High Court of Kerala Vs Siraj

Court: High Court Of Kerala

Date of Decision: March 1, 2005

Acts Referred: Kerala Judicial Service Rules, 1991 â€" Rule 7, 7(2)
Kerala State and Subordinate Services Rules, 1958 â€" Rule 14, 15, 16, 17
Public Service Commission (Procedure) Rules, 1970 â€" Rule 12, 4

Citation: (2005) 1 ILR (Ker) 752 : (2005) 2 KLT 9

Hon'ble Judges: S. Siri Jagan, J; M. Ramachandran, J

Bench: Division Bench

Advocate: V. Giri, Latha Giri, Murali Purushothaman, P.M. Benzir, Deepu Lal Mohan, T.R. Ramachandran Nair, V.G. Arun, P. Ravindran, Ram Mohan G., Joice George, S.P. Aravindakshan Pillai, N. Santha, M.V.S. Namboothiry, T.A. Ramadasan, K.V. Pavithran and Pauly Mathew Muricken and Shinod, G.P, for the Appellant; Rajan Joseph, A.A.G., Augustine Joseph, Government Pleader, Sangeetha Lakshmana, C.P. Sudhakara Prasad, V.A. Mohammed, K.E. Hamza, K. Ramakumar, S. Ramesh, P.N. Santhosh, S.D. Ashokan, Blaze K. Jose, Sasthamangalam S. Ajithkumar, Renjith Thampan, K.K. Sivaraman, K.V. Pavithran, Siby Mathew, V.C. James, Sergi Joseph Thomas, Sherji P. Abraham, Joice George, K.V. Kumaran, A.A. Abdul Hassan, P. Chellappan, Boby Augustine, P. Chandrasekharan and Elvin Peter, P.J., for the Respondent

Judgement

M. Ramachandran, J.
Judgment in O.P.No. 5219 of 2002 dated 6.8.2004 is under challenge in Writ Appeal No. 1496 of 2004, at the

instance of the High Court of Kerala. Two Original Petitions had been disposed of by a common judgment. The connected Original Petition was

O.P.No. 7813 of 2002 and the respondent-- High Court of Kerala has filed Writ Appeal No. 1497 of 2004 therefrom. In the meanwhile,

petitioners themselves had thought it necessary to bring in appeals to the extent reliefs had not been granted to them. The private respondents, who

stood adversely affected, also have filed appeals, questioning the legality of the directions issued by the learned Single Judge. Third parties too

have preferred Writ Appeals, seeking to intervene in the proceedings. Two Original Petitions, filed earlier, but which had not been listed along with

the connected cases, also had been referred to be heard along with the group of Writ Appeals. The details could be given as herein below.

2. Writ Appeal No. 1584 of 2004 has been filed by the petitioner in O.P. No. 5219 of 2002 seeking for larger reliefs. Likewise, Writ Appeal No.

1719 of 2004 has been filed by the petitioner in O.P.No. 7813 of 2002 praying for similar reliefs. Writ Appeal Nos. 1498, 1510, 1526, 1527,

1542, 1583 and 1975 have been filed respectively by respondents 8, 7, 5, 6, 3, 4 and 9 in O.P.No. 5219 of 2002. The Third respondent in

O.P.No. 7813 of 2002 has filed Writ Appeal No. 1503 of 2004. Writ Appeal Nos. 1646, 1647 and 1791 of 2004 are the appeals filed by third

parties, challenging the common judgment. O.P.No. 15861 of 2002 is filed by an aspirant, who had participated in the selection, which was the

subject matter of the Original Petitions along with the second petitioner, an Association of persons, who had challenged the selection as also the

vires of Rule 15(c) of Part II of the Kerala State and Subordinate Service Rules. Petitioner in O.P.No. 6784 of 2004 has similar claims. Counsel

representing the parties had addressed us on facts and law and taken us through a plethora of decisions vindicating their respective stand.

3. Two impleading petitions had been filed by third parties. One such petition had been rejected, at the threshold, for non-prosecution. The petition

filed by the Muslim Service Society for impleading themselves had not been formally allowed, but opportunity was offered to them to make

submissions at the time of final hearing. They sympathised with the cause of the petitioners in the Original Petitions.

4. We will duly examine the contentions of the appellant-High Court of Kerala as raised in Writ Appeal Nos. 1496 and 1497 of 2004 and in the

course of discussions, will advert to the arguments that had been placed before us by the rest of the appellants as also the respondents. The

essential facts appear to be as following.

5. By Ext.P1 notification dated 26.3.2001, applications had been invited in the prescribed form, from qualified candidates for appointment to the

post of Munsiff-Magistrate in the Kerala Judicial Service. After the preliminary screening, as stipulated in the notification, written test had been

conducted, and it was followed by an oral test, as referred to in the publication. Thereafter, adhering to required formalities, the High Court had

published a list of names of candidates, who were found suitable for appointment as Munsiff-Magistrates in the Kerala Judicial Service, in the

direct recruitment quota. The list contained 70 names, arranged, applying Rules 14 to 17 of the Kerala State and Subordinate Service Rules,

1958. It is marked as Ext.P2. The Note appended thereto showed that reservation slots 60, 62, 64, 66, 68 and 70 had been filled up by open

merit candidates. This was stated as done in the absence of candidates eligible for reservation in the merit list.

6. Essentially, the petitioners have challenged the notification on the ground that it restricted incorporation of name of candidates who had failed to

secure the minimum marks in the oral test. Objections were there about the steps taken up for filling up the posts in the slots available for

reservation candidates in the integrated cycle combining the rotation. Not only was the notification issued in excess of the jurisdictional powers

vested in the High Court under Rule 7 of the Kerala Judicial Service Rules, but the consequential steps for preparation of the list, was irregular and

ultra vires of the procedural formalities to be ensured.

7. The learned Single Judge found the objections above as valid. As seen from paragraph 8 of the judgment, it has been held that the High Court

had no authority to fix a cut off mark in the examination. It has been further found that ""it is crystal clear that the procedure adopted by the 1st

respondent-High Court for the preparation of Ext.P2 list is absolutely illegal and the list prepared by the 1st respondent-- High Court is in flagrant

violation of the principles laid down in Rule 7 of the Rules (Kerala Judicial , Service Rules, 1991) as well as Rules 14 to 17 of the K.S. & S.S.R.

and also in violation of the principles laid down in a catena of decisions by the Apex Court"". The learned Single Judge in paragraph 10 of the

judgment had entered a finding that ""under the pretext of short listing, many qualified candidates were irregularly and illegally taken out of the field

of consideration for the reason that they had not obtained qualifying marks in the oral examination"". Therefore, it was found that ""Ext.P2 list now

published by the 1st respondent- High Court is in clear violation of the provisions of the Rules"".

8. A further finding, as entered in paragraph 18 of the judgment, is that the High Court was not competent to decide whether the above posts are

to be de-reserved, since such power was vested in the Government alone. Therefore, ""filling up of the above posts from open merit is arbitrary and

illegal"". It had been, however, observed that while moulding the relief, the Court was to take notice of the circumstance that selected candidates

had already undergone training and they were given postings. Therefore, interference in Ext.P2, in its entirety, according to the learned Single

Judge, might not have been justified as it will injure equity and conscience. The Writ Petition was disposed of declaring that the decision to fill up

slot Nos. 60, 62, 64, 66, 68 and 70 in Ext.P2 from open merit candidates is illegal.

9. Private respondents were the beneficiaries of appointments to the above positions and as there was threat of termination of their services, they

had come up in appeal. In view of the interim orders passed by this Court, as also the Supreme Court, the appointments secured by them were to

be subjected to further orders to be passed in the group of appeals.

10. The principal contentions, which gained acceptance in the impugned decision, as could be seen are (1) there was no provision either in the

Rules or in the K.S.& SSR to fix a cut off mark in the oral examination. Therefore, the High Court erred in prescribing a minimum mark in the oral

examination, whereby candidates who failed to get that marks, were to be summarily disqualified from being considered for the post; (2) The select

list has not been prepared as authorised by Rule 7(2) of the Kerala Judicial Service Rules; and (3) while preparing and publishing the list, the High

Court had failed to follow the principles of reservation contained in Rules 14 to 17 of the Kerala State and Subordinate Services Rules. As

referred to earlier, the contentions as above have been found as acceptable.

11. Mr. V. Giri, counsel appearing for the appellant-- High Court, points out that the reasoning as also the findings of the learned Single Judge,

although they are sought to be arrived at, relying on the judgments of the Supreme Court, nevertheless could not have been sustainable, as the

observations have been picked and principles applied, out of context and overlooking the real purport of the governing Rules. He is supported in

his endeavour by the counsel who appeared for the other party respondents, challenging the judgment.

12. Ext.P1 notification dated 26.3.2001 had good response. It is not in dispute that there were 1800 applicants. The written examination was

conducted in August, 2001 and including the petitioners 118 persons had secured the minimum marks and were therefore eligible to be subjected

to an oral examination. The oral examination was conducted by a Committee, consisting of the Chief Justice and four senior most Judges. As for

the petitioners, they had not secured the minimum marks in the oral examination. This resulted in the rejection of their candidature. A list of 88

candidates were prepared, from whom 70 candidates were selected for appointment, following the principles of reservation. The list prepared by

the High Court had been approved by the Governor, as envisaged by the Rules. The Original Petitions had come to be filed in that context.

13. The learned Judge had held that prescription of minimum marks for the oral examination and rejection of candidates, who did not secure such

minimum marks, from the purview of selection was altogether bad and beyond the power of the High Court. Sustainability of this procedure of

course is one of the crucial questions.

14. We may refer to the notification, which had preceded the selection, and compare its relevance with the legal provisions, which authorised the

selection proceedings, so as to see whether the finding that the rejection of candidates, who had not secured the minimum prescribed marks, was

irregular by the standards prescribed by the Apex Court, and the Rules governing the selection.

15. Ext.P1 showed that probable number of vacancies might be 70. The methods of recruitment were (1) Direct recruitment from the Bar and (2)

Recruitment by transfer. We are concerned only with the first method of selection. The number of direct recruitment vacancies had been enhanced

during the course of the proceedings. By Clause 2 of the notification, it had been prescribed that the selection shall be after holding examinations,

written and oral. Clause 6 of the notification prescribes that rules relating to reservation of appointment for Backward Classes, Scheduled Castes

and Scheduled Tribes contained in Part II of the Kerala State and Subordinate Services Rules, 1958 shall apply to appointment by direct

recruitment. While prescribing the scheme for oral examination, by Clause 10, it had been indicated that the written examination shall consist of

four papers carrying a maximum of 100 marks each. Time for each paper shall be two and half hours. The subjects included, principally, Code of

Civil Procedure, Transfer of Property Act, Criminal Procedure Code and the Indian Penal Code and also certain other enactments of every day

application. Sub-clause (2) of Clause 10 showed that the oral examination would carry a maximum of 50 marks for deciding the candidate"s

general knowledge, grasp of general principles of law, analytical ability and suitability for appointment as Munsiff-Magistrate. Sub-clause (3), (4)

and (5) of Clause 10, however, assumes importance as of now. We may extract the provisions as hereunder: .

(3) Only candidates who secure not less than 35 per cent marks in each of the papers of the written examination with an overall minimum of 45

per cent of the total marks of written examination and 30 per cent of the marks for the oral examination shall be eligible for appointment provided

that the minimum marks required for pass in each paper of the written examination shall be 30 per cent with an overall minimum of 35 per cent of

the total marks for candidates belonging to Scheduled Castes/Scheduled Tribes. Fraction of half or more than half shall be regarded as full mark

and less than half shall be ignored.

(4) No candidate who has not secured the minimum marks prescribed above in the written examination shall be called for oral examination.

(5) The marks secured by the candidates at the oral examination shall be added to the total marks secured by them at the written examination and

the names of all those candidates shall be arranged in the respective lists on the basis of the total marks secured by them"".

16. In the case of the petitioners in the Original Petitions, all of them had secured the overall minimum and individual minimum marks in the written

examination, which were passports for them to appear for the oral examination. However, the position resulting from Sub-clause (3) of Clause 10

is that eligibility for appointment is reserved to those who could secure minimum of 180 marks in the written examination (140 in the case of SC/ST

candidates) and 15 marks (30% of 50 marks stipulated) for oral examination. This was the pre-fixed eligibility for inclusion in the final rank list.

Although there is no challenge about the prescription of minimum marks for the written examination, the contention raised was that the restriction

viz., the securing of 30% marks in the oral examination was a prescription beyond the jurisdiction of the High Court. It offended the principles of

fairplay and justice, and also was not in consonance with the law laid down by the Supreme Court. Essentially, this is the principal point that was

canvassed before the learned Single Judge and agitated over by the petitioners, while the appeals were being heard by us.

17. Before we go to a detailed discussion on this aspect, it would be necessary to refer to Rule 7 of the Kerala Judicial Service Rules, 1991. The

rules had been framed in exercise of powers conferred on the Government under Articles 234 and 235 of the Constitution of India read with the

Kerala Public Services Act, 1968. These were in supersession of the Kerala Civil Judicial Services Rules, 1973 and Kerala Criminal Judicial

Service Rules, 1988 which governed such appointments earlier. The category of Munsiff-Magistrates was one of the posts referred to in the said

rules. The appointing authority in respect of the said category was the Governor of the State and all such appointments by direct recruitment to the

category were to be made from the list of approved candidates in the order shown therein. Provisions of the Kerala State and Subordinate Service

Rules were to apply to this service wherever express provision was not made in the Rules.

18. Rule 7 also might be necessary to be extracted in full, since reference thereto might be necessary to a good extent. It is as following:

7. Preparation of lists of approved candidates and reservation of appointments:--

(1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely

to be filled up and prepare a list of candidates considered suitable for appointment to category 2. The list shall be prepared after following such

procedure as the High Court deems fit and by following the rules relating to reservation of appointments contained in Rules 14 to 17 of Part II of

the Kerala State and Subordinate Services Rules, 1958.

(2) The list consisting of not more than double the number of probable vacancies notified shall be forwarded for the approval of the Governor. The

list approved by the Governor shall come into force from the date of the approval and shall remain in force for a period of two years or until a fresh

approved list is prepared, whichever is earlier"".

Ext.P1 notification had come to be issued in exercise of powers under the said Rules.

19. The learned Single Judge had held that the High Court had no authority to fix a cut off mark in the examination. This was with reference to the

oral examination however, although the restriction operated with equal vigour on both written and oral examinations. The counsel for the appellant-

-High Court of Kerala, argued that the finding as above could not have been supportable, firstly because of the plain terms of the rules, and

secondly by virtue of the parameters of selection which had been laid down in Ext.P1 notification. This required to be strictly followed, and the

permissible amount of discretion exercised by the High Court by any yardstick could not have been termed as unreasonable. Thirdly, he argued

that the learned Single Judge had overlooked the law, that had been laid down by the Supreme Court, while such matters were being examined. In

paragraph 7 of the judgment, the learned Single Judge had found that under the Rule the High Court had no residuary powers to prescribe

minimum marks for written and oral examinations. He points out that this was a misconception. The rules require and empower the High Court to

conduct examinations ""written and oral"". It is, however, stated that the learned Judge went wrong in holding that the High Court need conduct

examinations ""either written or oral or both"". This was a wrong understanding of the position. According to the counsel, perhaps this wrong notion

had carried the learned Judge to further terrains, which were irrelevant. It is pointed out that advertence had been made by the learned Judge to

decisions of the Supreme Court in Dr. Krushna Chandra Sahu and Ors. v. State of Orissa and Ors. 1995 (5) SLR 337), P.K. Ramachandra Iyer

and Others Vs. Union of India (UOI) and Others, , as well as Durgacharan Misra Vs. State of Orissa and Others, , Evidently, the rules had been

adverted to and the above judgments had been relied on, of course for coming to the conclusion that prescription of cut off marks was

unauthorised. Relying on the said judgments, the learned Single Judge held that aggregate marks from the written as well as oral examinations were

to be mandatorily taken notice of, and a screening procedure would have vitiated the selection process.

20. Since this forms the substratum of the ultimate findings, we may advert to the rules once again so as to see whether there would have been

power on the part of the High Court to prescribe the modality of the test, as had been followed.

21. Under the rules, power is conferred on the High Court to hold examinations, written and oral, after notifying the probable number of vacancies

likely to be filled up. The High Court is to prepare a list of candidates considered suitable for appointment to the category. The crucial provision

appears to be that ""the list shall be prepared after following such procedures as the High Court deems fit"". It should also be after following the rules

relating to reservation of appointments contained in Rules 14 to 17.

22. The appellant contends for a position that the mandate of the rules fully authorises the High Court to prepare the list after following such

procedure as the High Court deems fit. What is mandatory is that a written and oral test is to precede the selection. The counsel for the appellant

submits that the notification had been issued for securing this end. The manner in which the examination was to be conducted, the subjects which

were to be included for the candidates to deal with, the duration of time of the examination and the maximum and minimum marks etc., would and

should have been only within the prerogative of the High Court. Likewise, the manner and method of the oral examination, and the marks which

were to be awarded also could have been fixed by the High Court. It was idle, according to the appellant, to expect that Rules would have

provided for such details. Only general parameters were expected to be laid. What was being held were examinations, written and oral. The very

word ""examination"" presupposed, according to the counsel, a prescription of minimum marks to be obtained by a candidate for adjudging as to

whether a person passes or fails in the process. What had been notified was only a prescription in these areas and clearly made known by Ext.P1

notification. It was the method adopted in the previous selection after the advent of the Rules. A challenge about such a selection had been earlier

rejected by a learned Judge, which had attained finality, and therefore the High Court had no inkling that the pattern and procedure sought to be

followed were likely to be criticised in the succeeding selection. A departure from the procedure was impermissible and would have been termed

as whimsical or arbitrary.

23. According to him, the failure to obtain the minimum cut off marks stipulated in the written examination would have foreclosed the chances of a

candidate to come over and participate in the oral examination and likewise failure to secure minimum marks in the oral examination could have

interfered with his rights for getting included in the final select list. Therefore, fundamentally there was no error about the methodology, unless the

rules governing the selection prescribed a change in procedure. Further, according to him, it was neither abnormal nor irregular in the presence of

such prescription, when such power had been conferred on the High Court to prepare the list after following such procedure as the High Court

deemed fit.

24. According to him, perhaps only in a case where such powers had not been conferred on the body, which was entrusted with a duty of a

selection, requirement of subsidiary rules or specific authorisation might have been necessary. It is submitted that when we understand the rule as

above, the observations in the decisions cited by the petitioners, which had found acceptance by the learned Single Judge, could have been found

as not relevant. Such reliance, according to the appellant, led the Judge to commit a mistake of declaring that prescription of a cut off mark was an

irregularity.

25. Dr. Krushna Chandra''s case (cited supra) is pointed out as an authority for the proposition that a selection committee had no jurisdiction to lay

down the criteria for selection unless they were specifically authorised in that respect by the relevant rules. That cannot be the case here. Heavy

reliance had been placed on P.K. Ramachandra Iyer''s case, but Mr. Giri took us to the background of the said case. According to him, we are

necessarily to come to a conclusion that the observations there were not applicable, as contended by the petitioners in the Original Petitions and

accepted by the learned Single Judge. The Supreme Court therein had held that as per the Rules applicable in that case after the candidate took

the written test and when he had obtained the minimum marks, he was eligible for being called for viva voce test. Thereafter, the final merit list

should be drawn up taking into account the aggregate of marks obtained by him in the written test plus viva voce examination. However, the

mistake-committed here was to understand it as a universal rule. It was a position as could be gathered from the specific rules, which governed the

said selection. The Rules there provided an absolute and rigid procedure, that the aggregate marks should be the basis of the selection. That is not

at all the case here, when the High Court had by Ext.P1 notified the procedure it was following, and proposed to be adopted.

26. In Shri Durgacharan Misra''s case, counsel points out that the facts were totally dissimilar. The decision would not have come to the support of

the petitioners for raising a contention that notwithstanding the specific prescription of cut off marks in the selection, it should not have been

followed.

27. Before we examine the rest of the issues, this could be a resting point, so as to take notice of the reply made. It has to be observed that these

points highlighted, practically go unanswered. Of course, valiant effort had been made by Mr. Sudhakara Prasad, learned counsel appearing for

the respondent, to salvage the situation. He had to agree that the decisions relied on by the learned Judge, referred to earlier, may not apply on all

fours. But the submission is that substantial rights cannot at all be circumscribed by a prescription for adopting a procedure. When the Rule does

not give power to the authority to prescribe minimum cut off marks, the discretion has to be understood as circumscribed. Advertence was made

to a decision reported in K. Prabhakara Rao Vs. Union of India (UOI) and Others, . But it does not appear to be a judgment, incorporating any

substantially relevant principle, as claimed by the respondents herein. Dr. Krushna Chandra Sahu v. State of Orissa 1995 (5) SLR 337, was cited

for the proposition that a selection committee is incompetent to prescribe the procedure for selection. Counsel also adverted to the decisions, viz.,

Umesh Chandra Shukla Vs. Union of India (UOI) and Others, ; P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, ;

Durgacharan Misra Vs. State of Orissa and Others, , and State of Punjab and Others Vs. Manjit Singh and Others, , in an effort to show that no

minimum marks could have been prescribed, which prevents a candidate from entering the final field of the selection. Counsel urged that elimination

on the basis of marks obtained in interview is deprecated, and the marks should be added on to the marks of the written test. In fact, what was

required was a relaxation so as to safeguard the intention and purport of the Rule.

28. Mr. Mohammed, appearing on behalf of the self same appellant/petitioner, presented his view that Rule 7 of the Rules did not admit of an

interpretation, that aggregate marks need not have been taken notice of. He also referred to Tamil Nadu and Andhra Pradesh Rules, to show that

of course it would have been possible to exclude candidates, but it can be on well laid down prescriptions, which the Kerala Rules were lacking in.

Mr. Chandrasekharan, on behalf of the appellant in W.A.No. 1584 of 2004 reiterated the contentions as above, and urged that the procedure did

not prescribe for a short listing or a qualifying test, by any stretch of imagination. Independence of judiciary did not give it power to misuse or

misinterpret the statute, and the procedure resulted in unequals being treated as equals, which offended the principle in the decision reported in

Manjit Singh''s case (cited supra) and the law laid down in State of Kerala and Another Vs. N.M. Thomas and Others, . A general oral test,

without reservation for eligibles, operated in such a way as to violate the principles of Articles 14 and 16 of the Constitution. In short, only for the

reason that the candidates did not obtain cut off marks, their success in the written test could not be written off as of no consequence, and

according to him, the principles laid down in the decision in Praveen Singh v. State of Punjab AIR 2001 SC 152, squarely stood violated. It is

asserted that fundamentally Ext.P1 notification was bad. If at all cut off marks could have been there, it should have been confined only as far as

open merit candidates alone are concerned, and not members belonging to SC/ST category. He relied on the decision in Ajit Singh and Others Vs.

The State of Punjab and Others, , for this proposition.

29. Mr. V.C. James, who appeared for the respondent in W.A.No. 1497 of 2004 (and appellant in W.A.No. 1584 of 2004) did not address

separate arguments, but adopted the contentions as raised above.

30. Before going to the other limb of the arguments, we may apply ourselves to the issue as raised above. The petitioners have shaped their

contentions, which have been accepted by the learned Single Judge, on the substratum that a separate minimum for oral examination was

impermissible, and as could be gatherable from the judicial pronouncements. According to them, this was an equitable principle, and subserved the

interests of reserved communities, and an interpretation as arrived at by the learned Judge is not to be disturbed.

31. We have to bear in mind that what is administered in the Court is justice, according to law. Consideration of equity and fair play, however

important they may be, must yield to clear and express provisions of law. If, in reaching its decision, the High Court contravenes express provisions

of law, it will inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling, and that is

a reproach which judicial process must constantly and scrupulously endeavour to avoid. Madamanchi Ramappa and Another Vs. Muthalur

Bojjappa, . Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written or settled law.

(Latha v. State of Kerala 2003 (1) KLT 949).

32. Mandate of Rule 7, quoted earlier, could be examined in the above backdrop. There cannot be any dispute that holding of written and oral

examinations are essential before a candidate is cleared for appointment. Use of the expression ''after following such procedure as the High Court

deems fit'', we feel, totally disarms the case of the critics, notwithstanding the amount of case law they muster in support of their contentions. And

going by the weighty observations of the Supreme Court in State of Bihar and Another Vs. Bal Mukund Sah and Others, , the conferment of such

power and jurisdiction on the High Court appears to be quite in order.

33. The constitution Bench, in the above case, was dealing with the issue of powers of Legislature to legislate in respect of judicial service. The

Court held that recommendation of the High Court under Article 233(2) and consultation under Article 334 were sine qua non for direct

recruitment to the higher as well as lower levels.

34. Referring to Indra Sawhney v. Union of India 1992 Supp. (3) SCC 217, which held that not only SC/ST candidates, but other backward

classes also are eligible for the protection of reservation, and the thrust of Article 335 of the Constitution, as well, the Court observed that if the

authority considered that such reservation will adversely affect the efficiency of the administration, then exercise under Article 16(4) is not

permissible. The Court termed this as an instance of constitutional limitation on the exercise of enabling power under the Article. It was further

observed in paragraph 59 as following:

59. Leaving aside this question even on the express language of the impugned Section 4 of the Act, the argument of learned Senior Counsel for

the appellant State would fall through as the said section does not envisage creation of separate category of posts for reserved category of

candidates in the existing cadres of District Judges and Subordinate Judges. On the contrary, that section postulates available vacancies in the

already existing posts in the cadres and tries to control appointments to such existing posts in the vacancies falling due from time to time by

adopting the rule of thumb and a roadroller provision of 50% vacancies to be reserved for reserved category candidates, meaning thereby, the

section mandates the High Court and that too without consulting it, that it shall not fill up 50% of available vacancies by selected candidates

standing in the order of merit representing general category candidates and must go in search of less meritorious candidates for Filling up these

vacancies supposedly reserved for them. Such a scheme can be envisaged only under the relevant rules framed under Articles 233 and 234 after

consultation with the High Court and cannot be made the subject matter of any legislative fiat which the High Court is expected to carry out willy-

nilly and de hors the constitutional scheme regarding full and effective consultation with the High Court in this connection. It must, therefore, be held

that the impugned Section 4, as existing on the statute-book, if allowed to operate as it is for controlling recruitment to the posts of District Judges

as well as to the posts in the Judiciary subordinate to the District Courts, would directly conflict with the constitutional scheme of Articles 233 and

234 constituting a complete code and has to be treated as ultra vires the said constitutional scheme"".

As far as Kerala Judicial Service Rules are concerned, ambiguity does not really exist. It may not be safe to agree with the argument that the

''procedure'' referred to in the rule requires to be read down. Such powers for prescribing the method, we feel have been conferred, duly taking

notice of the primacy of the Institution, policy laid down by the Constitution, and anxiety to preserve administrative efficiency.

35. Thus, when the High Court is specifically authorised to follow the procedure, which it may deem fit, prescriptions notified, including

requirement of minimum marks in the written and oral examinations, were valid. As such the reasoning of the decisions cited by the petitioners led

by Inder Parkash Gupta Vs. State of Jammu and Kashmir and Others, , can have no relevance. They are neither ultra vires nor alien propositions

exceeding the jurisdictional powers. The candidates are to be presumed as having responded aware of such procedure. If this is the emerging

position, we have to hold that the finding of the learned Judge, on the above point, is not sustainable.

36. Learned counsel for the respondents of course urged that, in effect, viva voce test stood as an obstacle even in respect of a candidate, who

had secured high marks in the written examination. This, according to them, affects the veracity of the selection, process. However, we are not

impressed by the above said argument, especially when we find that the procedure was prescribed as authorised by the Rules, and even at the time

of inviting applications by Ext.P1, the method for the contemplated selection were made known. In the case cited by the petitioners, the Supreme

Court had expressed apprehension, when the selection was entirely on the basis of viva voce. But that is not the case here. In fact, the decisions

are clear that viva voce test is mandatory, at least for appointment to certain posts, where the appointees are to exercise powers, administrative

and executive in nature. Officers selected will have to face the general public in the course of their duties, and as referred to in Ext.P1, the purpose

of oral examination was for deciding the areas of general knowledge, grasp of general principles of law, analytical ability and his general suitability

for appointment to the post. Fixation of 30% as minimum marks to be secured by a candidate at the oral examination therefore could not have

been considered as irrational by any standards. For the same reason, a stipulation that failure to show an efficiency level in the above said region

may entail rejection of his candidature, cannot be considered as whimsical. That he could present a better picture of himself at the written

examination and therefore, should not have been shown the door, appears to be too feeble an argument for acceptance.

37. A submission had been raised by the appellant in Writ Appeal No. 1719 of 2004, that although reduced marks had been prescribed as far as

SC/ST candidates were concerned in the written examination, this concession was not there even in respect of SC/ST members, concerning the

oral test. Argument was that this was a discrimination since unequals were likely to be treated as equals. We fail to find the logic in such

submission. 30% was the minimum prescribed cut off marks. It works out to 15 of the total admissible 50 marks. We have to notice that the

participants in the selection were members of the lawyer community with a minimum of five years" experience, at the bar: Therefore, such a

prescription uniformly applied could not have been termed as arbitrary or irregular. Ext. P1 shows that there was opportunity offered to the SC/ST

candidates for a pre-examination training, for helping them to get equipped for the selection contemplated. In the circumstances, the argument that

a helpless sector had been taken off guard is unimpressive.

38. The short-listing of the candidates in the select list was the next aspect which had found as objectionable, by the learned Single Judge, as

according to him, this was also a procedure without authority of law. Only 118 candidates, who had got themselves qualified in the written

examination, were called for the oral examination, from whom a list of 88 candidates had been chosen. Names of 70 candidates were proposed as

found suitable. The learned Judge had found that since Rule 7(2) of the Kerala Judicial Service Rules, 1991 require that the list of consisting of not

more than double the number of probable vacancies notified were to be forwarded for the approval of the Governor and when such a list had not

been forwarded, it was in irregular procedure. However, the averments in the counter affidavit filed by the Registrar of the High Court dated

22.11.2002 apparently has gone unnoticed. In paragraph 10 of the counter affidavit, it has been stated that a merit list of 88 candidates prepared

in accordance with para 10(5) of Ext.P1 notification had been forwarded to the Government and from the said list, 70 candidates were selected

for appointment. The said list was prepared observing the rules of communal reservation as required by Rules 14 to 17 of the Kerala State and

Subordinate Services Rules. The said list had been approved by the Government as per Notification No. 8402/C3/2002/Home dated 23.3.2002.

Therefore, advertence to the decision in State of Punjab and Others Vs. Manjit Singh and Others, , strictly was not relevant. The above said case

dealt with an issue of short listing, and the arbitrary manner of short listing, according to the Supreme Court, would have resulted in a position

where sufficient number of candidates might not have been available for selection. Evidently, the said contingency was not there. The Rule here

only saw to it that excess candidates were not included in the list, a reduced number did not offend the Rule. In fact, the point had come up for

consideration of this Court in Hareendran Nair v. State of Kerala 1999 (3) KLT 111. The same Rule was the subject matter of the case, and to

the twenty vacancies, a list containing twenty names had been forwarded. The Court observed in paragraph 4, as following:

What this sub-rule provides is that a list consisting of vacancies selected for the number of vacancies notified shall be forwarded to the Governor.

The said list may contain the names of more candidates than the number of actual vacancies. In such cases the list of candidates shall contain not

more than double the number of probable vacancies notified. That does not mean there shall always be a list consisting of not more than double the

number of probable vacancies"".

39. Therefore, the strong words used by the learned Single Judge that ""under the pretext of short listing, many qualified candidates were irregularly

and illegally taken out of the field of consideration"" does not appear to be factually sustainable. Figuratively speaking, the game was played as per

the rules, the candidates were sufficiently forewarned about the procedure and there was no change in the rules in the midst of the game.

40. Rule 7(2) only prescribes that the list should not contain more than double the number of probable vacancies notified. There was no

prescription against a list being sent up which contained only a lesser number. After the selection, the high power body might have found that fewer

number of candidates had been qualified for appointment. They cannot be blamed for this reason or their reluctance for relaxing the standard.

Candidates, who performed satisfactorily in the written and oral examinations, alone deserved to be included in the list, which was a selection to a

sensitive post. The arguments presented were therefore plainly unacceptable, and the judgment suffers from an indiscretion, as highlighted by the

appellant. It is pertinent to point out, at this juncture, the observations of the Supreme Court in Mehmood Alam Tariq and Others Vs. State of

Rajasthan and Others, , that prescription for minimum marks for viva voce in respect of sensitive post was in good taste. Academic excellence is

one thing. Ability to deal with the public with tact and imagination is another. Higher traits of personality is not an unreasonable expectation. Similar

observations had also been made in State of U.P. Vs. Rafiquddin and Others, , which again was a selection to the judiciary. The principle appears

to be well settled. For sake of completeness, advertence could also be made to similar observations of the Supreme Court made in State of

Maharashtra and Others Vs. Hussein Sheikh and Others, . Perhaps the observation in Delhi Bar Association v. Union of India and Ors., (2002)

10 SCC 159 , that ""what has to be seen is, whether the candidate has the attributes of becoming a good Judicial Officer, namely, integrity, honesty,

basic knowledge of law and robust common sense"" can be best ascertained only by a process of interview by a higher power body. Failure of the

candidate to get himself registered with them, can be one of the safe conclusion arising out of the process of selection, from the point of view of the

selecting body. The judgment of a Full Bench decision of the Karnataka High Court in T.N. Manjula Devi v. State of Karnataka 1980 Lab.I.C.

759, cited by Mr. T.R. Ramachandran Nair underscores the necessity for a viva voce test to the judicial position and has correctly laid down the

science involved.

41. The learned Single Judge had also contended upon the failure on the part of the High Court to include sufficient number of candidates in the

reserved category, and had suggested that it would have been possible to prepare a separate list of such candidates. Candidates belonging to

backward classes could have been arrayed in a supplementary list. Advertence was made to Rule 4(iv) of the Kerala Public Service Commission

Rules of Procedure, The said rule authorises the Public Service Commission to prepare a separate rank list of candidates coming under separate

groups in accordance with the qualifications or other conditions as stipulated in the notification. The Commission had the discretion to prepare such

supplementary lists for the purpose of satisfying the rules of reservation of specified categories. Reliance had been placed on Rule 12 of the said

Rules as well. All the candidates interviewed and who obtained not less than the minimum marks fixed by the Commission were to be included in

the ranked list. According to the learned Single Judge, the said Rules were meant for ensuring that statutory requirement of Rules 14 to 17 were

not overlooked. If so, there might not have been any opportunity for handing over any of the reserved vacancies in favour of the open merit

candidates.

42. However, we find that the above opinion could have been a sufficiently strong circumstance to find fault with the present selection, for more

than one reason. The selection was carried out by the High Court in exercise of the powers under Rule 7 of the Rules. It could not have looked

askance at Kerala Public Service Commission Rules of Procedure. Further, even such rules prescribe for adherence to the conditions stipulated in

the notification. The Commission might have been obliged to include interviewed candidates, who obtained the minimum marks fixed by the

Commission, but that was not the case here. The only reason that reserved communities did not come to be included in the list after rank No. 60,

could not have been shown as a reason for holding that the selection was altogether illegal. Further, though not strictly relevant, Mr. Giri points out

that 29 posts have gone to candidates, who belonged to reserved communities, by the process of selection, among 70 candidates, who got

appointments.

43. The Rules of procedure cited were not statutory, and one in in-house system for the Public Service Commission, who were to hold hundreds

of selections. It would not have had application in a selection envisaged by Ext.P1. The prime objective was to select the most meritorious, to a

sensitive post. In any case, the criticism was not justified.

44. From this position, we may go to the operative portion of the judgment, where the learned Single Judge had found fault with accommodation of

6 candidates, who were nominated for filling up the slots meant for reservation candidates, ignoring the roster prescribed by the rules. The finding

was that this was not authorised and what resulted was a gross error, especially since the High Court had no jurisdictional power to de-reserve

posts, which were earmarked by a statutory roster in favour of reservation candidates. Therefore, appointments made to the said vacancies were

directed to be cancelled. Reliance had been placed on Rajasthan Public Service Commission and Anr. v. Harish Kumar Purohit and Ors. 2003 (4)

AD (SC) 1. A perusal of the judgment shows that such a view, as arrived at, could not have been possible to be made on the facts of the case.

The Supreme Court had observed that the Rules did not provide for a decision to be taken to fill up the posts from the general category or to de-

reserve or engage in exercise of a carry forward in case of non-availability of candidates from the reserved categories. The Supreme Court had

found that the decision challenged therein suffered from various irregularities and therefore it cannot operate as a safe guideline. More or less,

similar observations made in Chairman/M.D., Mahanadi Coalfields Ltd. v. Sadashib Behera AIR 2005 SCW 129, also had been relied on. We

may however probe further.

45. Perhaps a challenge had been made in O.P.No. 1586 of 2002 against the vires of Rule 15(c) of the Kerala State and Subordinate Service

Rules aware of such possible difficulty. However, Rule 15(c) is irrelevant, since what was to be followed and in fact the prescription accepted was

the one spoken to by Rule 15(b), which reads as follows:

(b) If a suitable candidate is not available for selection from the group of communities classified as ""Scheduled Castes"" in the turn allotted for such

a group in the Annexure the said group shall be passed over and the post shall be filled up by a suitable candidate from the group of communities

classified as ""Scheduled Tribes"" and vice versa. If no suitable candidate is available for selection in any of the two groups classified as ""Scheduled

Castes or Scheduled Tribes"" selection shall be made from among the communities immediately next to the group of communities entitled to be

appointed according to the turn allotted in the Annexure in the order of rotation. If no suitable candidate is available for selection in any of the

communities or group of communities selection shall be made from open competition candidates"".

Therefore, filling up of the posts by open merit candidates was a method authorised by the statute. It is too late in the day to urge that principle of

reservation has to be borne in mind, even before the selection process is over. It could only follow as a next step. The likes and dislikes or opinion

of the Court, therefore had little relevance mere and little sustenance could be drawn from Harish Kumar Purohit''s case (cited supra). So long as

the appointees belonged to the list, and candidates at the roster point from other communities were not available, all of them had a statutory right to

be considered to the position in preference to any others. It could not at all have been considered as objectionable. The opportunity for selection

came to them, as they were adjudged as meritorious, and their names found a place in the select list. Any wishful thinking could not have been

sufficient to deny them the opportunity to claim appointment, situated as they were.

46. In our view, the learned Judge erred in interfering with the selection and appointment. The procedure adopted was valid, and in consonance

with the Rules. As a matter of fact, we do not find that any substantial question is involved in the petitions. It is also seen that the issue had come up

for consideration before this Court on an earlier occasion, which resulted in the judgment reported in 1996 (2) KLT 439, Remani v. High Court of

Kerala. Advocate Mr. Murali Purushothaman submitted before us that advertence and submissions were made with reference to the above

decision, but apparently by an oversight, its presence had been omitted to be noticed.

47. Mr. Giri had presented an argument that on principles of estoppel, the petitioners had no right to challenge the notification, when they had

responded thereto. An after thought of filing a Writ Petition, only when it was found that they could not get through the selection process, could not

have been entertained. Adverting to certain decisions, the counsel contended that the discretionary jurisdiction, in the case, should not have been

exercised, in favour of persons who were sitting on fence.

48. However, principles of estoppel as such might not be applicable in such matters. In the case of selection, option of an aspirant evidently is

limited. If we accept the suggestions of the appellant, the candidate had to take a risk of abstaining from the selection and challenge it at the time of

notification. This will be too rigid, not to say impractical, as an objection could be raised that a person who had not even responded to the

selection had no locus standi. On this point, we are in agreement with the law laid down by a Division Bench of this Court in Sathi v. Cochin

University of Science and Technology 2000 (2) KLT 871. In appropriate cases, when a candidate finds that there was sufficient justification for

him to challenge the process of selection, on grounds available to him, participation in the selection as such would not have annulled his rights, since

resort to constitutional remedies could not have been defeated or discarded. The observation contrary to the above principle in Remani''s case has

to be understood in the above background alone.

49. It had been suggested by Mr. Chandrasekhar that the preparation of the select list was not transparent, and it is doubtful whether the principle

of rotation had been followed, when the final select list was made, as this was a continuation of previous selection.

50. Mr. K. Ramakumar, appearing on behalf of persons who had similar interests, pointed out to the necessity of this Court examining and

satisfying itself of the procedure that had been followed in the pattern of awarding of marks, and preparation of the lists. On our instructions, the

files had been made available. The compilation of records are immaculately done, and at every stage, the senior Judges, including the Chief Justice,

who were in office, had been closely monitoring the selection process. The details of marks awarded, in the written and oral examinations, were

available, as arising from the selection process. Details of candidates, with permissible amount of secrecy, and the marks respectively secured by

them were available, under the signature of the Chief Justice and his companion Judges. The records reveal that principles of rotation have been

borne in mind.

51. The note regarding preparation of list of candidates applying Rules 14 to 17 of the K.S. & S.S.R. also have been authenticated by the above

high power body. It is recorded that the last appointment to the category was in turn 82, of the cycle of 100. Therefore, it had been noticed that

appointment has to commence from the turn 83. This turn was to go to an open merit candidate. It was so allotted. In respect of the 84th turn, it

had been noticed that it was to go the Scheduled Caste community. But, in the previous selection as Scheduled Caste hand had derived extra

benefit and secured the position, on principles of rotation, finding that the Dheerava community became the ultimate loser, the 84th position was

allotted to a member of Dheerava community, though he was lower in the rank position. 85th turn again went to open merit candidate and the 86th

turn was reserved for a member of Muslim community. We are, therefore, certain that no arbitrariness had been shown in the process.

52. Mr. Pauly Mathew Muricken, appearing on behalf of the petitioners, highlighted the requirement for issue of a direction, whereby the

Government was to be directed to take up steps for a process of special recruitment, since there has been a shortfall, admittedly in the cadre.

However, we do not think it is necessary to issue a writ of mandamus on this ground, as several other aspects also will have to be noticed before

finalising such a proposal. The Government may have to take note of the situation and resort to remedial measures, as might be required.

53. We are not unmindful of the general awareness, which came to be focussed on the selection, which is the subject matter of these proceedings.

Innuendos were made about the functioning of the system, thanks of course to certain remarks in the judgment which came to be recorded.

Frankly, we had approached the issue with certain amount of trepidation but now find that our fears had no factual basis. We will not avoid doing

something, which we consider as right, and it will be done unhampered by the commentaries which have inundated the scene.

54. Writ Appeal Nos. 1496 and 1497 of 2004 are allowed. Consequently, W.A.Nos. 1498, 1503, 1510, 1526, 1527, 1542, 1583 and 1975 of

2004 also are allowed. W.A.Nos. 1646, 1647 and 1791 of 2004 will be governed and stand closed by the findings as are rendered above.

W.A.Nos. 1584 and 1719 of 2004 are dismissed. Likewise, O.P.Nos. 6784 and 15861 of 2002 also are dismissed. The selection and

appointments made are declared as regular, in all respects.

We direct that the parties are to suffer their respective costs.