

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.23417 of 2013

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1. Dhirendra Kumar Singh S/O Sri Rajeshwar Pd. Singh R/O Village - Bhuwan Chapra, P.S. - Chakia, East Champaran, Bihar
 2. Om Prakash Pal S/O Sri Lal Bihari Pal R/O Vill . - Kudra, P.S. - Kudra, Distt. - Kaimur (Bihar)
 3. Arjun Lal Barnwal S/O Sri Rameshwar Lal Barnwal R/O Makatpur, P.S. - Giridih Sadar, Dist - Giridih (Jharkhand)
 4. Niraj Kumar S/O Sri Ram Chandra Prasad R/O Edgah Road, P.S. - Jamalpur, Dist - Munger (Bihar)
 5. Amit Kumar Singh S/O Sri Chandeshwar Pd. Singh R/O Rampur Ramhar, P.S.- Jandaha, Dist - Vaishali (Bihar)
 6. Rupesh Kumar S/O Sri Rajendra Prasad R/O Village - Khairan, P.S. - Balrampur, Dist - Katihar (Bihar)
 7. Gopal Krishna S/O Sri Veevekanand Roy R/O Village - Narkatia, P.S. - Thana Bihpur, Dist - Bhagalpur (Bihar)

.... Petitioner/s

Versus

1. The State Of Bihar Through The Principal Secretary, General Administration Department, Government of Bihar, Patna
2. Joint Secretary, General Administration Department, Government Of Bihar, Patna
3. Bihar Public Service Commission Through Its Chairman, 15 , Jawaharlal Nehru Marg (Bailey Road), Patna
4. Secretary, Bihar Public Service Commission, 15, Jawaharlal Nehru Marg, (Bailey Road), Patna
5. Officer On Special Duty, Bihar Public Service Commission, 15, Jawaharlal Nehru Marg, (Bailey Road), Patna

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Kumar Kaushik, Adv.
For the Respondent/s : Mr. Ajay Kr. Rastogi, AAG-10
Mr. Parijat Saurav, AC to AAG-10

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 19-09-2016

Heard learned counsel for the parties.

The petitioners in this case are candidates, applied in pursuance of Advertisement No. 22/99. They have made a prayer for issuance of writ of mandamus directing the respondent to appoint the



petitioners who were empanelled candidates in pursuance of result dated 29.5.2002 published by Bihar Public Service Commission (in short "the Commission") for appointment to the post of Assistant in Secretariat and its attached offices in the light of the liberty granted to the petitioners by the Hon'ble Apex Court vide order dated 22.4.2013 passed in Civil Appeal No. 3289-3290 of 2012.

The short fact of this case is that the Bihar Public Service Commission issued an advertisement being Advt. No. 22/99 inviting application for appointment to the post of Assistant in the Bihar Secretariat and its attached offices. In the advertisement, it has been mentioned the number of vacancy as 331 posts and in pursuance thereof, the petitioners along with others applied for the post of Assistant. The petitioners appeared in the written test and finally, result was published on 29.5.2002. All the petitioners are from general category candidate, they came within 330 short listed candidates. Accordingly, the result was published on 29.5.2002, recommendation was made on 4.7.2002 but in the meantime, the Bihar Re-organization Act, 2000 came into force with effect from 15.11.2000. In such circumstances, the aforesaid recommendation remained hanging in air. The Government took decision on 6.6.2003, directed the Commission to send recommendation of 2/3rd candidates out of the earlier recommended list for the appointment. The Commission, in the



initial stage, refused to send fresh recommendation by changing the reservation policy saying that result was already published and recommendation has already been sent. The Deputy Secretary cum Secretary of the Commission vide letter dated 25.8.2003 sent fresh recommendation of 221 candidates as per the new reservation policy. The recommendation was for the 2/3rd of the number of vacancy advertised which led to filing of the writ application vide CWJC No. 11175 of 2003 particularly for quashing the order dated 25.8.2003 as claiming that, the recommendation should be of 330 posts and it should not be only 2/3rd, the ground was taken that as sufficient number of vacancies were available in the State of Bihar. The said writ application was disposed of vide order dated 13.10.2004 giving direction to the Government to consider the empanelled candidates for the post of L.D.C. clerk on the said 2/3rd vacancies. The same was challenged in Letters Patent Appeal being LPA No. 109 of 2002 directed to consider the entire exercise within a period of two months. The contempt application, MJC No. 2815 of 2004 with a review application being Civil Review No. 184 of 2004 was filed which was dismissed as not maintainable in view of pendency of the review application. Accordingly, the contempt application was disposed of vide order dated 26.10.2005 and the review application was withdrawn. Further a contempt application was filed being MJC No.



3187 of 2005 which was also disposed of vide order dated 29.11.2006 in view of the fact that 2/3rd vacancies falling in the share of State of Bihar were already filled up. The petitioners have again approached this Court in CWJC No. 1812 of 2009 for a direction to the State to fill up all vacancies of 330 and the same was dismissed vide order dated 8.7.2009 as not maintainable on the principle of resjudicata since the same was adjudicated and decided. The petitioners have also filed LPA No. 1298 of 2010 but the same was dismissed vide order dated 23.11.2011. It has been stated in the writ application that the petitioner no.1, namely, Dharendra Kumar Singh filed an application under the Right to Information Act seeking an information of joining of 221 candidates who were declared successful in response it transpired that only 180 candidates have joined the post and remaining 26 posts are still lying vacant. The present petitioners moved before the Apex Court in Civil Appeal Nos. 3289-3290 of 2012, the same was disposed of giving liberty to approach the High Court for redressal of the grievance. It will be relevant to quote relevant portion of the order ,which reads as follows:-

"The appellants have placed on record the order dated 12.09.2006 whereby the candidates appointed as Lower Division Clerk have been appointed to the post of Assistant.

We have been told that few of the appellants who were earlier appointed as Lower Division Clerk have not been appointed as Assistants. However, no details have been

In that view of the matter, we are not inclined to give any direction in this regard.

However, we give liberty to such of the Lower Division Clerks to approach the High Court for the redressal of their grievances. In such a grievance is made, the High Court shall examine the same on merit in accordance with law.

We have also been told that despite the direction of the High Court, some of the empanelled candidates have not been appointed. No details thereof have been given. If that be so, they are also given liberty to approach the High Court for the appropriate relief. In case they do so, the High Court shall examine the same on merit in accordance with law."

From the counter affidavit which was filed by the State, there is no challenge to the fact that out of 206 vacancies, 180 have joined the post and 26 posts could not be filled up as the recommended candidates did not turn up.

Learned counsel for the petitioners has submitted that the present petitioners should be adjusted against the vacancies which the State has vehemently opposed on account of long lapse of time, the vacancies which remained vacant have already consumed, at the same time much water has flown during the long period, in such view of the matter, the petitioners cannot claim their appointment against the vacancies which were not filled up on account of non-joining of the recommended candidates. From the records, it appears that the petitioners have been making all efforts for their entry in service but



the question would arise when certain persons did not join, can this Court exercise its power and give direction to the State to allow the petitioners to join the said post. It is also a fact that the petitioners were not within 216 recommended candidates but they were as per their claim falling under the 330 candidates who were originally recommended for the appointment.

Learned counsel for the petitioners has placed reliance in the case of *A.P. Aggarwal Vs. Government of National Capital Territory of Delhi & Anr.* reported in *AIR 2000 S.C. 205*, *Jai Narain Ram Vs. State of U.P. and Ors.* reported in *(1996) 1 SCC 332*, *Surinder Singh & Ors. etc. Vs. State of Punjab & Anr.* reported in *AIR 1998 SC 18*, *Ashutosh Kumar Vinayak & Ors. Vs. The State of Bihar & Ors.* reported in *2000(3) PLJR 495*, *Asha Kaul & Anr. Vs. State of Jammu and Kashmir & Ors.* reported in *(1993) 2 SCC 573* and *Dr. Surendra Kumar & Anr. Vs. The State of Bihar & Ors.* reported in *2005(4) PLJR 478*, Learned counsel for the State has placed reliance in the case of *Subodh Kumar Vs. The Sate of Bihar & Ors.* reported in *2012(2) PLJR 647*, *Kulwinder Pal Singh & Anr. Vs. State of Punjab & Ors.* reported in *(2016) 6 SCC 532* and order passed in CWJC No. 11090 of 2006 (Annexure-C to the counter affidavit).

The issue involved in the present case has come across many occasions by the Hon'ble Supreme Court as well as this Court with regard to status of panel and persons whose names are standing



in the panel. It has repeatedly been held that the persons who have been empanelled does not have the indefeasible right for appointment. The question came for consideration in ***Shankarsan Dash vs Union Of India*** reported in ***AIR 1991 SC 1612***. In this case, the petitioner was selected in the combined civil services examination held by the Union Public Service Commission for the appointment of several service including Indian Police Service, a combined merit list was published for I.P.S. and Police Services, Group-B which included the name of the petitioner. The position of the petitioner in the merit list was below, was offered for appointment to the Delhi Andman and Nicobar Police Services which he accepted. On account of selected candidates allotted to police service, Group-B did not join, the position of the petitioner improved and ultimately he came at the top in the list. Fourteen posts in the I.P.S. remained vacant on account of non-joining in the services, he filed representation making prayer that in view of non-joining of the fourteen candidates and the vacancy remained standing, he should be allotted one post but the request was turned down, the writ was filed, the same was dismissed. The matter reached to the highest court, claim was made that since several vacancies in general category of the I.P.S. remained unfilled, he was entitled to be appointed in one of them and the authorities were not right in rejecting the representation. The Court held that it is not correct to say



that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies but it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons but if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected in the recruitment test, and no discrimination can be permitted. It has further been held that it is open to the government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates and there must be a conscious application of mind by the Government. It has further been held that the existence of vacancies does not give a legal right to a selected candidate for appointment. It would be relevant to quote paragraph nos. 7 & 8 of the said judgment which reads as follows:-

"7. It is not correct to say that if a number of vacancies



*are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha and Others*, [1974] 1 SCR 165: (AIR 1973 SC 2216); *Miss Neelima Shangla v. State of Haryana and Others*, [1986] 4 SCC 268 : (AIR 1987 SC 169), or *Jitendra Kumar and Others v. State of Punjab and Others*, [1985] 1 SCR 899 : (AIR 1984 SC 1850).*

8. *In State of Haryana v. Subhash Chander Marwaha*, (AIR 1973 SC 2216) (*supra*) 15 vacancies of Subordinate Judges were advertised, and out of the selection list only 7, who had secured more than 55% marks, were appointed, although under the relevant rules the eligibility condition required only 45% marks. Since the High Court had recommended



*earlier, to the Punjab Government that only the candidates securing 55% marks or more should be appointed as Subordinate Judges, the other candidates included in the select list were not appointed. They filed a writ petition before the High Court claiming a right of being appointed on the ground that vacancies existed and they were qualified and were found suitable. The writ application was allowed. While reversing the decision of the High Court, it was observed by this Court that it was open to the Government to decide how many appointments should be made and although the High Court had appreciated the position correctly, it had "somehow persuaded itself to spell out a right in the candidates because in fact there were 15 vacancies". It was expressly ruled that the existence of vacancies does not give a legal right to a selected candidate. Similarly, the claim of some of the candidates selected for appointment, who were petitioners in *Jitendra Kumar and Others v. State of Punjab*, (AIR 1984 SC 1850), was turned down holding that it was open to the Government to decide how many appointments would be made. The plea of arbitrariness was rejected in view of the facts of the case and it was held that the candidates did not acquire any right merely by applying for selection or even after selection. It is true that the claim of the petitioner in the case of *Miss Neelima Shangla v. State of Haryana*, (AIR 1987 SC 169) was allowed by this Court but, not on the ground that she had acquired any right by her selection and existence of vacancies. The fact was that the matter had been referred to the Public Service Commission*



which sent to the Government only the names of 17 candidates belonging to the general category on the assumption that only 17 posts were to be filled up. The Government accordingly made only 17 appointments and stated before the Court that they were unable to select and appoint more candidates as the Commission had not recommended any other candidate. In this background it was observed that it is, of course, open to the Government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates; and there must be a conscious application of mind by the Government and the High Court before the number of persons selected for appointment is restricted. The fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment. None of these decisions, therefore, supports the appellant."

Similar issue came for consideration in the case of Asha Kaul (supra). The advertisement was published for the appointment of Judicial Officer, the examination was conducted, interview was held, the Government received complaints against the manner of holding the competitive examination and on that account, the Government did not move for the appointment of candidates prepared by the Public Service Commission but as there was need of judicial offices, the Government on the request of the High Court, approved the names of



thirteen persons. As seven persons who were not recommended approached the High Court, ultimately the matter went to the Supreme Court where it has been held that mere inclusion of name of candidates in the select list does not confer upon the candidate an indefeasible right for appointment but it is obligation of the Government to act fairly. It has further been held that the Commission issued a notification to hold written test, conducted the interview, prepared select list, communicated to the Government, the Government cannot, for good and valid reason, nullify the whole exercise and tell the candidate when they complain that they have no legal right to appointment. It has further been held that they do not have any legal right for appointment. It has again been held that the Government is the appointing authority of the Munsiff but it is misleading to assert that in the matter of selection and appointment, the Government has an absolute power. Such an argument violates the constitutional scheme in view of independent constitution of Public Service Commission as provided under the Constitution. Every appointment has to be made after consultation of the Public Service Commission. It has further been held that the Government cannot approve a part of the list and disapprove the balance. They cannot appoint certain person from the said list and without any reason leave the person from appointment. Though the Government on a

reasonable ground can refuse the appointment such as non-availability of the vacancy or on account of lapse of life of the panel. It would be relevant to quote paragraph nos. 7 & 8 of the said judgment which reads as follows:-

"7. *Construed in the above light, Rule 39, in our opinion, does not confer an absolute power upon the government to disapprove or cancel the select list sent by the public service commission. Where, however, the government is satisfied, after due enquiry that the selection has been vitiated either on account of violation of a fundamental procedural requirement or is vitiated by consideration of corruption, favouritism or nepotism, it can refuse to approve the select list. In such a case, the government is bound to record the reasons for its action, and produce the same before a Court, if and when summoned to do so, apart from placing the same before the Legislature as required by clause (2) of Article 323. Indeed, clause (2) of Article 323 obliges the Governor of a State to lay a copy of the annual report received from the commission before the Legislature "together with a memorandum explaining, as respect the cases, if any, where the advice of the commission was not accepted (and) the reasons for such non-acceptance." Evidently, this is meant as a check upon the power of the government. This provision too militates against the theory of absolute power in the government to disapprove or reject the recommendations of the commission. For the same reason, it must be held that the government*



cannot pick and choose candidates out of the list. Of course, where in respect of any particular candidate any material is discovered disclosing his involvement in any criminal activity, the government can. always refuse to appoint such person but this would not be a case touching the select list prepared and recommended by the commission. It is equally not open to the government to approve a part of the list and disapprove the balance. In this case, it may be remembered that the government itself had asked for a list of twenty and the commission had sent a list of twenty. (we are not concerned with the waiting list sent by the commission, at this stage). It could not have been approved in part and rejected in part. The number of vacancies available on the date of approval and publication of the list is not material. By merely approving the list of twenty, there was no obligation upon the government to appoint them forthwith. Their appointment depended upon the availability of vacancies. A reading of Rule 41 makes this aspect clear. The list remains valid for one year from the date of its approval and publication. If within such one year, any of the candidates therein is not appointed, the list lapses and a fresh list has to be prepared. In this case, no doubt, a number of complaints appears to have been received by the government about the selection process. We have seen the note file placed before us. It refers to certain facts and complaints. But if the government wanted to disapprove or reject the list, it ought to have done so within a reasonable time of the receipt of the select list and for reasons to be recorded. Not having



done that and having approved the list partly (thirteen out of twenty names) the\ cannot put forward any ground for not approving the remaining list. I indeed, when it approved the list to the extent of thirteen, it ought to have approved the entire list of twenty or have disapproved the entire list of twenty. The objection, the government have pertains to the very process of selection i.e., to the entire list, and not individually to any of the remaining seven candidates.

8. *It is true that mere inclusion in the select list does not confer upon the candidates included therein an indefeasible right to appointment State of Haryana v. Subhash Chandra Marwaha AIR 1973 SC6; Mani Subrat Jain v. State of Haryana A.I.R. 1977 S.C. 276 and State of Kerala v. A. Lakshmikutty A.I.R. 1987 S.C. 1 but that is only one aspect of the matter. The other aspect is the obligation of the government to act fairly. The whole exercise cannot be reduced to a farce. Having sent a requisition/request to the commission to select a particular number of candidates for a particular category, in pursuance of which the commission issues a notification, holds a written test, conducts a notification, holds a written test, conducts interviews, prepares a select list and then communicates to the government-the government cannot quietly and without good and valid reasons nullify the whole exercise and tell the candidates when they complain that they have no legal right to appointment. We do not think that any government can adopt such a stand with any*



justification today. This aspect has been dealt with by a Constitution Bench of this Court in Shankarsan Dash v. Union of India (1991) 3 S.C.C.47 where the earlier decisions of this court are also noted. The following observations of the court are apposite: (SCC pp.50-51, para 7)

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwahs, Neelima. Shangla v. State of Haryana or-

Jatendra Kumar v. State of Punjab."

(Underlining for emphasis)



In the case of Surinder Singh (supra), the Government appointed excess to the vacancies mentioned in the advertisement. The High Court declared that the excess appointment as well as the notified vacancies will be illegal and one person from the selected candidate within the post advertised had not joined, the claim was made that as the person did not join, the petitioner could be appointed. The Hon'ble Supreme Court refused to grant relief on the ground of delay and laches. While deciding this issue, a question arose as with regard to status of wait list candidate in the panel. The selected person did not join the post. The Court has held that a candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join but when the selected candidate join, no vacancy arise due to resignation or any other reason within the period the list is to operate under the rules or within reasonable period and where no specific period is provided than the candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the Selection of the candidate was held for it. He has no vested right except to the limited extent or when the appointing authority acts arbitrarily and makes appointment from the waiting list by pick and



choose method for extraneous reasons. A waiting list prepared does not furnish a source of recruitment for future vacancy. It only operates 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 in the vacancies so caused or if there is some extreme exigency, the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. The waiting list cannot be used as a perennial source of recruitment filling up the vacancies not advertised. It will be relevant to quote paragraph nos. 13, 14 and 15 of the said judgment which reads as follows:-

"13. ----- A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided than candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the Selection was held for it. He has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons.

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 in the vacancies so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service."

14. *Prem Singh case [1996] 4 SCC 319 was decided on the facts of that case and those facts do not hold good in the present case. In the case of*



Gujarat State Dy. Executive Engineers Association [1994] Supp. 2 SCC 591, this Court has explained the scope and intent of a waiting list and how it is to operate in service jurisprudence. It cannot be used as a perennial source of recruitment filling up the vacancies not advertised. The Court also did not approve the view of the High Court that since vacancies had not been worked out properly, therefore, the candidates from the waiting list were liable to be appointment. Candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative.

15. *It is in no uncertain words that this Court has held that it would be improper exercise of power to make appointments over and above those advertised. It is only in rare and exceptional circumstances and in emergent situation that this rule can be deviated from. It should be clearly spelled out as to under what policy such a decision has been taken. Exercise of such power has to be tested on the touch stone of reasonableness. Before any advertisement is issued, it would, therefore, be incumbent upon the authorities to take into account the existing vacancies and anticipated vacancies. It is not as a matter of course that the authority can fill up more posts than advertised."*

(Underlining for emphasis)



Similar issue came for consideration before the Hon'ble Supreme Court in the case of A.P. Aggarwal (supra). In this case, an advertisement was published for appointment of Member of Sales Tax Appellate Tribunal, one M.L. Sahni was appointed but later on he was selected in the Income Tax Appellate Tribunal and Mr. A.P. Aggarwal was the next person in the panel was not appointed but the Government has embarked fresh process of selection by issuing advertisement in the newspaper. The Hon'ble Supreme Court has interpreted a memorandum considering the contingency of preparation of panel but in a case when the vacancies are not filled up or certain persons resigns or did not join, it was pointed out that the post could not be remained vacant for a long period. The matter was examined by the Government in consultation with the UPSC, it was decided that the reserve seats will be operated in case where vacancy is created by a candidate resigning the post or in the event of death within a period of six months from the date of joining the post subject to the condition that such an operation of the lists should be limited in respect of statutory post and those of scientific, technical, academic or medical nature or other similar nature where it may not be possible to keep the post vacant till the completion of fresh recruitment or to make local arrangements. In such a situation, the Supreme Court has directed the appointment of Mr. A.P. Aggarwal. The Supreme Court while giving



direction for appointment has held that a person selected in panel does not have a vested right to be appointed to the post for which he was selected has a right for reconsideration for appointment and at the same time, the appointing authority cannot ignore the select panel or decline to make an appointment on its whims and capricious. It would be relevant to quote paragraph no.12, 13, 14 and 15 of the judgment which reads as follows:-

- "12. *It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs ns. (vide Shrilekha Vtdyarthi versus_State.of U.P. ((1991) I S.C.C. 212): (AIR 1991 SC 537).*
13. *Learned Additional Solicitor General referred to the judgment of this Court in Madan Lal and Others versus State of J -& K and Others ((1995) 3 S.C.C. 486 : (1995 AIR SCW 1109: AIR 1995 SC 1088)) and placed reliance on Paragraph 23 of the judgment at Page 502 (of SCC para 22) (at p. 1123 of AIR). That ruling has no relevance in the present case. The advertisement was for applications to the post of Munsif. According to the advertisement, there were 11 vacancies to be filled up and the requisition to the Public Service Commission was to select 11 persons for filling up the said seven vacancies. While sending the list of selected candidates, die Public Service Commission sent a list containing more names than I*



I. That was obviously with a view to fill up the vacancies, if any of the 11 candidates according to their merit did not join., from among the 11 candidates in the waiting list according to their merit. The Bench held that once the 11 candidates who were selected joined the post, the list got exhausted and the waiting list could not be used for any purpose thereafter. That principle will not apply in the present case in view of the facts already set out by us.

14. ----- The Bench observed that though a person on the select panel has no vested right to be appointed to the post for which he has been selected has a right to be considered for appointment and at the same time the appointing authority cannot not ignore the select panel or decline to make an appointment on its whims. The Court said that when a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, ordinarily there is no justification to ignore him for appointment and that there has to be a justifiable reason to decline to appoint a. person who is on the select panel. -----
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15. *Vircudcr S. Hooda and others versus State of Haryana and .another (1999 S.C.C. 696: (1999 AIR SCW 1327: AIR 1999 SC 1701). The Haryana Service Commission advertised 12 posts of Haryana Civil Service (Executive Branch). On completion of selection final list was published. Some of the selected candidates did not join and the appellant*

contended that they should have been considered against the vacancies so arising, depending upon the ranking obtained by the appellants in the competitive examination. -----."

Another latest judgment is in the case of Kulwinder Pal Singh (supra). In this case, the matter relates to appointment of judicial officer. Altogether 52 posts were advertised, 27 posts for the general category, 25 posts for the reserved category which include 3 posts for ex-servicemen; 2 posts for physically handicapped, 10 posts for scheduled castes, 3 posts for backward class ex-serviceman and 1 post for backward classes, 1 post for backward class ex-servicemen and 1 post for sports person. 27 candidates of general category, 10 candidates of scheduled castes and 5 candidates from backward classes were declared successful and they accordingly joined and eight posts were de-reserved. Against that, 7 candidates from the general category and 1 candidate from backward classes were offered appointment. However, three candidates at serial nos. 1, 5 and 32 did not join the service. A writ application was filed where a pleading was made that three persons did not join and they should be appointed. The High Court refused to grant relief as having held that 27 vacancies which were notified for general candidate were filled up and no vacancy is available for them. The matter went to the Supreme Court where the Hon'ble Supreme Court has refused to grant relief as



having been held that the Select list cannot be treated as a reservoir for the purpose of appointment, that vacancy can be filled by up taking the names from the list as and when it is so required. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. The appointment made beyond number of vacancy advertised is without jurisdiction, violative of Article 14 and 16 of the Constitution of India and thus nullity, inexecutable and unenforceable in law. The moment the vacancy stands filled up, the process of selection comes to an end and unexhausted waiting list becomes meaningless and cannot be pressed in service in any manner. It is relevant to quote paragraph nos. 10, 11, 12 and 13 of the said judgment which reads as follows:-

"10. It is fairly well-settled that merely because the name of a candidate finds place in the select list, it would not give him indefeasible right to get an appointment as well. The name of a candidate may appear in the merit list but he has no indefeasible right to an appointment (vide Food Corporation of India v. Bhanu Lodh,(2005) 3 SCC 618; All India SC & ST Employees' Assn. v. A. Arthur Jeen (2001) 6 SCC 380 and UPSC v. Gaurav Dwivedi (1999) 5 SCC

180.

11. *This Court again in the case of State of Orissa v. Rajkishore Nanda. (2010) 6 SCC 777, held as under:*

“14. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate.

* * *

16. A select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required...”

12. *In Manoj Manu v. Union of India 2013 (10) SCALE 204: (2013) 12 SCC 171, it was held that merely because the name of a candidate finds place in the select list, it would not give the candidate an indefeasible right to get an appointment as well. It is always open to the government not to fill up the vacancies, however such decision should not be arbitrary or unreasonable. Once the decision is found to be based on some valid reason, the court would not issue any mandamus to government to fill up the vacancies. As noticed earlier, because twenty two other candidates were declared successful by the Supreme Court pertaining to the selection of the years 1998, 1999, 2000 and 2001 as Civil Judges (Junior Division), they were to be accommodated, as*

rightly resolved by the Administrative Committee in the meeting dated 06.07.2011. The three resultant vacancies of the year 2007-2008 stood consumed with the joining of the said seventeen candidates and the same could not be filled up from the select list of that year. The decision of the Administrative Committee observing that the three resultant vacancies stood consumed is based on factual situation arising there and cannot be said to be arbitrary.

14. *As noticed earlier, as against twenty seven posts of general category advertised for the year 2007-2008, thirty one general category candidates have joined and are working. In Rakhi Ray v. High Court of Delhi (2010) 2 SCC 637, observing that the vacancies cannot be filled up over and above the number of vacancies advertized, recruitment of the candidates in excess of the notified vacancies would amount to denial of equal opportunity to eligible candidates, this Court held as under: (SCC pp. 642-43, paras 12-13)*

“12. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, the process of selection comes to an end. Waiting list, etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence

after the issuance of notification/ advertisement. The unexhausted select list/ waiting list becomes meaningless and cannot be pressed in service any more.

13. In the instant case, as 13 vacancies of the general category had been advertised and filled up, the selection process so far as the general category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to record room."

In the case of Jai Narain Ram (supra), the issue came for consideration of waiting list of candidates in scheduled caste category who were selected but did not join with respect to the appointment of Treasury Officers cum Accounts Officers in the U.P. Finance and Accounts Services, Sales Tax Officers and Regional Audit Officers. The Hon'ble Supreme Court has held that if certain selected person did not join the services, the next person cannot be refused their appointment. It would be relevant to quote paragraph ns. 4, 6 and 7 of the said judgment which reads as follows:-

"4. In paragraph 11 of the special leave petition, a specific stand has been taken in paragraph 11 that the four candidates selected by the PSC, namely, Ram Bodh, Roll No.22142, Serial No.13, Lolark Ram, Roll No.442, Serial No. 23, Ram Daras Chandrahas, Roll No.2301, Serial No.24, and Raja Ram, Roll No. 1787, Serial No.30, though selected and recommended for appointment in the first category, did not join in the

service. As a consequence, 4 posts were left vacant and required to be filled up by the reserved candidates. Since the appellant is the fourth candidate among the candidates who were standing in the order of merit, rejection of the appellant's claim for appointment is illegal and unconstitutional.

6. *It is not in dispute that the appellant is a reserved candidate belonging to Scheduled Castes. In view of the admitted position that four posts were reserved in the Finance Department in Category 1 mentioned earlier and 4 selected candidates appeared to have not joined in the service, as asserted in paragraph 11 of the SLP and not specifically denied by the respondents in the counter-affidavit in paragraph 6 as referred to earlier, it is clear that the appellant also is the fourth candidate in the order of merit and would have been selected, had there been a requisition by the State Government for appointment of the reserved candidates.*
7. *Right to seek appointment to a post under Article 14 read with Articles 16(1) and (4) is a constitutional right to equality. The State failed to perform its constitutional duty to requisition the P.S.C. to recommend the next qualified persons to the posts reserved for scheduled castes. Under these circumstances, the denial of appointment to the appellant and three others above him is unconstitutional, Therefore, the respondents are not justified in denying the claim of the appellant for the appointment to the above post."*

An identical issue came for consideration before this Court on a number of occasions and one of such cases is the case of **Ranjit**



Kumar Singh Vs. The State of Bihar & Ors. reported in *1997(2) PLJR 960* where the matter relates to appointment of Judicial Officer related to 24th Judicial Service Examination, 245 posts were notified and from that few selected candidates did not join the post, writ was filed for appointment of persons from waiting list, the State took a plea that in view of Circular dated 17.6.1977 and resolution dated 29.10.1988 which provides that the vacancy remained unfilled due to non-joining the post or for any reason, shall be carried forward to next year. The Court has discussed the 1977 circular and gave a finding that the Government has merely relied the aforesaid circular that the unfilled vacancy on account of non-joining of the candidates are to be carried forward to the next year but not acted upon in terms of the said resolution. The Court has considered the large number of judgments of Supreme Court specially the judgment passed in the case of *Bhogeshwarudu Vs. Andhra Pradesh Public Service Commission* reported in *1989(4) Judgments Today 130* where the Hon'ble Supreme Court has said that if out of the names recommended for appointment, some candidates did not join, whether the vacancies remaining unfilled should or should not be filled up from out of the remaining successful candidate. It has been held that there is no justification in the stand of Public Service Commission that instead of filling up the vacancies by recommending the candidates next in order of merit out of the present

list but to go for fresh selection should be made. Ultimately, the Court has directed the Public Service Commission to send recommendation and make appointment against the 9 vacant posts. It is relevant to quote paragraph nos. 11 & 12 of the said judgment which reads as follows:-

"11. *In view of the decision in Shankarsan Dash (supra) I wanted to know from the counsel for the State/BPSC as to whether any decision had been taken to close the selection/recruitment process on the basis of 24th Judicial Service Examination by including the unfilled vacancies in the advertisement for the next examination i.e. 25th Judicial Service Examination. The counsel for the State in no uncertain terms that this has not been done. As a matter of fact, they merely relied on the above said circular dated 17th June 1977 that unfilled vacancies on account of non-joining of the candidates "are to be" carried forward to the next year. The supplementary counter affidavit of the State also merely states that "the vacancies available due to non-joining of candidates are to be carried forward to the next year." The fact of the matter is that this has not been done so far.*

12. *In Bhogeshwarudu vs. Andhra Pradesh Public Service Commission [1989(4) Judgments Today 130] the Supreme Court directed that unfilled vacancies on account of non-joining of selected candidates be filled up out of the list of successful candidates of the concerned examination. It would be useful to quote the following*

observations from the aforesaid judgment:-

"The only point which requires consideration is as to whether if out of the names recommended for appointment, some candidates do not join, whether the vacancies remaining unfilled should or should not be filled up from out of the remaining successful candidates. We see no justification in the stand of the State Public Service Commission that instead of filling up the vacancies by recommending the candidates next in order of merit out of the present list why a fresh selection should be made."

In Asha Kaul vs. State of Jammu & Kashmir [(1993) 2 SCC 573] after noticing Shankarsan Dash case, the Supreme Court observed, that though mere inclusion in the select list does not confer upon the candidate any indefeasible right to appointment, but that is only one aspect of the matter. The other aspect is the obligation of the Government to fill up all the posts for which requisition was given and advertisement was made. In Jai Narain Ram vs. State of Uttar Pradesh (AIR 1996 Supreme Court 1703), relied upon by counsel for the petitioner, 15 posts of Treasury Officers-Accounts Officers in the U.P. Finance and Accounts Service, amongst others, were advertised. The Commission recommended as many candidates. No waiting list was prepared. 4 selected candidates did not join. The petitioner claiming to be the 4th candidate in waiting in order of merit filed a writ petition



which was dismissed. The Supreme Court held that the State had failed to perform its constitutional duties to requisition the Commission to recommend the next qualifying candidate to the post reserved for the particular reserved category and directed the Commission to recommend the name of the petitioner and, in turn, the State to issue order of appointment within time-frame."

In the case of Ashutosh Kumar Vinayak (supra), a similar issue came for consideration related to appointment of APP, the APP panel was prepared and exhausted, certain vacancy was created in view of the creation of new Munsiff Courts whereas the strength of APP was not matching with the number of increased courts (courts), writ was filed for giving direction to the State to send requisition for appointment of APP from the old panel prepared but the Court refused to grant relief on the ground that all the appointments as was notified has already been made and, as such, the list stood exhausted and held that the waiting list cannot be used as a perennial source of recruitment. The candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list would remain operative for the purpose aforesaid. The candidates included in the waiting list cannot claim appointment on the ground that the vacancies were not worked out properly. It will

be relevant to quote paragraph nos. 12, 15, 16 and 17 which reads as follows:-

- "12. ----- In cases of non-joining of any candidates appointed against notified vacancies, a person from the said panel which becomes waiting list is to be appointed, but no appointment can be made from the said panel or writing list in excess of the posts advertised unless so or the State Government takes a policy decision to meet certain extreme or urgent situation.-----.
15. The Same principle has been reiterated by the Apex Court in the case of *Surinder Singh and others vs. State of Punjab and another*, (1997) 8 Supreme Court Cases 488) and it has been held that waiting list cannot be used as a perennial source of recruitment for filling up the vacancies not advertised. The candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative. The candidates included in the waiting list cannot claim appointment on the ground that the vacancies were not worked out properly.
16. Reference in this connection may also be made to the judgments of the Supreme Court reported in (1997) 4 Supreme Court Cases 283 (*Sanjoy Bhattacharjee vs. Union of India and others*), (1997)5 Supreme Court Cases 171 (*Hindustan Steel Works Construction Ltd. vs. State of Kerala and others*), (1997)6 Supreme Court Cases 255 (*State of Haryana and others vs.*

Ajaywalla (Ms).

17. *Thus the law is well settled that in case the vacancies are notified in the advertisement then the appointment from the select list is to be made to the extent of vacancies notified in the advertisement and no appointment is to be made in excess of the post advertised except to fill up the posts available due to non-joining or some exceptional or emergent situation as stated above.-----"*

In the case of Dr. Surendra Kumar (supra), the Court has also reiterated the position of law that the recommended candidate has no legal right to be appointed on the post but, in such a situation, the State is required to give reason for not appointing the recommended candidates. It is relevant to quote paragraph no.12 of this judgment which reads as follows:-

- "12. *Having appreciated the rival submission, I do not find any substance in the submission of Govt. Pleader No.1 and the point is not res integra. This Court had the occasion to consider this question in the case of Jonoon Sangi vs. The State of Bihar & Ors. 2002(2) PLJR 577 in which it has been held that the recommendation made by the Commission shall not be infructuous necessitating de novo selection on account of reorganization of the State. Para-5 of the said judgment which is relevant for the purpose reads as follows:-*

- "5. *It is well known that recommendee has no legal right to be appointed on the post but in such a situation the State is required*



to give reason for not appointing the recommended candidates. In view of Section 71 of the Bihar Reorganization Act, 2000 read with Article 315(2) of the Constitution of India recommendation made by B.P.S.C. would not be binding on the State of Jharkhand but it does not mean that recommendation would not be given effect and it shall be made infructuous necessitating de novo selection. The Government of Bihar has allocated two third post in the State of Bihar other than the post of Forest Department. Therefore, I find substance in the submission of learned counsel for the petitioner that out of 81 vacancies 54 vacancies advertised by Advertisement No. 88/98 were meant for the State of Bihar. However, the Court accepts the stand of the respondents with respect to recalculation but that cannot be a ground for de novo selection on the basis of fresh requisition. Therefore, stand of the respondents, in my opinion, is not reasonable. In similar situation a Bench of this court in the case of Subhas Chandra Yadav & Ors. vs. The State of Bihar & Ors. C.W.J.C. No. 11491/2001 disposed of on 8.10.2001 has directed the respondents to consider the recommended persons against available vacancies after identifying and calculating the vacancies. In the circumstances, I feel no hesitation in issuing

writ directing the respondents to consider the recommendation of B.P.S.C. and appoint the petitioner against available vacancies after calculating the vacancies."

In the case of Subodh Kumar (supra), the issue was raised of right of a person in the panel in the event the selected candidate did not join. The State has taken a plea that in view of Circular of 1977 and reiterated in 2007 provides that in case a person appointed does not report for duty, the resulting vacancy is required to be carried forward. In corollary, the person whose name standing in the panel, vacancy created in such manner, will not get any chance for his appointment in the post. The Court has discussed large number of cases. It has been held that once the selection process in respect of number of vacancies so notified comes to an end, it is no more open to give offer of appointment to person from the unexhausted list. The purpose of making list of double of the vacancies notified is to offer the appointment to the persons from the waiting list in case the persons who are offered appointment do not join but it does not give any vested right in favour of the candidates whose names appeared therein. The court has placed reliance on a circular dated 17.6.1977 which provides that the remaining unfilled vacancies due to candidates not joining the post or for any other reason shall be carried forward to the next year and the court held that the judgment in the

matter of *Niraj Kumar Singh & Anr.* reported in 2007(3) PLJR 702 does not set out the correct law and has been declared per incurium. It is relevant to quote paragraph nos. 19, 20, 21 and 23 of this judgment which reads as follows:-

- "19. In view of the aforesaid policy of the State Government, the settled law discussed hereinabove and the binding precedents of the Hon'ble Supreme Court and the Division Bench of this Court, we must hold that the judgment in the matter of **Niraj Kumar Singh & Anr.** (supra) does not set out the correct law and is per incurium the judgment of the Supreme Court in the matter of **Bihar State Electricity Board** (supra). The finding that the 17th June 1977 Circular (sic: Memorandum) was never followed is not supported by the facts on record and is erroneous. Anyway, in view of the subsequent judgments of the Division Bench, it is not a good law.
20. In view of the binding instructions issued by the State Government to carry forward the unfilled vacancy to the next recruitment process, the relief sought for by the petitioner cannot be granted. Further, since the recruitment pursuant to the Advertisement No. 4 of 2007, the Commission has already commenced the next recruitment process by holding the Preliminary Test preceding the 53rd to 55th Common Combined Competitive Examination.
21. The contention that a panel once prepared is operative till the next panel is prepared is equally



misconceived, contrary to the aforesaid Memorandum of 1977 and the Resolution of 2007 and has no legs to stand on. Although neither the Memorandum of 1977 nor the Resolution of 2007 specifically provides for how long the panel shall be operative. However, clause (xi) of the Memorandum of 1977 specifically provides that the recommendation made by the Commission shall correspond to the number of actual vacancies. The same reads as under:-

“(xi) The number of candidates recommended by the Commission for appointment out of the merit list thus drawn up shall correspond to the number of actual vacancies.”

22. *In our opinion, the conjoint reading of the above referred clauses (xi) and (xiv) of the Memorandum of 1977 coupled with the settled law that not more than advertised vacancies can be filled in pursuant to a selection process, establish by necessary implication that once the Commission makes the recommendation for the vacancies advertised, the merit list stands exhausted. No further appointment can be made from such merit list.*
23. *In our view the claim made by the petitioner is misconceived. The relief prayed for by him cannot be granted."*

An identical issue came for consideration in the case of ***Manoj Manu & Anr. Vs. Union of India & Ors.*** reported in 2013(4) PLJR 88 (SC). In this case, Manoj Manu was working as an Assistant in the



Central Secretariat Service (CSS), appeared in the Limited Departmental Competitive Examination for the next promotion to the post of Section Officer's Grade in that service. There are two channels of promotion, one by way of seniority and other fast track in the form of Limited Departmental Competitive Examination. Manoj Manu appeared in the said examination conducted by the UPSC, on the requisition for 184 candidates in two lots, first lot of 141 candidates were found to be suitable candidate for the said post whereas second lot of 43 successful candidates were recommended for appointment. Out of them 6 candidates did not join. Later on, requisition was made of three candidates from the reserved list, two candidates from the merit list were refused appointment, Manoj Manu approached to the Tribunal alleging arbitrary act of UPSC in denying him to get his appointment. The hon'ble Supreme Court placing reliance in the case of *Ms. Neelima Shangla Vs. State of Haryana* reported in (1986)3 SCR 785 and *State of Haryana Vs. Subash Chander Marwaha* reported in AIR 1973 SC 2216 has held that the person whose name is included in the select list does not acquire any right to be appointed. The Government may decide not to fill up the vacancy for the valid reasons. The reasons should be not arbitrary or unreasonable and must be based on sound and rational reason. If it is found that the decision of the Government is based on some valid reason, the Court would refuse to issue any

mandamus to the Government to fill up the vacancies. It will be relevant to quote paragraph nos. 14 and 17 of his judgment which reads as follows:-

- "14. It is, thus, manifest that though a person whose name is included in the select list, does not acquire any right to be appointed. The Government may decide not to fill up all the vacancies for valid reasons. Such a decision on the part of the Government not to fill up the required/advertised vacancies should not be arbitrary or unreasonable but must be based on sound, rational and conscious application of mind. Once, it is found that the decision of the Government is based on some valid reason, the Court would not issue any Mandamus to Government to fill up the vacancies.
17. This Court in *Sandeep Singh vs. State of Haryana & Anr.* (2002) 10 SCC 549 commended that the vacancies available should be filled up unless there is any statutory embargo for the same. In *Virender S. Hooda & Ors. Vs. State of Haryana & Anr.* AIR 1999 SC 1701, 12 posts for direct recruitment were available when the advertisement for recruitment was made which was held in the year 1991. Some of the selected candidates did not join in this batch almost similar to the present case, the Court held that the appellant's case ought to have been considered when some of the candidates for reasons of the non- appointment of some of the candidates and they ought to have been appointed if they come within the range of selection."



This Court has also considered an identical issue in CWJC No. 236 of 2016 (Manjeet Kumar Vs. State of Bihar) reiterating the same principle, a direction was given to appoint the person in case of non-joining of the selected candidates. On conspectus of the principles of law laid down that has been delineated by the Supreme Court and this Court, it emerges that mere appearance of the name in the select list does not create indefeasible right but equally important that the Government must act reasonably, properly, not in whim and capricious but must be based on sound reasoning and so much so that when certain selected candidates does not join, in such circumstances, on the valid reason, the appointment can be refused but normally benefit of appointment must be conferred on the person whose name is standing next in the list of selected candidate so long the panel remained statutorily valid. In the present case, applying the principles with regard to making appointment of the persons whose name stands in the waiting list can be accommodated in case certain persons did not join the post. It is also a principle of law that the waiting list cannot be used as reservoir for the future appointment. The moment the number of vacancies notified is filled up will be treated to have been exhausted. No future vacancy will be filled up from the panel of waiting list.

In the present case, the selection was initiated in the year



1999, at the relevant time 331 posts of Assistant were advertised, result was published in the year 2002 but in the meantime, the Bihar Re-organization Act, 2000 came into effect on 15.11.2000, created a confusion as to whether a selection is to be made to 331 posts or 2/3rd candidates in view of old reservation rule or the amended rule. Ultimately, the issue was resolved, it was held that the selection has to be made on 2/3rd vacancy, inasmuch as, it was also decided that the selection would be made in terms of old reservation rule. The 221 persons i.e. 2/3rd of the total vacancy notified out of which 15 vacancy falling under the scheduled tribe category were dropped, finally it was decided to fill up 206 vacancy of successful candidates. Out of 206 candidates, 180 candidates joined and 26 posts remained vacant on account of non-joining of the selected candidates.

Normally, this Court would have directed for filling up of the post on account of non-joining of the 25 candidates but a question would arise, after lapse of such a long period about 16 years, would it be advisable to issue mandamus for appointment of the petitioners on account of non-joining 25 candidates as has been held by the Hon'ble Supreme Court, the panel of waiting list candidates cannot be used for the reservoir for filling up of the future vacancy. At the same time, this Court in the case of Subodh Kumar (supra) considered the 1977 resolution as well as 2007 resolution and after considering of the



same, it has been held that the life of panel is one year, if any vacancy left out on account of non-joining, the same would be carry forward for the next year of the selection. Even keeping aside the resolution, as it has been argued that major portion of the resolution has not been followed but merely because it has been mentioned that the life of the vacancy is one year and any vacancy remained unfilled will be carry forward, the situation will not improve in the sense that the Hon'ble Supreme Court has repeatedly held that either in the case of Subash Chander Marwaha (supra) wherein a caution has been given that the power should not be exercised in an arbitrary in whim and capricious manner but must be based upon sound reason as well as in the case of Manoj Manu (supra), the Court has also held that in normal circumstances, the Government is bound to fill up the vacancy except a decision is based on good reasoning, not suffering from whims and capricious as has been held by Hon'ble Supreme Court in the case of *S.G. Jaisinghani Vs. Union of India & Ors.* reported in *AIR 1967 SC 1427* that absence of arbitrariness is essential part of rule of law. If a decision is taken without principle or without any rule of unpredictable, such decision is antithesis of decision taken in accordance with rule of law. It would be relevant to quote paragraph no.14 of the said judgment which reads as follows:-

"(14) *In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey-"Law of the Constitution"-Tenth Edn., Introduction cx). "Law has reached its finest moments,". stated Douglas, J. in United States v. Wunderlick, (1951) 342 US 98, "when it has freed man from he unlimited discretion of some ruler..... Where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes(1770) 4 Burr 2528 at p. 2539 "means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague and fanciful."*

The plea of Government that on account of the long lapse of time and so much so that as those vacancies have merged with the subsequent advertisement cannot be said suffering arbitrariness. In

such view of the matter, this Court cannot issue a writ of mandamus after delay of long lapse of times for the appointment of these petitioners.

Thus, this court does not find any merit in this writ application and the same is, accordingly, dismissed but without any costs.

(Shivaji Pandey, J)

Rishi/-

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CAV DATE	NA
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