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SUPREME COURT CASES

(2003) 12 SCC

14. We may further notice that *P.H. Kalyani case*² has also recently been followed by another Constitution Bench in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma*¹⁷.

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15. We may, however, observe that although in certain contingencies an employer may in a case of grave nature of misconduct dismiss a workman without holding an enquiry but ordinarily such an enquiry will not be dispensed with. In the event it is found ultimately by the Labour Court/Industrial Tribunal that the employer had taken recourse to unfair labour practice or the order of termination has been passed mala fide or by way of victimisation, it will be open to the Tribunal to direct payment of compensation even in a case where ultimately charges are proved, despite holding that the order of termination is valid for the reason that the principles of natural justice have not been complied with.

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16. For the aforesaid reasons, we do not find any merit in this appeal. It is, accordingly, dismissed.

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17. There shall be no order as to costs.

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(BEFORE V.N. KHARE, C.J. AND S.B. SINHA AND DR. AR. LAKSHMANAN, JJ.)

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NAIR SERVICE SOCIETY

.. Appellant;

Versus

DISTT. OFFICER, KERALA PUBLIC SERVICE

COMMISSION AND OTHERS

.. Respondents.

Civil Appeals Nos. 4075-81 of 1998[†], decided on November 17, 2003

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A. Service Law — Reservation — Appointment of reserved category candidates in non-joining duty (NJD) vacancies in excess of prescribed ceiling — Impermissibility — Kerala Public Service Commission preparing a ranked list for appointment of Sub-Engineers and also supplementary lists in respect of reserved categories, namely, SC, ST and OBC — No supplementary list for open competition merit candidates — KPSC advising names to State Government till the exhaustion of the main ranked list — Some of the advised candidates including candidates of open category as well as reserved categories not joining duty — Statutory rules viz. KSSR prohibiting reservation in excess of 50% in any year — In such circumstances, High Court's direction to KPSC to advise more names from the supplementary lists of reserved category candidates for appointment on NJD vacancies, held, per incuriam, violative of statutory rules as also Arts. 16(4)/16(4-B) of the Constitution — However, in the peculiar facts and circumstances of the case, appointments made pursuant to High Court's direction not disturbed — Further held (*per Dr. Ar. Lakshmanan, J.*), Rules provide for only one ranked list and the supplementary list has no statutory

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17 (2002) 2 SCC 244 : 2002 SCC (L&S) 279

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[†] From the Judgment and Order dated 5-8-1997 of the Kerala High Court in OPs Nos. 18154, 18176, 18409 of 1995, 357, 3655 of 1997, WAs Nos. 582 and 583 of 1997 : (1997) 2 KLT 492

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- basis and cannot operate after exhaustion of the main list — (Per S.B. Sinha, J. concurring) Rules 4 and 12 of KPSCR require the preparation of two separate ranked lists, one for open category candidates and the other for reserved category candidates — The said Rules are non-statutory and should be read in a manner to fulfil the reservation criteria contained in the statutory rules — Hence, preparation of only one supplementary list for filling up NJD vacancies only from reserved category candidates would be illegal — Constitution of India, Arts. 16(4) & (4-B), 309 and 162 — Kerala State and Subordinate Services Rules, 1958, Rr. 14 to 17 — Kerala Public Service Commission Rules of Procedure, Rr. 2(g), 3, 4, 12 and 13 — Interpretation of Statutes — Particular statutes or provisions — Non-statutory rules — Mode of interpretation of**

- B. Constitution of India — Art. 136 — Maintainability — PIL — Appeal challenging High Court's order for making appointments from supplementary list of reserved category candidates only, after exhaustion of the main list, filed by a third party and not by the aggrieved candidates nor by PSC — Appeal filed after obtaining special leave — Persons whose appointment was challenged continuing to work for several years — In such circumstances, the challenge to maintainability of the appeal not adverted to and the impugned appointments left undisturbed but the question of law arising in the appeal considered and decided**

- The Kerala State Electricity Board (for short "KSEB") sought the Kerala Public Service Commission (for short "KPSC") to prepare a select list for appointment of Sub-Engineers. KPSC prepared a rank list of 177. It also prepared supplementary lists in respect of reserved category candidates, viz., SC, ST and OBC. However, no supplementary list was prepared in respect of open category candidates. On a requisition from KSEB on 20-8-1994, KPSC advised 150 names. However, on a second requisition on 21-12-1994 for 100 more names, KPSC could furnish only 89 names as with that advice the rank list stood exhausted. Thus, a total of 239 names were advised: 177 from the main rank list and 62 from the supplementary list so as to fill up the alternate reservation vacancies in the cycle of rotation of appointment in accordance with the relevant rules. The Kerala State and Subordinate Services Rules, 1958 (for short KSSR) framed under Article 309 provided for a 50% reservation in the aggregate for SC, ST and OBC groups. Every alternate appointment was for open competition and every succeeding appointment was for reserved candidates. It was further provided that in no year reservation, including carrying forward vacancies to a category of post should exceed 50% of the total number of vacancies for which selection by direct recruitment to that category was resorted to in that year. Out of the second advice of 89 candidates 20 candidates [11 open competition candidates, three SCs, three Ezhavas (OBCs) and three Muslims] did not join service. Those non-joining duty (for short "NJD") vacancies were although reported to KPSC, it did not make any advice. Thereafter, the next unadvised candidate in the Muslim supplementary list filed a writ petition before the High Court. That was followed by similar other writ petitions. KPSC's stand was that on exhaustion of the main rank list, the supplementary list ceased to be in force as otherwise the rule of 50:50 would stand violated. However, a Single Judge allowed the writ petitions. In writ appeals, KPSC contended that NJD vacancies might include open competition vacancies and the filling up of the reserved posts**

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would violate the proviso to Rule 15. However, the writ appeals were dismissed. The appellant herein, although not a party before the High Court, filed the instant appeals by way of PIL after obtaining special leave.

Referring to Rules 14 to 17 of KSSR and Articles 16(4) and 335 of the Constitution, the appellant contended that the impugned order of the High Court violated Rule 15 and the operation of the supplementary list after the expiry of the main list violated Article 335. That the High Court erred in directing KPSC to give appointment to the respondents before it without examining KPSC's contention that the said respondents were not even entitled to appointment. The question of maintainability of the appeals was also raised. Refusing to deal with the question of maintainability, but deciding the question of law arising in the appeals, the Supreme Court

Held :

Per Dr. Ar. Lakshmanan, J.

It is not necessary to deal with the question of maintainability at this stage as SLPs were filed after obtaining leave which was in turn granted. Moreover, the appointment to the services was done in complete regard and compliance of the High Court's direction and, therefore, the petitioner Society ought not to have any grievance. Further, all the appointed candidates are working in various departments. Therefore, it is not proposed to disturb the said appointments at this distance of time, that too at the instance of a third party and also because the really aggrieved candidates have not challenged the said appointments. Since the questions of law raised by the parties are of great importance, the same have been considered and decided herein. (Paras 15 to 17)

R.K. Jain v. Union of India, (1993) 4 SCC 119 : 1993 SCC (L&S) 1128 : (1993) 25 ATC 464 : AIR 1993 SC 1769, *followed*

From Rules 14 to 17, KSSR, it is clear that the scheme of reservation followed in the State of Kerala under direct recruitment is with respect to vacancies. The High Court proceeded on the wrong premise that the principle of reservation is with reference to the post as defined in Rule 2(g) of the KPSC Rules of Procedure (for short "KPSCRP"). Rules 14-17 do not contemplate making a supplementary list and the statutory rules envisage making a ranked list. The definition in Rule 2(g) shows that there is only one ranked list. Therefore, the supplementary list prepared by KPSC to satisfy the rules of reservation has, in fact, no statutory backing. Therefore, when the main list is exhausted or expired, supplementary list cannot be allowed to operate. Secondly, after the expiry or exhaustion of the main list if the supplementary list is operated it would violate the first proviso to Rule 15(c) and would adversely affect the open category candidates and violate the statutory rule.

(Paras 19 and 20)

The High Court was not correct in its conclusion that the respondents would be entitled to appointment based on the supplementary list. Likewise, it was not open to the High Court to exceed percentage of reservation beyond 50% against the statutory protection. Therefore, it is held that once the main list is exhausted, the supplementary list has no survival of its own. (Para 36)

Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385 : AIR 1993 SC 477; *State Bank of India Scheduled Caste/Tribe Employees' Welfare Assn. v. State Bank of India*, (1996) 4 SCC 119 : 1996 SCC (L&S) 911, *followed*

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Per S.B. Sinha, J. (concurring)

a The matter relating to reservation is governed under Rules 14 to 17 of KSSR, 1958 and KPSC was under a statutory duty to follow the principles laid down in the said Rules. (Para 39)

KPSC framed KPSCR which are non-statutory in nature. (Para 40)

b KPSC under a misconception prepared a supplementary list only in relation to the reserved category of candidates and did not prepare such list in terms of the open category candidates. The two provisos appended to both Rules 4 and 12 clearly show that two separate ranked lists were required to be prepared, one for the open category candidates and another for the reserved category candidates. The purport and object of preparing such separate ranked lists is absolutely clear and unambiguous. Such list should be in the nature of waiting list so that the vacancies arising during the period when such list is prepared till the publication of a new list as envisaged in Rule 13 can be filled up. What was required to be

c prepared was a main list — a separate ranked list for open category candidates as also a supplementary list for the purpose of satisfying the rules of reservation of appointment of reserved category candidates. Non-statutory rules framed by the Commission must be read in such a manner which would fulfil the reservation criteria contained in the statutory rules. (Para 43)

d Preparation of only one supplementary list for filling up the vacancies by some candidates not joining their posts, only from the reserved category of candidates, therefore, would be illegal, as thereby the relevant provision relating to the percentage of reservation contained in Rule 15 of the statutory rules would stand infringed. (Paras 44 and 45)

e The hardship created to open category of candidates in terms of Rule 13, KPSCR had not been considered by the High Court inasmuch as such vacancies might not be filled up for a period of three years. Furthermore, by reason thereof, the reservation policy of the State as contained in KSSSR, 1958 has been violated. In a large number of decisions it has been held by the Supreme Court that for the purpose of making the reservation policy a reasonable one the extent thereof should not exceed 50% save in exceptional situation. The statutory rules also contain such a prohibition. Article 16(4-B) is also a pointer to that fact. The judgment of the High Court, if implemented, would thus be violative of Article 16(4-B) as also the statutory rules. (Paras 47 and 48)

f However, having regard to the facts and circumstances of the case it is not intended to set aside the appointments made in favour of the private respondents herein. (Para 49)

g **C. Constitution of India — Art. 16(4) — Reservation for any person not belonging to “backward classes” not permissible under — Nor can there be reservation of posts on communal lines** (Para 32)

H-M/AFLKSTZ/29363/SL

Advocates who appeared in this case :

K.K. Venugopal, Senior Advocate (K.V. Mohan and V. Balachandran, Advocates, with him) for the Appellant;

P.A. Mohammed and T.L.V. Iyer, Senior Advocates (Fazlin Anam, E.M.S. Anam, Vipin Nair, P.B. Suresh, Romy Chacko, Ms V. Mohana and Ramesh Babu M.R., Advocates, with them) for the Respondents.

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Chronological list of cases cited ***on page(s)***

1. (1996) 4 SCC 119 : 1996 SCC (L&S) 911, *State Bank of India Scheduled Caste/Tribe Employees' Welfare Assn. v. State Bank of India* 25b a
2. (1993) 4 SCC 119 : 1993 SCC (L&S) 1128 : (1993) 25 ATC 464 : AIR 1993 SC 1769, *R.K. Jain v. Union of India* 19a
3. 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385 : AIR 1993 SC 477, *Indra Sawhney v. Union of India* 24g

The Judgments of the Court were delivered by

DR. AR. LAKSHMANAN, J. (*for Khare, C.J. and himself*)— The appellant before us, a society called Nair Service Society (“NSS” in short) filed the above appeals through its Secretary against the common judgment and order dated 5-8-1997 passed by the Kerala High Court in Writ Appeal No. 582 of 1997 etc. batch and also to stay the operation of the common judgment and also by restraining the respondent authorities from giving effect to the above judgment in any manner and not to appoint any person from the supplementary list. The appellant Society was not a party before the High Court. The appellant Society sought leave to file the above appeals. The reason given by NSS for filing the appeals by a non-party is that the Kerala Public Service Commission (in short “KPSC”) which had lost in the High Court was not filing any appeal after the impugned judgment which was against the interests of the public and, therefore, NSS was filing the appeal bona fide in public interest to protect the weaker sections who would not be able to come to this Court after the impugned order. This Court on 9-1-1998 directed issue of show-cause notice to the respondents and granted leave thereafter on 17-8-1998. b
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2. The original petitions were filed by the candidates before the High Court seeking to direct KPSC to advise candidates against the non-joining duty (“NJD” for short) and also for other consequential and incidental reliefs. e

3. KPSC makes the selection of candidates for appointment in the Government as well as in governmental bodies like the Kerala State Electricity Board (hereinafter referred to as “KSEB”). Appointments in government service have to be made following the rules of reservation laid down in Rules 15 to 17 of the Kerala State and Subordinate Services Rules, 1958 (hereinafter referred to as “KSSR”) framed under Article 309 of the Constitution. The Rules, *inter alia*, provide for a 50% reservation in the aggregate for Scheduled Castes (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC). They also provide as to how the reservation vacancies are to be filled in by the various categories and castes included in the SC, ST and OBC groups. It is only necessary to note here that every alternate appointment is for open competition (merit) and every succeeding alternate appointment is for reserved candidates. Suffice it to say that the first proviso to Rule 15(c) lays down categorically that in no year reservation, including carrying forward vacancies to a category of post shall exceed 50% of the total number of vacancies for which selection by direct recruitment to that category is resorted to in that year. The note to the rule lays down that the period of one year for purposes of this proviso shall commence on and f
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from the day on which the rank list of candidates prepared by the Commission in respect of that post comes into force.

a 4. The dispute in these appeals arises out of what are called NJD vacancies. This is illustrated with reference to the facts of one of these cases.

5. KSEB had sought preparation of a select list for appointment of Sub-Engineers. KPSC prepared a rank list of 177. Along with that it also prepared separate supplementary lists. Copies of these lists are annexed at pp. 125 to 128. The list came into force on 4-7-1994. There was a requisition from KSEB for 150 names on 20-8-1994. These names were advised. There was a second requisition on 21-12-1994 for 100 more names. KPSC could furnish only 89 names, as with that advice the list of the candidates in the merit list stood advised for appointment. Thus, KPSC advised in all 239 names, drawing 177 names from the main rank list and 62 names from the supplementary list, which became necessary to fill up the alternate reservation vacancies in the cycle of rotation of appointment. Be it stated, that in this total advice of 239 candidates, KPSC which had resorted to the supplementary list for getting reservation candidates had advised Nos. 1 to 18 among the supplementary list for Muslims. No. 19 onwards to that list could not be advised as the main rank list got exhausted in the meanwhile.

d 6. Out of the second advice of 89 candidates, 20 candidates did not join duty which comprised of eleven open competition candidates, three SCs, three Ezhavas (OBCs) and three Muslims. Those NJD vacancies were therefore, reported to KPSC for advice on 20-6-1995. No advice was, however, made by KPSC whereupon No. 19 in the Muslim supplementary list who claimed appointment to one of these NJD vacancies of Muslims, he being the next unadvised candidate in the Muslim supplementary list filed OP No. 12305 of 1995 in the Kerala High Court for a direction to KPSC to advise candidates to the NJD vacancies of Muslims. This was followed by similar other writ petitions.

e 7. The stand taken up by KPSC was that once the main rank list stood exhausted by advising the last of the candidates included thereon the supplementary list of reservation candidates also ceased to be in force as otherwise the rule of 50:50 will stand violated as pointed out thereon. KPSC's stand will be clear from the counter-affidavit at pp. 79 to 81 as also in the writ appeal pp. 102-06 and counter-affidavit pp. 163-68 in this Court.

f 8. A learned Single Judge of the High Court on 13-2-1997 allowed the petition filed by the respondents herein holding that there was no justification to reject the case of the petitioner therein on the ground that the main list got exhausted on 21-12-1994 and directed KPSC to advise Respondent 5 therein to appoint them on the NJD vacancy. In holding so the learned Judge ignored the mandate of the proviso to Rule 15(c) of KSSR that the reservation cannot in any case exceed 50% in any year. In terms of the said order, other original petitions filed by other candidates were also disposed of.

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9. Aggrieved by the said order, KPSC filed writ appeals in the High Court and contended that the supplementary list is an appendage to the main list and when the main list ceased to operate, no candidate could be advised from the supplementary list. It was also pointed out that the supplementary lists are prepared to make good the deficiency of reserved communities in the main list and when the main list ceased to operate the supplementary list cannot be allowed to operate independently. A Division Bench of the High Court, by its common judgment dated 5-8-1997 dismissed the appeal filed by KPSC and allowed the writ petitions filed by the respondents and directed the respondents to issue advice memo for appointments to those, without going into the question whether the limit of reservation would exceed 50% and also whether they were entitled to be appointed at all and also the primary question as to what is to be done to the 11 NJD vacancies existing in case of *open category* candidates and that there was no supplementary list in their case.

10. The High Court in para 8 of its judgment has observed as follows:

“The petitioners in these original petitions contended that they are all entitled to get appointment against the NJD vacancies as their names are included in supplementary lists. The stand taken by PSC is that once the main list is exhausted or expired it is not possible to advise any candidate who is included in the supplementary list. It is true that once the main list is exhausted or expired further advice cannot be made from the supplementary list for the vacancy that may arise subsequently. That is also the view taken by one of us (Balakrishnan, J.) in OP No. 3902 of 1993. But as regards NJD vacancies, we do not think that the supplementary list can be totally ignored under all circumstances. If a few candidates belonging to reserved communities failed to join duty and there arose some NJD vacancies, if there are candidates available in the supplementary list, such candidates can very well be advised for appointment. The vacancies to be filled are the actual vacancies which ought to have been filled up along with the candidates in the main list. Learned counsel for PSC pointed out that the NJD vacancies may include the open competition vacancies as well as vacancies in the reserved category and if reserved posts alone are allowed to be filled up, that will exceed the quota earmarked for reservation and it would be a violation of the proviso to Rule 15 of KS&SSR that in no year reservations including carrying forward vacancies to a category of post shall exceed 50% of the total number of vacancies for which selection by direct recruitment to that category is resorted to in that year. Such situation may occur under certain circumstances, but that does not amount to denial of opportunity of a particular class of persons as the general NJD vacancies are filled up in the next batch of selection. Even in the instant case, 150 candidates were advised on 26-8-1994. Out of 150 candidates, 125 candidates were against fresh vacancies and 25 were NJD vacancies and the counsel for PSC admitted that 25 NJD vacancies were filled up and thereafter the roster point was fixed in respect of 125 candidates. Therefore, it cannot

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a be said that there is any violation of the proviso to Rule 15 of KS&SSR in the sense that there was denial of opportunity to any of the candidates, either open competition candidates or the reserved candidates.”

b 11. Aggrieved against the above judgment, the appellant Society, after obtaining leave from this Court filed the special leave petitions against the common judgment impugning the judgment as erroneous and as against the provisions of the statute, namely, the Kerala State and Subordinate Services Rules, 1958 and is, therefore, liable to be set aside.

12. On the above facts and circumstances, the following two primal questions of law arise for consideration by this Court:

c (1) Whether the High Court, after holding that once the main list got extinguished the supplementary list also automatically gets extinguished, is correct in its conclusion that the petitioners in the original petition would be entitled to appointment based on the supplementary list when they did not have any legal rights or fundamental rights over the selection.

(2) Whether it is open to the High Court to exceed the percentage of reservation beyond 50% against the statutory provisions.

d 13. We heard Mr K.K. Venugopal, learned Senior Counsel for the appellant, and Mr P.A. Mohammed and Mr T.L.V. Iyer, learned Senior Counsel for the contesting respondents. Learned Senior Counsel invited our attention to the relevant rules, namely, Rules 14-17 of the Kerala State and Subordinate Services Rules, 1958 which lay down the principle of reservation under Article 16(4). The Rules lay down the principle and procedure to be followed in giving effect to the reservation for Scheduled e Castes/Scheduled Tribes and Backward Classes in the State of Kerala. Our attention was drawn to the relevant rules of the Kerala Public Service Commission Rules of Procedure (Annexure P-7) and Circular No. 17/87 dated 4-7-1987 of the Kerala Public Service Commission and other relevant records. Mr Venugopal, learned Senior Counsel for the appellant, further f submitted that the impugned judgment is against the statutory principle and that by the judgment the backward turns alone are to be filled in whereas Rule 14 lays down that the open category turn is to be filled in first and then the backward turns. The order of rotation is also laid down. It was further submitted that all these procedures indicate that in order to work out the rotation open competition candidates would also be available. Mr Venugopal g would further contend that Rule 15 provides that in no year reservation including carrying forward of vacancies to a category of post shall exceed 50% of the total number of vacancies for which selection by direct recruitment is resorted to in that year. The direction in the impugned judgment violates this provision. According to Mr Venugopal, the supplementary list prepared and operated should only satisfy the reservation h under Article 16(4) and that the said article is always conditioned by the mandate of Article 335 and, therefore, the operation of the supplementary list

after expiry of the main list is against the mandate of Article 335 also. KPSC has fixed the life of a ranked list under its power to regulate the procedure for selections and the procedure followed is that once the main list is exhausted the supplementary list has no survival on its own. Learned Senior Counsel would also submit that the Division Bench has not given any valid or good ground for taking the view that NJD vacancies can be filled up by candidates included in the supplementary list even if the main list is exhausted or expired except a sweeping statement that on an analysis of various provisions of law on this point they take the view aforesaid. Concluding his submission, learned counsel submitted that the High Court has committed a grave error in directing KPSC to give appointment to the respondents without going into the question whether they are eligible when according to KPSC the respondents were not even entitled to appointment. It was submitted for the aforesaid reasons the supplementary list cannot be acted upon and the respondents would not be entitled to any relief.

14. Mr T.L.V. Iyer, learned Senior Counsel, submitted that though KPSC contended before the High Court that the supplementary list has no independent existence after the exhaustion of the main list, KPSC has not preferred any special leave petition before this Court and has decided to implement the order passed by the Division Bench of the High Court. It was also contended by learned counsel for KPSC that the appellant is not a party in the High Court proceedings commenced from 1995 and had no right or locus standi to rush to this Court and that the appeal at the instance of the third-party Society is not maintainable in law.

15. We do not propose to deal with the question of maintainability at this stage since the special leave petitions were filed after obtaining leave from this Court and later this Court also had granted leave to the appellant. This apart, it was stated in the counter-affidavit filed in this Court that the appointment to the services was done in complete regard and compliance of the High Court and, therefore, the petitioner Society ought not to have any grievance. Moreover, as per the said directions of the High Court, KPSC advised for appointments of some respondents and the vacancies were filled up by the candidates included in the supplementary list and all the appointed candidates are working in various departments of the Government of Kerala. We, therefore, do not propose to disturb the said appointments at this distance of time, that too at the instance of the appellant Nair Service Society, a third party to the proceedings in question. We are also not inclined to disturb the appointments since the really aggrieved persons have not questioned the correctness of the appointment of some of the candidates who were included in the supplementary list. We make it clear that this judgment of ours shall not affect the appointments already made pursuant to the judgment of the Division Bench of the High Court.

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16. These appeals have been filed by the appellant Society by way of public interest litigation. In the judgment in *R.K. Jain v. Union of India*¹ in AIR para 74 at p. 1803 of the judgment, it has been held that: (SCC p. 174, para 74)

“In service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no locus standi to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public-spirited person.”

17. Since the question of law raised by learned Senior Counsel is of great public importance, we are inclined to consider and decide the two questions formulated by us for our decision in this appeal.

18. We have given our thoughtful consideration to the legal submissions made by the counsel appearing for the respective parties. The impugned judgment, in our opinion, did not appreciate the well-settled principles of law that the court should not substitute the provision of a statute by its own decision. In this case, the impugned judgment ignored the provisions of statutory rules to substitute the decision in the place. The KS&SS Rules, 1958 lay down the principle of reservation under Article 16(4). The Rules laid down the principle and the procedure if to be followed in giving effect to the reservation for Scheduled Castes and Scheduled Tribes and Backward Classes in the State. Rule 15 refers to the integrated cycle of rotation and it deals with the procedure to be adopted in selections where any candidate may become available for recruitment from the reserved group. This Rule lays down the principle of limitation of percentage of reservation including the carry-forward. The reservation of vacancies including carry-forward vacancies shall not exceed 50% of the total number of vacancies for which selection by direct recruitment to that category is resorted to in that year. Rule 16 provides that there is sub-rotation among OBCs. Rule 17 enumerates the subgroups among OBCs mentioned in Rule 14(a) and Rule 16. Throughout these Rules, there are clear indications that the scheme of reservation followed in the State of Kerala under direct recruitment is with respect to vacancies. Rule 14(c) lays down the manner of making appointments. Rule 15 also makes it clear that appointment referred to is with reference to vacancies as made out in the proviso under Rule 15(c) and the note thereunder. The judgment of the High Court proceeds on the wrong premise that the principle of reservation is with reference to the post. In our view, Rules 14-17 do not contemplate making a supplementary list and the statutory rules envisage making a ranked list which is defined in Rule 2(g) of the KPSC Rules of Procedure. Rule 2(g) of the KPSC Rules of Procedure reads thus:

“2. (g) ‘Ranked list’ means list of candidates arranged in the order of merit either on the basis of the interview or examination or by both;”

¹ (1993) 4 SCC 119 : 1993 SCC (L&S) 1128 : (1993) 25 ATC 464 : AIR 1993 SC 1769

19. The above definition shows that there is only one ranked list. Therefore, the supplementary list prepared by KPSC to satisfy the rules of reservation has, in fact, no statutory backing. For that reason when the main list is exhausted or expired, supplementary list cannot be allowed to operate. If the supplementary list alone is allowed to operate it would amount to giving greater sanctity to it and long life than the main list prepared in accordance with the Rules. Secondly, after the expiry or exhaustion of the main list if the supplementary list is operated it would violate the first proviso to Rule 15(c) of the General Rules. The reason is that the NJD vacancies in respect of OBC candidates cannot be filled up after the expiry or exhaustion of the main list and only reserved candidates can be advised from the supplementary list which would violate 50% rule as no OC category candidates could be advised. As rightly contended by Mr Venugopal, it would adversely affect the OC category candidates and violate the statutory rule. The reason given by the Division Bench that if any NJD vacancy arises in the OC category, the same could be filled up in the next batch of appointment thereby, the rights of OC candidates can very well be protected without any violation of the proviso to Rule 15 of KS&SSR is not legally acceptable. The above reasoning, in our opinion, is equally applicable to NJD vacancies which arise in the reserved categories as well. By advising candidates from the supplementary list, without any opportunity of balancing the advice with an open competition candidate the consequence would have been a violation of 50:50 rule with a tilt in favour of the reserved candidates lasting their quota above 50%. The net result is that there will be excess reservation over 50% in the year.

20. In our opinion, KPSC has failed to protect the interest of the open competition candidates while implementing the decision of the High Court. It is an admitted position in the present case that the open competition quota of NJD vacancies has not been filled up and the only plea is that the list got exhausted. If the list had not expired, the NJD vacancies of the OC category also would be filled up. The open competition candidates who belong to the forward communities alone do not get the appointment by the process evolved by KPSC.

21. For regulating, *inter alia*, procedure in relation to the preparation of the rank lists KPSC has made rules titled the KPSC Rules of Procedure. Rule 3 enumerates the various types of lists/examination which the Commission may conduct to assess the merits of candidates considered for appointment to a post. Needless to say it includes written examination and oral test (interview). Rule 4 insofar as it is relevant provides that where a written examination is conducted, the Commission shall prepare a list in the order of merit of such number of candidates as it may determine from time to time. The provisos to the Rule enable the Commission to prepare separate rank lists in the order of merit of candidates coming under separate groups in accordance with the qualifications or other conditions as stipulated in the notification; and also further that for the purpose of satisfying the rules of

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reservation of appointment of SCs, STs and OBCs, also, the Commission
a may prepare such supplementary lists as found necessary from time to time in the order of merit of the candidates belonging to such classes. The relevant part of the Rules reads as under:

“4. Where a written examination and/or a practical test is conducted by the Commission for recruitment to a service or post, the Commission shall:

(i) announce:

b (a) the qualifications required of the candidates for the examination,

(b) the conditions of admission to the examination including the fees,

(c) the subjects, scheme or syllabus of the examination, and

c (d) the number of vacancies to be filled from among the candidates for the examination:

Provided that where the exact number of vacancies to be filled is not ascertainable, the Commission may either announce the approximate number of vacancies to be filled or state that the number of vacancies has not been estimated.

(ii) invite applications and consider all the applications so received,

d (iii) make all arrangements for the conduct of the examination for the candidates whose applications are found to be in order, and

(iv) prepare a list in the order of merit of such number of candidates as the Commission may determine from time to time:

Provided that the Commission may also prepare separate ranked lists in the order of merit of candidates coming under separate groups in accordance with the qualifications or other conditions as stipulated in the notification:

e Provided further that for the purpose of satisfying the rules of reservation of appointment of Scheduled Castes, Scheduled Tribes and Other Backward Classes also the Commission may prepare such supplementary lists as found necessary from time to time in the order of merit of the candidates belonging to such classes.”

f **22.** It is only necessary to refer to one more rule, namely, Rule 13 which provides the period for which a list as above prepared shall remain in force. The normal period for which the list is to remain in force is one year from the date on which it is brought into force, but it will continue to be in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of three years, whichever is earlier. Based on the

g procedure so prescribed, KPSC prescribes the ranked merit list in the order of merit. The candidates are arranged strictly according to merit and are not arranged according to community or caste or group or according to the cycle of rotation, in reservation. The number of candidates to be included in this rank list is filled with reference to some principles followed by them, which are explained in para 4 of KPSC’s writ appeal before the High Court

h (pp. 102-03). The candidates are advised for appointment as and when

vacancies are reported, but following the rules of reservation and rotation prescribed in Rules 14 to 17 of KSSR.

23. With a view to secure adequate representation of reserved communities in the selection and thereby to effectuate the policy of reservation, KPSC prepares what it calls supplementary list of candidates for the different reserved communities who will be entitled to appointment, comprising of a number equal to half the number of turns as per the quota to each reservation group. Thus if Muslims were entitled to ten turns in the list, the supplementary list of Muslims will comprise of at least five Muslims. The advantage of this procedure was that no reservation turn will be passed over to open competition and reservation groups will get the representation due to them, at the same time maintaining the balance of 50:50 between open competition and reservation candidates.

24. The supplementary list was only in respect of reservation categories. There was no supplementary list prepared in relation to open competition merit candidates for the reason that where the last of the candidates has been advised from the rank list in the open competition, there was no further scope for drawing on the supplementary list or advising from that list, as all the advice hitherto was on the basis of one open competition followed by reservation, thereby keeping the balance of 50:50. If any more candidates are advised from the supplementary list, the number of reservation candidates will go up and the 50:50 rule will be violated.

25. KPSC was therefore always of the view that once main rank list got exhausted by advising the last of the candidates therein, the supplementary list also ceased to be in force as there was no scope for advising any more candidates therefrom without violating the 50:50 rule.

26. All this is explained in the writ appeal filed by KPSC as also the counter-affidavit filed in this Court.

27. In the case on hand, the appellant Society is seeking to enforce the rule of reservation to limit the same up to 50% in order to maintain the balance. KPSC even stated that under Rule 15, the 50% rule of reservation should be observed in a selection year of the ranked list. The rule clearly safeguards the interest of the backward communities by providing that if no candidate was available to a particular community in a particular year, it should be restored at the earliest after having passed over by adjusting the post of another community, which derived extra benefit. But in a case of open competition candidate there is no right for restoration as set out by KPSC in its counter.

28. A rejoinder-affidavit was filed on behalf of the appellant Society. Para 7 of the rejoinder-affidavit is reproduced hereunder:

“In para 3 of its counter, the Commission itself admits that the vacancy created as a result of ‘non-joining duty’ of a candidate must be made by advising the candidates belonging to the same group such as OC

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or BC. But for this the ranked list should be valid. This is evident from the following:

a

As the turns in the rotation are continuous, the ‘non-joining duty’ (NJD) of a candidate, results in the break of the chain in the cycle of rotation. The break in the chain is mended by advising a candidate, belonging to the group concerned. This being the position, the turns becoming available due to ‘not joining duty’ of candidates is filled up first and only after filling up the ‘not-joining-duty’ turn the remaining vacancies are filled up following the turns in the rotation from where it ended last time. Candidates can be advised against the vacancies caused due to the ‘not joining duty’ only from a valid ranked list. So not-joining-duty vacancy resulting from the failure of candidates must be filled up by advising candidates. Otherwise, the principles contained in Rules 14 to 17 KS&SSR will be defeated.

b

c

Further in Annexure R-1, at p. 176, it is stated as follows:

According to the above judgment, vacancies arising by reason of failure of candidates to join duty must be filled up by advising candidates belonging to the same group OC or reserved. As per the procedure now followed by the Commission, if a candidate fails to join duty in a particular post, that advice is cancelled and another candidate is advised to fill up the above vacancy continuing the rotation from where it previously ended. As this procedure is against the spirit of the above judgment, the Commission order that hereafter the vacancies arising due to not joining duty of the candidates already advised, have to be filled up by the candidates belonging to the same group. This will apply to all requisitions (both for special and general recruitment) received on and after 6-11-1981.

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e

The Commission supported the case of the petitioner Society in its affidavit in paras 4 and 5 also. Annexures R-1 and R-2 also support the case of the petitioner including that once the ranked list expired the supplementary list also gets exhausted and that it should not be acted upon.”

f

29. However, in spite of the averments made as above, KPSC decided to implement the order of the High Court and thereby failed to protect the interests of the open category candidates by announcing General Circular No. 25/97 dated 22-12-1997. The said circular is stated to be retrospective in nature and to be acted upon w.e.f. 13-2-1997.

g

30. As already noticed, the Government of Kerala issued a circular on 22-12-1997 only because KPSC had to comply with the judgment of the High Court. Now that we have clarified the correct position of law as canvassed by the counsel appearing for parties, the circular dated 22-12-1997 will have no effect.

h

31. Article 16 of the Constitution deals with equality of opportunity in matters of public employment. The said article reads thus:

“16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. a

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment. b

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State. c

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year. d

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.” e

32. Clause (4) only permits reservation for “backward classes of citizens” who are not, in the opinion of the State, adequately represented in the services of the State. It does not permit reservation for any person who does not belong to the category of “backward classes”, nor does it enable the State to reserve posts on communal lines. f

33. This Court in the case of *Indra Sawhney v. Union of India*² held that the reservation of more than 50% of the vacancies as they arise in any year or a carry-forward rule will be outside the protection of Article 16(4). A normal rule is that the reservation under Article 16(4) should not exceed 50% of the appointments or posts to be made in a particular year. This Court has also observed that the rule of 50% a year will be taken as the unit and not the entire strength of the cadre or service as the case may be (AIR para 96 : SCC g

2 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385 : AIR 1993 SC 477 h

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- a para 814, pp. 736-37) . If suitable candidates are not available in the year to fill the reserved seats, the reserved quota should not be carried forward to the next year, so as to exceed the 50% limit for reservation (AIR paras 98-99 : SCC paras 817-18, pp. 739-40).

- b 34. The reserved vacancies should not be carried forward beyond the period of three years at the end of which they lapse and cannot be revived and filled retrospectively by applying the relaxed norms. (*State Bank of India Scheduled Caste/Tribe Employees' Welfare Assn. v. State Bank of India*³.)

35. It is also observed in the said judgment that Article 16(4) speaks of class protection and not the protection of individuals.

- c 36. We are, therefore, of the opinion that the High Court is not correct in its conclusion that the respondents would be entitled to appointment based on the supplementary list. Question (1) is answered in the negative. Likewise, it is not open to the High Court to exceed percentage of reservation beyond 50% against the statutory protection. This question is also answered in the negative. We, therefore, hold that once the main list is exhausted, the supplementary list has no survival of its own.

37. With these observations, the appeals stand disposed of. No costs.

- d **S.B. SINHA, J.** (*concurring*)— The mode and manner of selection and method of appointment to the post of Sub-Engineer (Civil) in the Kerala State Electricity Board as also the terms and conditions thereof indisputably are governed by the Kerala State and Subordinate Services Rules, 1958 (“the Rules”). The Rules also provide for reservation being governed by Rules 14 to 17 thereof. Rule 14(c) provides for the manner in which the order of rotation shall be worked out. In terms of Rule 15, it is provided that if a suitable candidate is not available for selection from any particular community or group of communities specified in the annexure, the said community or group shall be passed over and the post shall be filled up by a suitable candidate from the community or group of communities immediately next to the passed-over community or group in the said annexure, as the case may be, in the order of rotation. In the annexure appended to Rule 15 for direct recruitment to the posts other than those included in the Kerala Last Grade Service, a 100-point roster is given. Once, however, the benefit of the turn in terms of Rule 15 is forfeited to a particular community or a group of community having been passed over, the same shall be restored to it at the earliest possible opportunity, if a suitable candidate from the particular community or group is available for selection upon making adjustment therefor against the claims of that community or group, as the case may be.
- g The proviso appended to the said rule in no uncertain terms restricts reservation including carrying forward vacancy to a category of posts in the year of recruitment in question not exceeding 50% of the total number of vacancies.

- h 39. By reason of a note appended to Rule 15, it is provided that for purposes of application of the proviso to Rule 15 limiting the number of

3 (1996) 4 SCC 119 : 1996 SCC (L&S) 911

vacancies to be reserved in a year as 50 per cent in respect of a category of posts, the period of one year shall commence on and from the day on which the ranked list of candidates prepared by the Commission in respect of that post comes into force. The matter relating to reservation is governed thereunder and the Public Service Commission was under a statutory duty to follow the principles laid down in the said Rules. a

40. The Public Service Commission of the State of Kerala framed the Kerala Public Service Commission Rules of Procedure which are non-statutory in nature. Rule 2(g) of the said Rules defined “ranked list” as: b

“2. (g) ‘Ranked list’ means list of candidates arranged in the order of merit, either on the basis of the interview or examination or by both;”

41. Rule 4 of the said Rules which is material for the purpose of determining the issues raised in this matter reads thus:

“4. Where a written examination and/or a practical test is conducted by the Commission for recruitment to a service or post, the Commission shall,— c

(i) announce:

(a) the qualifications required of the candidates for the examination,

(b) the conditions of admission to the examination including the fees, d

(c) the subjects, scheme or syllabus of the examination, and

(d) the number of vacancies to be filled from among the candidates for the examination:

Provided that where the exact number of vacancies to be filled is not ascertainable, the Commission may either announce the approximate number of vacancies to be filled or state that the number of vacancies has not been estimated. e

(ii) invite applications and consider all the applications so received,

(iii) make all arrangements for the conduct of the examination for the candidates whose applications are found to be in order, and

(iv) prepare a list in the order of merit of such number of candidates as the Commission may determine from time to time: f

Provided that the Commission may also prepare separate ranked lists in the order of merit of candidates coming under separate groups in accordance with the qualifications or other conditions as stipulated in the notification:

Provided further that for the purpose of satisfying the rules of reservation of appointment to Scheduled Castes, Scheduled Tribes and Other Backward Classes also the Commission may prepare such supplementary lists as found necessary from time to time in the order of merit of the candidates belonging to such classes.” g

42. Relevant parts of Rules 12 and 13 of the said Rules read as under:

“12. All the candidates interviewed and who obtained not less than the minimum marks fixed by the Commission shall be included in the ranked list prepared in the order of merit: h

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a Provided where the candidates have been called for interview for the purpose of satisfying the rules of reservation alone such candidates who have got not less than the prescribed minimum marks in the interview shall be included in the supplementary list or lists arranged in the order of merit among the candidates belonging to each class:

b Provided further that the Commission may also prepare list or lists of such categories of candidates who have got not less than the prescribed minimum marks in the interview and who are entitled to priority according to the terms of the notification inviting applications:

Provided further that the Commission may also prepare lists of overaged candidates who have secured not less than the prescribed minimum marks in the interview and who are eligible to be considered for appointment in the absence of candidates who conform to the rules regarding age-limits.

* * *

c 13. The ranked list published by the Commission shall remain in force for a period of one year from the date on which it was brought into force provided that the said list will continue to be in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of three years whichever is earlier:"

d 43. The Kerala Public Service Commission under a misconception prepared a supplementary list only in relation to the reserved category of candidates and did not prepare such list in terms of the open category candidates. A bare perusal of the two provisos appended to both Rules 4 and 12 clearly shows that two separate ranked lists were required to be prepared, one for the open category candidates and another for the reserved category candidates. The purport and object of preparing such separate ranked lists is absolutely clear and unambiguous. Such list should be in the nature of waiting list so that the vacancies arising during the period when such list is prepared till the publication of a new list as envisaged in Rule 13 can be filled up. In other words, in terms of the aforementioned Rules what was required to be prepared was a main list — a separate ranked list for open category candidates as also a supplementary list for the purpose of satisfying the rules of reservation of appointment of reserved category candidates. Non-statutory rules framed by the Commission must be read in such a manner which would fulfil the reservation criteria contained in the statutory rules.

e 44. Preparation of only one supplementary list for filling up the vacancies by some candidates not joining their posts, only from the reserved category of candidates, therefore, would be illegal, as thereby the relevant provision relating to the percentage of reservation contained in Rule 15 of the statutory rules would stand infringed.

f 45. Both the lists viz. for the open category of candidates as also the reserved category of candidates were necessary, thus, required to be prepared in terms of the said Rules for maintaining the ratio of 50:50.

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46. The respondents herein filed a writ petition before the High Court for giving effect to the said purported supplementary list wherein the following prayers were made:

“(i) to issue a writ of mandamus or any other appropriate writ, order or direction commanding the 1st respondent to advise candidates against the non-joining-duty vacancies of Muslim candidates advised on 20-8-1994 from Ext. P-1 list and also to such vacancies of candidates, advised on 21-12-1994;

(ii) to direct the 2nd respondent to report non-joining duty among 89 candidates advised from Ext. P-1 list on 21-12-1994.”

47. The High Court by reason of the impugned judgment granted the said prayer inter alia holding that the rule of reservation is not affected as the vacancies created by reason of non-joining of the posts belonging to open category candidates may be filled up in the later year. The hardship created to one category of candidates in terms of Rule 13 had not been considered by the High Court inasmuch as such vacancies may not be filled up for a period of three years. Furthermore, by reason thereof, the reservation policy of the State as contained in the Kerala State and Subordinate Services Rules, 1958 has been violated. This Court in a large number of decisions has clearly held that for the purpose of making the reservation policy a reasonable one the extent thereof should not exceed 50% save in exceptional situation. The statutory rules also contain such a prohibition. Article 16(4-B) of the Constitution is also a pointer to the said fact in terms whereof an enabling provision has been created whereby and whereunder the State may consider to fill up the unfilled vacancies of a year which are reserved for being filled up in that year in accordance with the provisions made under clause (4) or (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on total number of that year.

48. The judgment of the High Court, if implemented, would thus be violative of Article 16(4-B) of the Constitution as also the statutory rules.

49. The High Court, therefore, committed an illegality in passing the impugned judgment insofar as it failed to take into consideration that in the event the same is given effect to, more than 50% of the vacancies in a particular year will be filled up from amongst the reserved category candidates. We, however, having regard to the facts and circumstances of the case do not intend to set aside the appointments made in favour of the private respondents herein only on the ground that the judgment of the High Court has been acted upon.

50. For the reasons aforementioned, I agree that the appeals shall be allowed to the extent as directed by my learned Brother Dr. Lakshmanan, J. in his judgment.

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