supplementary list after assessing the shortfall by advising equal number candidates from the reported vacancies. The Tribunal, thus, issued the following directions:

“Therefore the Original Application is allowed and accordingly it is declared that Annexure A6 circular providing that the said order will be applicable to all the Ranked Lists published on or after 21.11.2009 cannot adversely affect the claim of the applicants. In view of the above declaration the respondents are bound to fill up the shortfall in reservation in advices made in respect of the previous ranked list from Annexure A2 Ranked List. There will be a further direction to the Commission to advise the candidates from supplementary list whole belong to Hindu Nadar Community after assessing the shortfall by advising equal number candidates from the reported vacancies.”

9. The private respondents, who are candidates belonging to the Open Category, Anglo Indian and Vishwakarma community, challenged the said order of the Tribunal before the High Court, *inter alia*, on the ground that the shortfall in reservation for the Hindu Nadar community on the advice of the Commission from the rank list published on or after 21.11.2009 till the date of publication of the Rules alone were required to be adjusted in future vacancies without disturbing the advice already made. Since no rank list had been published after 21.11.2009 except the rank list published on 3.8.2015, the shortfall in vacancies could not be filled up on the basis of the succeeding rank list. Appointments had already been made on the basis of such rank list.

10. In the counter affidavit filed by the Commission before the High Court, it averred that the Commission on its own assessed the shortfall of the Hindu Nadar Community and arrived at the figure of three posts. Thereafter the Commission decided to fill up the shortfall by advising candidates from the rank list that came into force on 3.8.2015 from among the vacancies reported prior to the expiry of the above rank list on 3.8.2018 i.e. after a validity period of three years. The relevant extract reads as under:

- A “2.....The direction in Exhibit P3 was to the Public Service Commission (PSC for short) to assess the shortfall in respect of Hindu Nadar Community candidates that arose from 21.11.2009 onwards. The PSC on their own assessed the shortfall and arrived at the figure of 3 and decided to fill up the shortfall by advising candidates from the rank list that came into force on 3.8.2015 from among the vacancies reported prior to the expiry of the above rank list on 3.8.2018.....”
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11. The High Court held that Commission could have kept the vacancies unfilled if suitable candidates from the Hindu Nadar community were not available for selection and could notify the same separately for the community in that particular selection year. Such exercise was not resorted to by the Commission and all pending vacancies cannot be compensated after 2.2.2006 as per the Note to Rule 15(a) of the Rules.
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12. Mr. Pillay, learned senior counsel appearing for the appellants contended that reservation for the Hindu Nadar community was provided after persistent effort by the community. Therefore, the benefit of reservation to the members of such community could not be denied, particularly in view of Explanation II inserted in the Rules, vide amendment dated 3.8.2010. Reliance was placed upon the stand of the Commission that there was shortfall of three posts after the amendment in the Rules, therefore, the appellants were rightly appointed on 16.10.2018 and 28.11.2018 in pursuance of the directions of the Tribunal.
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13. On the other hand, Mr. Nidhesh Gupta, learned senior counsel appearing for the private respondents, argued that 133 candidates had been appointed from the rank list published on 3.8.2015. The post for the Hindu Nadar Community was at roster point 60 in a 100-point roster. One Hindu Nadar community candidate was advised for appointment on 8.3.2017. Therefore, the next available post would come at Serial No. 160 only. It was contended that the shortfall in vacancies as claimed by the appellants could not be permitted to be filled up on the basis of the succeeding rank list. For any shortfall, in terms of Rule 15(a), vacancies had to be notified vide a separate notification, for that community. Since there was no recruitment process initiated for the shortfall vacancies, the appellants could not claim the right of appointment merely because their names appear in the succeeding rank list. The appellants could not do so unless there was a post available for the Hindu Nadar community after the publication of such rank list.
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14. Further, it was submitted before this court, that the appellants had not challenged the denial of reserved vacancies in the rank list dated 27.07.2009, therefore, challenge by way of an application before the Tribunal suffered from a delay of six years after the publication of the Rank list and after three years of its validity period. Thus, the appellants had waived their right if any. It was also submitted that the right to seek an appointment under the 2009 rank list could be claimed only by those belonging to the Hindu Nadar community in such rank list. But the names of the appellants did not feature therein. In support of such plea, reliance was placed upon judgments reported as *P.S. Gopinathan v. State of Kerala and Others*,⁶*Dr.G Sarana v. University of Lucknow and Others*⁷and *Inderpreet Singh Kahlon and Others v. State of Punjab and Others*,⁸.

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15. It was also submitted that the Rules as amended and the Circular of the Commission dated 31.08.2010 were to the same effect with regard to the application of reservation for Hindu Nadar community. There was no violation of the Rules nor had the Commission postponed the date of applicability of the reservation as asserted by the appellants. It was also submitted that there was no challenge to the Circular issued by the Commission in the Original Application filed by the Appellants.

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16. Further, it was submitted that Article 16(4-B) of the Constitution is merely an enabling provision and thus, the appellants cannot claim any right based upon such provision of the Constitution.

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17. On the other hand, the Commission in the written submissions filed before this Court averred that Rule 15(a) is inapplicable to the facts of the present case, as it is not a case of temporary passing over of vacancies or the case of non-availability of candidates. It was also submitted that the amended rules were made applicable to all ranked list published on or after 21.11.2009. The relevant extract from the written submission is as under:

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“17. The primary contention of the KPSC is that the High Court judgment is erroneous on the fundamental premise that Rule 15(a) of the Rules is inapplicable to the facts of the present case, as it is not a case of temporary passing over of vacancies or the case of non-availability of candidates. It is also contended that the

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⁶ (2008) 7 SCC 70

⁷ (1976) 3 SCC 585

⁸ (2006) 11 SCC 356

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A amended rules were made applicable to all ranked list published on or after 21.11.2009 by Circular No. 20/2010 dated 31.08.2010.

Under these circumstances, it is submitted that the advice by the KPSC qua the present petitioners, in compliance of the Tribunal Judgment was legal and justified. The SLP on these grounds be disposed of in accordance with law.”

18. The Note to Rule 15(a) of the Rules was inserted when the Rules were amended vide notification dated 8.3.2006 with retrospective effect from 2.2.2006. This note had a one-time application and was not applicable to all future rank lists to be prepared by the Commission. It was applicable in respect of pending vacancies such as those that were temporarily passed over or where no candidate was available or non-joining duty as on 2.2.2006. Such vacancies were required to be compensated in future selection processes in view of the amendment carried out on 8.3.2006.

19. The first part of Rule 15(a) of the Rules provides for rotation in terms of clause (c) of Rule 14 and sub-rotation in sub-rule (2) of Rule 17 as specified in the Annexure. The second part of the Rule is that if a suitable candidate is not available for selection from any particular community, such vacancy shall be kept unfilled which will be *notified separately* for group of communities for that selection year. The selection year has been explained to mean the period from the date on which rank list of candidates comes into force to the date on which it expires. The present is not a case, where no candidate was available or there was temporary passing of the vacancies. Thus, we find the stand of the Commission in the written submission filed is correct in law.

20. Explanation II is applicable to the rank list published by the Commission on or after 21.11.2009 till 3.8.2010 when the Rules were amended. No such rank list was published during this period. This explanation was to save the appointments already made before the Rules were statutorily amended leaving an option open for adjustment of reservation in future vacancies. Since no rank list was published during the period of the decision of the Government and publication of the amended Rules, Explanation II will not be applicable in the present case, though it recognizes the rights of the Community in respect of the short fall of vacancies between the date of the decision of the Government and the subsequent amendment. The posts falling vacant after the

amendment of the Rules are required to be filled up in accordance with the amended Rules. The Rules as amended provided reservation to Hindu Nadar Community from 21.11.2009. The rank list is a merit list which has a validity period of three years. Such rank list is the source for making appointments as and when, any vacancy arises. The vacancies have to be determined in terms of the applicable rules. The present is a case of non-consideration of the vacancies accruing after 21.11.2009 while filling up the posts from the rank list published. The appellants were thus rightly appointed against the shortfall of vacancies which arose on or after 21.11.2009.

21. The Commission has admitted that there were three posts falling to the Hindu Nadar Community after amendment of the Rules. Such vacant posts had to be filled up. Since the only source of shortlisted candidates was the rank list issued in 2015, appointments had to be made from that List. The entire argument of the respondents is based upon the rank list published on 27.7.2009. Such rank list was published prior to the amendment in the Rules and has no application to the facts of the present case. In fact, the appellants are not even claiming any right on the basis of such rank list.

22. We thus find that the Circular of the Commission and the Explanation II inserted by amending the Rules, provide that the shortfall in reservation in the advices made during the period from 21.11.2009 to the date of issue of the Circular were to be adjusted in future vacancies without disturbing the advices already made. It did not mean that the vacancies arising after the amendment were not required to be filled up as per the merit in the rank list. We find that the posts available for the Hindu Nadar community after 21.11.2009 are required to be provided to the them. The Commission has rightly admitted in the written submissions filed that, Rule 15(a) of the Rules is inapplicable in the present case, as it is not a case of temporary passing over of vacancies nor the case of non-availability of candidates. Furthermore, the rank list was operative till 3.10.2013 and had to reflect the policy of reservation, but did not do so.

23. The entire submission on behalf of the private respondents are misconceived and untenable. The appellants are not claiming any right whatsoever on the basis of the rank list published on 27.7 2009. The claim of their appointment is in respect of the vacancies which arose after 21.11.2009 when the Rules were amended and reservations

- A for the Hindu Nadar community was provided. The Commission has not taken into consideration, posts which have fallen vacant from the date of the amendment of the Rules till the date of the appointments advised from the rank list dated 3.8.2015. The Commission has advised only one candidate from the Hindu Nadar Community to be appointed following Roster Point No. 60 out of the 133 candidates who were advised for appointment. It did not take into consideration the vacancies which had arisen after the amendment of the Rules. Such vacancies could have filled up only on the basis of rank list published in the year 2015.

24. Therefore, the argument of delay or waiver as submitted on behalf of Mr. Gupta has no basis either factually or legally. The judgments referred to by Mr. Gupta in the written submissions have no applicability to the facts of the present case as the cause to invoke jurisdiction of the Tribunal arose when candidates were not appointed on the basis of rank list issued in 2015. Similarly, the argument that there is no challenge to the Circular dated 31.8.2010 is again misconceived. Explanation II is applicable only in respect of the advice given by the Commission from the rank list published on or after 21.11.2009 till the Rules were statutorily amended and notified. It is an admitted fact that no advice was issued by the Commission for appointing any candidate nor was any rank list published during the period specified by Explanation II. The Circular dated 31.8.2010, issued by the Commission is on the lines of Explanation II but neither such explanation nor the Circular of the commission, deals with the shortfall of vacancies arising after the amendment of the Rules till the publication of the rank list on 3.8.2015.

25. Further, no reliance is being placed by the appellants, on the argument based on Article 16(4-B) of the Constitution, before this court. Thus, we find that the submissions made on behalf of Mr. Gupta do not warrant any acceptance.

26. Consequently, the appeals are allowed, and the order and judgment of the High Court is set aside and that of the Tribunal is restored.