

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

WP(C).No. 19353 of 2015 (T)

PETITIONER:

SMITHA T.PILLAI, AGED 36 YEARS,
W/O. KRISHNAKUMAR, MANGALATH HOUSE,
THEKKUMMURI, PERINGANADU P.O.,
PATHANAMTHITTA DISTRICT.

BY ADVS.SRI.RAJU JOSEPH (SR.)
SRI.FIROZ K.ROBIN
SRI.J.JULIAN XAVIER

RESPONDENTS:

1. JOINT REGISTRAR (GENERAL),
CO-OPERATIVE SOCIETIES, MINI CIVIL STATION,
PATHANAMTHITTA-689 645.
2. PANNIVIZHA SERVICE CO-OPERATIVE BANK LTD.NO.891,
ADOOR, PATHANAMTHITTA DISTRICT-689 645.
3. KERALA CO-OPERATIVE SERVICE EXAMINATION BOARD,
IIND FLOOR, KERALA STATE CO-OPERATIVE BANK BUILDING,
OVER BRIDGE JUNCTION, THIRUVANANTHAPURAM
REPRESENTED BY ITS SECRETARY/CHAIRMAN, PIN-695 001.

R2 BY ADV. SRI.P.N.MOHANAN
R1 BY GOVERNMENT PLEADER SRI.G.GOPAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
15-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 19353 of 2015 (T)

PETITIONER'S EXHIBITS:

EXT. P1 : TRUE COPY OF THE IDENTITY CARD ISSUED TO THE PETITIONER BY THE 3RD RESPONDENT.

EXT. P1(a): TRUE ENGLISH TRANSLATION OF EXT.P1.

EXT. P2 : TRUE COPY OF THE RANK LIST PUBLISHED BY THE 3RD RESPONDENT.

EXT. P3 : TRUE COPY OF THE PROFORMA DATED 9.5.2015 SUBMITTED BY THE 2ND RESPONDENT.

EXT. P4 : TRUE COPY OF THE REPRESENTATION DATED 13.5.2015 FILED BY THE PETITIONER.

EXT. P4(a): TRUE ENGLISH TRANSLATION OF EXT.P4.

EXT. P5 : TRUE COPY OF THE REPRESENTATION DATED 26.5.2015.

EXT. P5(a) : TRUE ENGLISH TRANSLATION OF EXT.P5.

RESPONDENT'S EXHIBITS: NIL.

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.19353 of 2015 T

Dated this the 15th day of September, 2015

JUDGMENT

Introduction:

In this writ petition, the survival of the rank list even after filling up of the notified vacancies is required to be examined, especially about the future vacancies.

Facts in Brief:

2. The petitioner, a prospective job seeker, responded to the notification issued by the third respondent Board for the appointment of Junior Clerk in the second respondent Bank. In fact, at the request of the second respondent, the third respondent Board on 21.11.2011 issued a recruitment notification for one post of Junior Clerk.

3. Consequent to the recruitment notification, the petitioner along with other candidates faced the written test

and the subsequent interview and eventually secured the second position in the rank list published by the third respondent.

4. Soon after the publication of the rank list, the person who secured the first position was appointed in the solitary vacancy. Nevertheless, since the validity of the rank list is two years in terms of Rule 182 of the Kerala Co-operative Societies Rules ('the Rules' for brevity), there arose another vacancy during the currency of the rank list. With hopes revived, the petitioner submitted Exhibit P4 representation before the Joint Registrar, the first respondent, apart from submitting Exhibit P5 representation before the employer Bank, the second respondent.

5. As nothing concrete has emerged subsequent to the representations made by the petitioner, he filed the present writ petition.

Summary of Submissions:**Petitioner's:**

6. Sri.Raju Joseph, the learned Senior Counsel for the petitioner, has straightaway drawn my attention to Rule 182(4) of the Rules to contend that so long as the rank list subsists, it is impermissible for the employer to go for fresh recruitment under any excuse, abandoning the rank list. He has further submitted that there is a salutary purpose behind providing a period of currency for the rank list. In elaboration, he has submitted that it is not administratively convenient or, for that matter, feasible to go for piecemeal recruitment as and when any vacancy arises. In this regard, the learned Senior Counsel has also drawn my attention to the practice being adopted by the Kerala Public Service Commission. According to him, the Public Service Commission, the apex recruitment agency of the State, keeps on advising the candidates who secured rank to be

appointed in the vacancies that have arisen even subsequent to the notification, so long as the rank list is not exhausted. In support of his submissions, the learned Senior Counsel has placed reliance on **Kodakara Farmers Service Co-op. Bank Ltd. v. Neena**¹.

7. Instead of appointing the petitioner in the subsequent vacancy, submits the learned Senior Counsel, the respondent Bank passed a fresh resolution on 29.07.2014 and requested the third respondent Board to issue another notification, which, according to the learned Senior Counsel, is clearly impermissible, as it is in violation of Rule 182. In summing up his submissions, the learned Senior Counsel has sought the intervention of this Court to ensure the appointment of the petitioner in the vacancy that arose while the rank list was subsisting.

¹ 2010 (1) KLT 541

Respondents':

8. Per contra, Sri.P.N.Mohanan, the learned counsel for the respondent Bank has strenuously contested the claim of the petitioner. The learned counsel has pointed out that initially the vacancy was notified on 21.11.2011, and soon after the publication of the rank list, within thirty days therefrom the person who secured the first position was appointed. According to him, much later, i.e. on 18.02.2014, the second vacancy arose. In the light of the statutory obligation under Section 80(5) of the Kerala Co-operative Societies Act ('the Act' for brevity) the respondent Bank reserved the said post for the physically challenged persons and accordingly notified it.

9. The learned counsel has submitted that though sub-section (5) was incorporated in Section 80 of the Act in 2010, the Registrar issued a circular on 14.07.2011 requiring the Co-operative Societies to earmark 33rd, 66th

and 99th vacancies in a roster of hundred for the physically challenged persons. The Bank, which has a sanctioned strength of twelve employees, initially felt that it had no obligation to comply with Section 80(5) of the Act. The learned counsel has further pointed out that in the light of the judgment rendered by this Court at the behest of a physically challenged person, as reported in **Jayaprakash v. Joint Registrar of Co-operative Societies**², it has become mandatory for all the Co-operative Societies to provide reservation for the physically challenged persons, notwithstanding its sanctioned staff strength. According to him, the judgment has also been upheld in appeal.

10. It is the specific contention of the learned counsel for the respondent Bank that in the wake of the judgment of this Court in Jayaprakash (supra), the respondent Bank was obligated to reserve the first vacancy that arose subsequent to the judgment. The learned counsel

² 2013 (4) KLT 788

has also submitted that pending writ petition the rank list expired on 02.07.2015. In the absence of any interim order, it is unsustainable to have the life of the rank list extended or renewed.

11. As regards the claim of the person in the rank list, the learned counsel would contend that mere inclusion in the rank list does not confer any substantive right on the candidate. Indulging in a bit of chronology, the learned counsel would also submit that the first vacancy was filled up on 02.07.2013 and the second vacancy arose only on 08.02.2014. According to him, the vacancy that subsequently arose can be filled up only through a fresh notification. In the face of the statutory compulsion to provide reservation for the physically challenged, contends the learned counsel, it is ineluctable that the subsequent vacancy should be filled up only through a fresh notification exclusively meant for the physically challenged persons. The

learned counsel for the respondent Bank has placed reliance on **Thrissur District Co-op. Bank Ltd. v. Delson Davis**³, **Deepthy Vijayakumar v. Joint Registrar**⁴, **Rakhi Ray and Others v. High Court of Delhi and Others**⁵, **Kerala Agricultural University v. Gopinathan Unnithan**⁶ and **Mukul Saikia and Others v. State of Assam and Others**⁷.

12. At this juncture, the learned counsel for the respondent Bank has brought to my notice that the judgment rendered by a learned Division Bench of Court in Neena (supra) was subsequently reversed by the Hon'ble Supreme Court in Kodakara Service Co-op. Bank Ltd. (supra). According to him, in the face of the doctrine of merger, whatever ratio laid down in Neena (supra) stood nullified given the reversal of the judgment by the Hon'ble

3 2002 (1) KLT 852 (SC)

4 2008 (4) KLT 321

5 (2010) 2 SCC 637

6 1996 (1) KLT 344

7 (2009) 1 SCC 386

Supreme Court. On the issue of the doctrine of merger, the learned counsel has placed reliance on **S.Shanmugavel Nadar v. State of Ramil Nadu and another**⁸.

13. The learned counsel for the respondent Bank has drawn my attention to the judgment of this Court in *Delson Davis* (supra) and submitted that even in that case there was a rank list and its currency was held to be for two years as could be seen from Circular No.18/1994 dated 07.06.1991. Despite the circular mandating the rank list will have a validity period of two years, this Court has held that as regards the subsequent vacancies the recruitment should be through a fresh notification.

Reply:

14. In reply, the learned Senior Counsel for the petitioner has submitted that what has merged is the operative portion of the judgment but not the reasoning.

⁸ AIR 2002 SC 3484

According to him, the salutary objective of the doctrine of merger is to ensure that there are no two decrees to be executed. In support of his submissions, he has placed reliance on **State of Madras v. Madurai Mills Co., Ltd.**⁹, **Kunhayammed v. State of Kerala**¹⁰ and **Gangadhara Palo v. Revenue Divisional Officer and Another**¹¹.

15. Heard the learned Senior Counsel for the petitioner and the learned counsel for the respondent Bank, apart from perusing the records.

Issues:

16. The issues that are required to be determined in the present writ petition are as follows:

- i. Whether the respondent employer is obligated to appoint the petitioner to a vacancy that arose subsequent to the recruitment notification on the premise that the rank list has been subsisting?

⁹ AIR 1967 SC 681

¹⁰ 2000 (3) KLT 354

¹¹ (2011) 4 SCC 602

ii. Whether the doctrine of merger effaces the ratio of the judgment assailed against once a judicial appellate forum renders a judgment either by affirming or reversing the decision?

Discussion:

Rule 182 of the Rules:

17. As both the issues are inter-connected, I have taken them up together for consideration. At the outset, we need to examine the statutory position to determine the ramifications of the rank list. Under Chapter XV of the Rules dealing with the establishment, Rule 182 provides for the manner of recruitment to the vacancies in the Co-operative Societies. Sub-rule (4) thereof provides for the procedure of recruitment to the Societies covered by Section 80B of the Act. Clause (viii) of sub-rule (4) of Rule 182 mandates that the Committee shall effect appointments to the vacancies from the select list within one month from the date of such publication and report to the Examination

Board. Indeed, it pays to examine clauses (vii) and (viii) of sub-rule (4) of Rule 182, which read as follows:

“Clause (vii): On the basis of the consolidated list so received from the Examination Board, the committee shall prepare the rank list of candidates and publish the same on the notice board of the society. The society shall send one copy of the rank list so published to the Examination Board also. The board shall examine the correctness of such rank list and report to the Registrar, the irregularities, if any. The list shall be valid for a period of two years from the date of publication of the same by the society.

Clause (viii): All appointments to the vacancies shall be made by the committee from the select list so published within one month from the date of such publication and shall be reported to the Examination Board.”

18. A perusal of the above-extracted portion of the provision makes it clear that the rank list shall be valid for two years from the date of publication of the same by the Society. Read in conjunction with clause (vii), it is evident from clause (viii) that the notified vacancies shall be filled up within one month from the date of publication of the rank list. In other words, despite the strict time frame of one month to fill up the notified vacancies, the very rank list

survives and remains valid for two years.

Neena's Case:

19. A learned Division Bench of this Court has squarely dealt with this issue in *Neena* (supra). Their Lordships have observed that the principal purpose of keeping the select list valid for two years prepared by the Society based on the examination conducted by the Examination Board is to enable the Society to fill up the vacancies arising during the currency of the rank list. Rejecting the contention of the employer Bank that only the notified vacancies could be filled up from the rank list, the learned Division Bench has further held that if that argument were to be accepted, it would render clause (vii) of sub-rule (4) of Rule 182 redundant.

20. The learned Division Bench has also held that if the respondent Bank's contention is to be accepted, each time as and when the vacancy arises, after filling up the

notified number of vacancies from the rank list, examination has to be conducted by the Board immediately after each round of selection. The learned Division Bench, in response to the precedents cited at the Bar to the contrary, has observed that all those decisions were rendered prior to the introduction of clause (vii) of sub-rule (4) of Rule 182.

21. The learned Division Bench has also addressed the issue of expiry of the rank list before the appointment could be made to the subsequent vacancy. Their Lordships have held that if the delay cannot be attributed to the applicant his right to be appointed cannot be defeated by the administrative delays, if any. As regards the power of the Registrar or his delegate to direct the employer Bank to appoint a person from the rank list in the subsequent vacancy, the learned Division Bench is of the opinion that in terms of Section 66A of the Act, the Registrar or his delegate has got ample powers. This having been

crystallized as the precedential position, as has been affirmed by a learned Division Bench of this Court, it applies, without demur, on all fours as far as this Bench is concerned. I could have concluded the discussion merely by placing reliance on Neena (supra) had it not been for the fact that the very issue was taken in appeal before the Hon'ble Supreme Court, which in Kodakara Farmers Co-op. Bank Ltd. (supra) reversed the said judgment.

The Case Law in a Conspectus:

22. If we examine the judgment in Kodakara Farmers Co-op. Bank Ltd. (supra), it is evident that the appellant Bank took a plea that despite the availability of subsequent vacancy it did not decide to go for any recruitment. The contention is that an unwilling employer could not have a candidate thrust upon it. In that context, the Hon'ble Supreme has observed as follows:

“On examination of the case it is seen that as per rules, even if the society framed feeder category rules and got it

approved by the Joint Registrar, there is absolutely no rule or law compelling the Board of Directors of the society to make appointments or promotion even in respect of any post that had been prescribed in the feeder category rule. Even if posts are permanent, it is not obligatory for the Board of Directors of a society to fill up all posts; It is an absolute prerogative right of the Board of Directors not to fill up any particular post even though the feeder category rules had sanctioned the post and enable the Board of Directors to effect appointment to the post, but they cannot be compelled to do so under any of the provisions of the Act or Rules.”

23. Eventually, their Lordships have observed that the Government has clearly held that an employer cannot be compelled to fill up the posts even if the posts are permanent, and that there is nothing to show that the Bank has acted arbitrarily in not filling up the posts. On the other hand, as per the select list, six candidates were already appointed. Thus, the Court at the end held that the High Court was not justified in upsetting the order passed by the Government.

24. In Gopinathan Unnithan (supra), as per the

notification issued in 1983, published by the Kerala Agricultural University, only one vacancy of Professor of Agricultural Statistics was notified. For filling up that one vacancy, a select list was prepared by a properly constituted Selection Committee. Three persons, who were holding the post of Associate Professor, were included in the select list. The first man was appointed against the vacancy that had been notified. Since another vacancy in the cadre of Professor of Statistics arose immediately thereafter, the candidate who stood second in the rank list was also appointed. Long subsequent to that, a third vacancy of Professor arose. The Petitioner, who stood third, has been directed by a learned Single Judge to be appointed against that vacancy.

25. In the appeal, the learned Division Bench of this Court has held that when one vacancy alone was notified, the candidates ranked in the select list cannot be appointed

to the vacancies that arose subsequently. It is pertinent to observe that by then Rule 182(4)(vii) providing a specific tenure for the rank list was not on the statute book.

26. In *Mukul Saikia* (supra), the Apex Court has observed that the select list prepared by the Public Service Commission could be used to fill up the notified vacancies and not the future vacancies. It is, thus, held that appointments beyond the number of posts advertised would amount to filling up the future vacancies meant for direct candidates in violation of the quota rules.

27. In ***Surinder Singh v. State of Punjab***¹² the Apex Court has laid down that a waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed to the vacancy so caused, or if there is

¹² (1997) 8 SCC 488

some extreme exigency the Government may as a matter of policy decision pick up the persons in the order of merit from the waiting list. The Court has eventually held that the constitutional discipline requires that the courts should not permit such improper exercise of power as may result in creating a vested interest and perpetrating a waiting list of one examination at the cost of fresh candidates either from the open or even from the service category.

28. In Mukul Saikia (supra) the Apex Court has further observed that currency of the select list had expired as soon as the notified posts have been filled up; therefore, appointments beyond the number of posts notified would amount to filling up the future vacancies, and the said course is impermissible in law.

29. In Rakhi Ray (supra), it is once again held that vacancies cannot be filled up over and above the number of vacancies notified as recruitment of the candidates would be

in excess of the notified vacancies. It is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of the vacancies. In that context, it is further observed that a person whose name appears in the select list does not acquire any indefeasible right of appointment.

30. In *Deepthy Vijayakumar* (supra) a learned Division Bench of this Court has held that recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution. The procedure adopted in appointing the persons kept in the waiting list by the respective Boards is unconstitutional, for the vacancies have arisen subsequently, but no fresh notification is issued.

31. In Jayaprakash (supra), a learned Single Judge of this Court has considered the impact of sub-section (5) of Section 80 of the Act, which, in fact, provides for the reservation to physically challenged persons. His Lordship has held that the mandate of reservation as provided in the proviso cannot at all be escaped from, and it has to be complied with at the earliest moment. It would not at all depend upon the whim or caprice of the employer.

32. In Delson Davis (supra), the facts, as could be seen from the judgment, are substantially similar to the facts in the present case. The appellant Bank invited applications for the posts of Clerk-cum-Cashier, Data Entry Operator, and Peons through a notification dated 10.11.1994. The notification contained only one vacancy of Data Entry Operator. On completion of the selection process, the Bank appointed the person who stood first in the rank list to the post of Data Entry Operator. The first

respondent secured the second rank. After some time, the person who was appointed as the Data Entry Operator resigned from service. Claiming the vacancy thus arose, the first respondent approached the Bank. Though he was appointed temporarily, he was not given permanent employment.

33. Having approached this Court seeking regularisation of his services, the first respondent emerged successful, for this Court has ordered that his claim to the vacancy after the resignation of the topper in the list is legitimate. What seems to have weighed with this Court is that the first respondent stood second in the rank list; after the resignation of the topper from the post, it is the second ranked person who should be appointed.

34. As can be seen, when the Bank appealed against the decision, the Apex Court has held that when once the selection process is complete, and the appointment has

been made, that process comes to an end. If any vacancy arises on the appointee leaving the post, it must be treated as a fresh vacancy and fresh steps in accordance with the appropriate rules should be taken.

35. In fact, the learned Senior Counsel for the petitioner has contended that in all the cases relied on by the learned counsel for the respondent Bank, there was no provision analogous to Rule 182(4)(vii) to be considered. If we examine the said provision, it is evident that clause (vii) of sub-rule (4) of Rule 182 was introduced through SRO 1005/2010 dated 02.11.2010. Even in *Delson Davis* (supra) the notification was issued in 1994.

36. Not to be outdone, the learned counsel for the respondent Bank has placed before the Court Circular No. 18/1994 dated 08.06.1994, which, among other things, stipulates that the rank list will be valid for a period of two years from the date of publication. The learned counsel has,

thus, submitted that Neena (supra) has to be rejected not only on the ground of merger but also on the ground of being per incuriam, if at all it survives the merger test, because in Delson Davis (supra), the ratio is emphatic. The pendulum has almost swung in favour of the respondent Bank. Or has it?

37. Now we have to take a final view on twin aspects: Has Neena (supra) survived the merger test? If it has, has it then rendered itself per incuriam in the light of the ratio in Delson Davis (supra), for Circular No.18/1994, which is analogous to Rule 182(4)(vii) is said to have been in operation then?

Doctrine of Merger:

38. In the light of the reversal of Neena (supra) in Kodakara Farmers Co-op. Bank Ltd. (supra), this Court is called upon to examine the issue of doctrine of merger. In Kunhayammed (supra), a locus classicus on the principle of

merger, a learned three-Judge Bench of the Hon'ble Supreme Court has initially examined the etymological significance of the term 'merger' by referring to Corpus Juris Secundum¹³, wherein it is defined thus:

42. "To merge" means to sink or disappear in [to] something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality.

39. After exhaustively examining the precedential parameters of the issue, their Lordships have summed up the principles concerning the doctrine of merger holding that where an appeal or revision is provided against an order passed by a Court, Tribunal or any other authority before the superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter that

13 Vol. LVII, pp. 1067-68

subsists, remains operative and is capable of enforcement in the eye of law, subject to the exceptions that have been provided in the very summary.

40. In Kunhayammed (*supra*), the Apex Court has explained the salutary purpose of the doctrine of merger to the effect that there cannot be more than one decree or operative order governing the same subject matter at any given point in time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, its finality, however, is put in jeopardy. Once the superior court has disposed of the lis before it either way—whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order

wherein merges the decree or order passed by the court, tribunal or the authority below.

41. Nevertheless, Kunhayammed (supra) further sounds a word of caution by saying that the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.

42. In Salmond's Jurisprudence, at page 149, the learned revising Author P.J.Fitzgerald has treated the issue of affirmation or reversal of a judgment in a different perspective. The learned author has illustratively begun by saying that it sometimes happens that a decision is affirmed or reversed on appeal on a different point. As an example, suppose that a case is decided in the Court of Appeal on ground A, and then goes on appeal to the House of Lords, which decides it on ground B, nothing being said upon A.

Then he posed a question unto himself: What, in such circumstances, is the authority of the decision on ground A in the Court of Appeal? Is the decision binding on the High Court, and on the Court of Appeal itself in subsequent cases?

43. The classic commentary goes on to answer the issue thus:

“The question cannot be positively answered. Jessel, M.R., in one case said that where the judgment of the lower court is affirmed on different grounds, it is deprived of all authority, giving as his reason the opinion that such conduct on the part of the appellate court showed that the appellate court did not agree with the grounds given below. In other words, the higher court relieved itself of the disagreeable necessity of overruling the court below by finding another ground on which the judgment below could be supported. Although this is sometimes a correct reading of the state of mind of the higher court, it is not so always. The higher court may, for example, shift the ground of its decision because it thinks that this is the easiest way to decide the case, the point decided in the court below being of some complexity. It is certainly possible to find cases in the reports where judgments affirmed on a different point have been regarded as authoritative for what they decided.

It is the same with cases reversed on another point. Such a case, as decided in the lower court, is not necessarily deprived of its significance as a judicial determination of

the law (w), on the other hand, the reversal, though on another point, may shake the authority of the point that was decided. It is submitted that the true view is that a decision either affirmed or reversed on otherwise have had; but it remains an authority which may be followed by a court that thinks the particular point to have been rightly decided.”

(internal references omitted)

44. In *Gangadhara Palo* (supra), the Apex Court has observed that according to the doctrine of merger, the judgment of the lower court merges into the judgment of the higher court. Hence, if some reasons, however meagre, are given by the Supreme Court while dismissing the special leave petition, then by the doctrine of merger, the judgment of the High Court merges into the judgment of the Supreme Court and after merger there is no judgment of the High Court. This ratio was laid down in the context of the unsuccessful party trying to avail himself of the remedy of review before the High Court after his unsuccessful venture before the Supreme Court.

45. On the same issue most felicitously are the observations of the Hon'ble Supreme Court in *S.Shanmugavel Nadar* (supra). Though loosely an expression merger of judgment, etc., of a court or forum into that of a superior forum is often employed, their Lordships observed, as a general rule, the judgment or order having been dealt with by a superior forum and having resulted in its confirmation, reversal or modification, what is merged is the operative part i.e. the mandate or decree issued by the court which may have been expressed in a positive or negative form.

46. The exposition of law on the aspect of merger in *S.Shanmugavel Nadar* (supra) is worthy of quoting at some length:

“10. [F]or example, take a case where the subordinate forum passes an order and the same, having been dealt with by a superior forum, is confirmed for reasons different from the one assigned by the subordinate forum, what would merge in the order of the superior forum is the operative part of the order and not the reasoning of the

subordinate forum; otherwise there would be an apparent contradiction. However, in certain cases, the reasons for decision can also be said to have merged in the order of the superior court if the superior court has, while formulating its own judgment or order, either adopted or reiterated the reasoning, or recorded an express approval of the reasoning, incorporated in the judgment or order of the subordinate forum.”

(emphasis supplied)

47. Guided by the above dictum, if we examine the ratio in *Neena* (supra), a learned Division Bench of this Court has explicitly dealt with the issue of the survival of the rank list beyond the recruitment of existing vacancies. The learned Division Bench has, in so many words, addressed the specific issue of what should be the position concerning the subsequent vacancies. In *Kodakara Service Co-op. Bank Ltd.* (supra), the Apex Court, in appeal, has reversed the judgment entirely on a different point. As has already been referred to, the Court has accepted the contention of the Bank that it did not intend to appoint any more candidates given its computerization. The issues of

the rank list and the subsequent vacancies have not been addressed at all.

48. In the light of the above authoritative pronouncement of law in S.Shanmugavel Nadar (supra), I am of the considered opinion that the ratio of Neena (supra) remains undisturbed despite the reversal of the verdict in Kodakara Farmers Co-op. Bank Ltd. (supra). The necessary corollary to that conclusion is that the ratio of the learned Division Bench does, in the absence of anything contrary to it from the Apex Court, bind this Bench as a matter of stare decisis. I, therefore, hold that the rank list held currency till its expiry and the vacancy that arose while it was subsisting should be filled up with the candidates from the rank list alone.

Per Incuriam: Sub silentio:

(a) Ratio Decidendi:

49. Indeed, a judicial adjudication has two facets: The reasoning and the relief—variably expressed, the ratio and the result. It is aphoristic to hold that the relief granted or the result of a lis is never the precedent, not even a part of it. It is not far to seek that in a majority of the landmark judgments, relief has never mattered, only the principles of law laid down have: a case in point being **Kesavananda Bharati v. State of Kerala**¹⁴ and **Maneka Gandhi v. Union of India**¹⁵.

50. It is only the ratio of a judgment that is to stand: stare decicis, so to speak. Balck'' Law Dictionary¹⁶ defines the Latin expression ratio decidendi, which literally means the reason for deciding, to the following effect:

“1. The principle or rule of law on which a court's decision is founded <many poorly written judicial opinions do not contain a clearly ascertainable ratio decidendi>. 2. The rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided otherwise <this opinion

14 AIR 1973 SC 1461

15 AIR 1978 SC 597

16 9th Edn.

recognizes the Supreme Court's ratio decidendi in the school desegregation cases>. — Often shortened to ratio. Pl. rationes decidendi.

"The phrase 'the ratio decidendi of a case' is slightly ambiguous. It may mean either (1) the rule that the judge who decided the case intended to lay down and apply to the facts, or (2) the rule that a later court concedes him to have had the power to lay down." Glanville Williams, *Learning the Law* 75 (11th edn. 1982).

"There are . . . two steps involved in the ascertainment of the ratio decidendi First, it is necessary to determine all the facts of the case as seen by the judge; secondly, it is necessary to discover which of those facts were treated as material by the judge." Rupert Cross & J.W. Harris, *Precedent in English Law* 65-66 (4th edn. 1991).

51. Most of the times the Courts deal with more than one issue in a judgment. Thus, there may be a confluence of ratios to come to one single conclusion. Ipso facto, an adjudication may give rise to more than one ratio. In **Oriental Insurance Co. Ltd. v. Raj Kumari**¹⁷, the Apex Court has observed that according to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts—direct and

17 (2007) 12 SCC 768

inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment.

52. Their Lordships in *Raj Kumari* (supra) have also held that a case is a precedent and binding for what it explicitly decides and no more. The words used by the Judges in their judgments are not to be read as if they are words in Acts of Parliament. A further caution has also been served to the effect that courts should not place reliance on the decisions without discussing how the factual situation fits in with the fact situation of the decision on which

reliance is placed. The observations of the courts are neither to be read as Euclid's theorems nor as provisions of the statute.

(b) Per incuriam:

53. Now we may turn our attention to the issue of per incuriam. I may firstly stress the obvious that the importance of judicial propriety and discipline, as has been constitutionally consecrated in Article 141 of the Constitution. In **Suganthi Suresh Kumar v. Jagdeesham**¹⁸, the Hon'ble Supreme Court has held that it is impermissible for the High Court to overrule the decision of the Apex Court on the ground that the Supreme Court laid down the law without considering any other point. It is, indeed, not only a matter of discipline for the High Courts in India, but also a mandate of the Constitution as provided in Article 141 of the Constitution.

¹⁸ AIR 2002 SC 681

54. In the case of **Government of A. P. v. B.Satyanarayana Rao**¹⁹, the Hon'ble Supreme Court has held thus:

“8. [R]ule of per in fermium can be applied where a Court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.”

55. We have to see that in *Delson Davis* (supra), the plea of the Bank even in the writ appeal before this Court (as can be seen from **Delson Davis v. State of Kerala**²⁰) is that the Bank does not want to go for any fresh appointments as it has already taken steps to computerise its operations. The Bank, in fact, contended that even the existing staff are being made redundant. Secondly, the Bank took a plea that as per Ordinance 10/1995, and the newly inserted sub-section (3A) of Section 80, further recruitments should be through the Kerala Public Service

19 (2000) 4 SCC 262

20 1999 (3) KLT 784

Commission. The learned Division Bench has felt that both the Ordinance and the newly added sub-section (3A) to Section 80 are prospective and they cannot defeat the vested right of the applicant. Thus, neither before this Court nor before the Hon'ble Supreme Court has the validity of the rank list fallen for consideration.

56. Placing heavy reliance on the above decision of the Hon'ble Supreme Court, the learned counsel for the respondent Bank has contended that Neena (supra) could render itself per incuriam, even if it were to survive the scare of merger. As has already been discussed, in Delson Davis (supra), the issue of the validity of the rank list or, for that matter, the impact of Circular 18/1994 has not fallen for consideration at any stage. Thus, any decision on either of those issues has been passed up sub silentio.

(c) Sub Silentio:

57. Sub silentio literally means under silence or without any notice being taken. Usually, a decision is robbed of its precedential value in either way of two ways: (1) That it has been overturned by a superior court or (2) That its statutory substratum has subsequently been changed. Nevertheless, there is a 'more subtle attack upon the authority of a precedent', as Salmond chose to call it, by saying that the decision was arrived at sub silentio. It is observed:

“A decision passed sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The courts may consciously decide in favor of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the courts should not have decided in favor of the particular party unless it also decided point B in his favor; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.”

58. A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue, indeed, cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 of the Constitution. That which has escaped the attention of the Court in the judgment is not the ratio decidendi: this is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined. (See **Arnit Das v. State of Bihar**²¹).

59. Viewed in the perspective of sub silentio, the decision of the Hon'ble Supreme Court in Delson Davis (supra) has not addressed the issue of the rank list. It has passed sub silentio. The inescapable conclusion, under these circumstances, is that Neena (supra) is not hit by the principle of per incuriam.

60. Compendiously considered, it cannot but be held that Neena (supra) still has precedential power and this

21 AIR 2000 SC 2264

Bench is bound by it. Ipso facto, it is an essential corollary to the above finding that the rank list did subsist when the vacancy arose the petitioner could have a legitimate claim to the post.

Absence of Interim Direction:

61. Another objection is that since the rank list has expired pending adjudication of the writ petition, in the absence of any interim direction saving its operation, it could not be extended. A legion are the precedents that a party cannot be made to suffer the consequences which he has not invited. In other words, either owing to the administrative delays or the systemic delays, as both apply in this case, a person who is otherwise diligent in asserting his rights and seeking appropriate redressal on time cannot be made to suffer. In fact, in Neena (supra) this issue, too, stood addressed.

62. It is appropriate to observe that mere absence of an interim order does not nullify or stultify the judicial proceedings. All the developments that take place subsequent to the commencement of a lis are subject to its outcome. Indeed, the doctrine of lis pendence is a remedy in equity at common law; it is, usually, applied in relation to immovable property, as has now been statutorily recognised in Section 52 of the Transfer of Property Act. Its objective being that it should prevent endless litigation vis-à-vis rights over a property sub judice. As essentially it is an in rem remedy, I do not see any compelling reasons not to have its application extended to any right, even incorporeal, in any other equity jurisdiction, say, in a writ petition. More often than not, Courts may, in the first blush, at the stage of admission, not be convinced that the matter requires immediate interim protection; nevertheless, upon deeper consideration, the Court may find that the suitor does

require relief from it. In such an event, it is, to me, inequitable to deny the relief just because the Court initially has not granted any interim relief.

63. In **Purushottam v. Chairman, M.SEB**²², the Apex Court has held that the right of a candidate to be appointed to the post to which he has been selected cannot be taken away on the pretext that the said panel has, in the meantime, expired, and the post has already been filled up by somebody else. Usurpation of the post by somebody else is not on account of any defect on the part of the applicant but the erroneous decision of the employer himself. In that view of the matter, the applicant's right to be appointed to the post cannot be illegally taken away by the employer.

64. In *Neena* (supra) it is observed thus:

“6. The next contention raised by the appellant that direction could not have been issued by the Joint Registrar after expiry of the list is also not tenable because since the Bank failed to fill up the vacancy that arose during the currency of the list, what the Joint Registrar did was to

22 (1999) 6 SCC 49

correct the Bank which failed in their duty in terms of the Rule. The eligibility of the first respondent for appointment is to be considered only when the vacancy arises and not when the matter was considered by the Joint Registrar pursuant to the direction issued by this Court. Therefore the delay in passing orders for the first respondent's appointment does not affect the validity of the order issued by the Joint Registrar. We therefore reject this contention as well."

65. In the present instance, too, the petitioner made his efforts to have himself appointed to the vacancy that arose while the rank list was subsisting; he submitted representations to the Government authorities as well as the respondent Bank and eventually filed the writ petition without wasting any time. There is no discernible delay in the approach of the petitioner, nor can he be accused of any laches. As a result, the expiry of the rank list while the writ petition was pending does not, in my considered view, affect the right of the petitioner to press for appointment in terms of the rank list.

The Right of Reservation:

66. Before parting with the matter, it is also essential to address the issue of reservation in favor of the physically challenged persons, especially in compliance with Section 80(5) of the Act. Firstly, the petitioner's right to be appointed is required to be constant as on the date of the availability of the vacancy. The second notification is subsequent. Secondly, as it has already been well settled through a catena of judgments, including the definitive decision of the Hon'ble Supreme Court in **Indra Sawhney v. Union of India**²³, the question of having vertical reservation in the case of physically challenged persons does not arise. On the other hand, since the rank list has already expired, the respondent Bank is at liberty to provide horizontal reservation in the vacancies that have arisen or arise subsequent to the expiry of the rank list.

²³ 1992 Supp (3) 217

67. Though not objectionable, as irony would have it, it is the learned counsel for the respondent, now holding the other end of the stick, that was instrumental in securing the ratio of Neena (supra), then appearing for the petitioner, insurmountable as the decision has proved itself now.

In the facts and circumstances, the writ petition is allowed, with a consequential direction to the respondent Bank to appoint the petitioner to the vacancy said to have arisen on 08.02.2014 on the strength of the rank he secured in the rank list, during the subsistence of which the vacancy arose. No order as to costs.

Dama Seshadri Naidu, Judge

tkv

'C.R.'