



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 04.08.2017

PRONOUNCED ON : 06.09.2017

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

W.P. (MD) No.13171 of 2017

and

WMP (MD) Nos.10246, 11288 and 10922 of 2017

Dr.Sagaya Panimalar

.. Petitioner

-vs-

001. The State of Tamil Nadu
represented by its Secretary
Health and Family Department
St. George Fort
Chennai 600 009

002. The Director of Medical and
Rural Health Services
D.M.S.Buildings
359, Anna Salai
Teynampet
Chennai 600 006

003. The Medical Services Recruitment Board
represented by its Member Secretary
7th Floor, D.M.S.Buildings
359, Anna Salai, Teynampet
Chennai 600 006

004. Dr.I.Aravind Aathavan

005. Dr.R.Muthuvijayan

006. Dr.R.Logaraja

007. Dr.A.Shahira banu

008. Dr.R.Suthakar

009. Dr.R.V.R.Jothiraj

010. Dr.M.Sivanesan

011. Dr.Sivajothi kumaran

012. Dr.C.Raj Sundar

013. Dr.S.Moorthy

014. Dr.Prabakaran

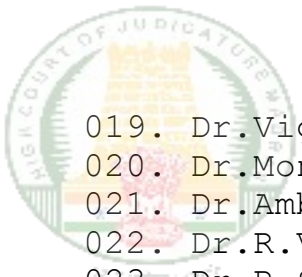
015. Dr.KS.Nandeeswaran

016. Dr.E.Priyadarshini

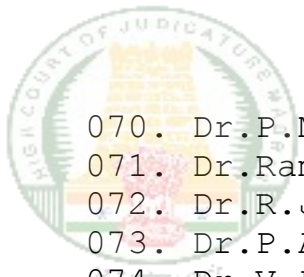
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017. Dr.S.S.Ramaprabha

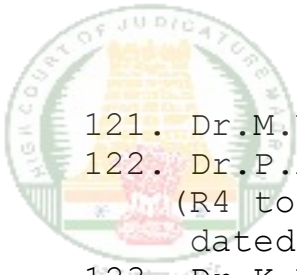
018. Dr.J.Joshua



019. Dr.Vignesh
020. Dr.Monica Justin
021. Dr.Ambiga
022. Dr.R.Vivek
023. Dr.R.Sujithra
024. Dr.A.S.Aruna
025. Dr.R.Ragavi
026. Dr.A.Selvakumar
027. Dr.R.Preethi Kanmani
028. Dr.M.Vignesh
029. Dr.Prathiba,D/o.Gunasekaran,
030. Dr.Prathiba,D/o.Selvaraj,
031. Dr.Abarna Gnanambigai
032. Dr.Raja Rajan
033. Dr.M.Sumithra
034. Dr.A.Mohaideen Abdul Kathier
035. Dr.R.Deepak Sankar
036. Dr.T.Naveen Vaitheesh
037. Dr.A.Tariq Abdul Majeed
038. Dr.A.Arthy Jeya
039. Dr.A.shamim Jawith Abdul Majeed
040. Dr.U.Ragavendran
041. Dr.R.Durgadevi
042. Dr.N.Revathi
043. Dr.R.Anugayathri
044. Dr.A.Murugeswari
045. Dr.E.J.R.Atchara
046. Dr.M.Nandhini
047. Dr.V.Pavithra
048. Dr.T.Mythili
049. Dr.C.Muthu Krishna Kumar
050. Dr.M.Gautham
051. Dr.G.Sathyapriya
052. Dr.A.Lailathu Nisha Beghum
053. Dr.Latha.V.K.
054. Dr.R.Renuka
055. Dr.K.Rajamarisaravanan
056. Dr.Renurajasekar.K.
057. Dr.F.M.Jenisha Vinothini
058. Dr.M.Praveen Kumar
059. Dr.A.Raghu
060. Dr.E.Yogeshwaran
061. Dr.A.Deepak Raj
062. Dr.M.Monika
063. Dr.L.Narmatha
064. Dr.A.Suganya
065. Dr.Aarthy.K
066. Dr.E.Narmatha
067. Dr.R.Selvakumar
068. Dr.R.Selvakumar
069. Dr.A.Mohan Padmanaban



070. Dr.P.Manikandan
071. Dr.Ramitha
072. Dr.R.Jai Sankar
073. Dr.P.Arul Narayanadass
074. Dr.V.Priyadharshini
075. Dr.K.Hemalatha
076. Dr.Sibi Chakravarthi.K
077. Dr.Kalaiarasan.S
078. Dr.Balachander.M
079. Dr.M.Sangeetha
080. Dr.Ramya.K
081. Dr.R.Devi Archana
082. Dr.M.Kaviyarasu
083. Dr.R.Kirubavathy
084. G.Satheeshumar
085. Dr.T.Parthiban
086. Dr.M.Saranya
087. Dr.P.Kayalvizhi
088. Dr.Nivethitha.K.S.
089. Dr.Balamani.B
090. Dr.Tamilmani.C
091. Dr.Nivetharaj
092. Dr.Ranjan.R
093. Dr.S.Vijayaprabha
094. Dr.Facil.C
095. Dr.Jayalakshmi
096. Dr.K.Sandhiya
097. Dr.L.Manoj
098. Dr.A.Tamilarasu
099. Dr.R.Prabakaran
100. Dr.M.Sangeetha
101. Dr.M.Ramamoorthi
102. Dr.K.Vinothkumar
103. Dr.R.Ravindar
104. Dr.K.Suren
105. Dr.R.D.Akilan
106. Dr.K.Srinivas
107. Dr.S.Shanmugapriya
108. Dr.K.Prathap
109. Dr.K.Shobapriya
110. Dr.M.Balamurugan
111. Dr.C.Deepak Vellingiri Raj
112. Dr.S.Agilan
113. Dr.S.Raghuvaran
114. Dr.R.Viveka priya
115. Dr.A.Muganeshwari
116. Dr.P.Priyadharshini
117. Dr.B.Vigneshwari
118. Dr.B.Vigneshwari
119. Dr.A.M.Vinoth
120. Dr.Louis Nikhilan



121. Dr.M.Vignesh

122. Dr.P.Arul Devanath

(R4 to R122 are impleaded vide Court order dated 27.07.2017 in WMP(MD) No.10963/17)

123. Dr.K.Vishnuraja

124. Dr.K.Manoj Kumar

125. Dr.S.Praveen

126. Dr.G.S.Parthiban

127. Dr.G.Ahaman

128. Dr.M.Karthikeyan

129. Dr.M.Siddeswaran

130. Dr.P.B.Anirudh

131. Dr.V.Lavanya

132. Dr.E.Vasanthan

133. Dr.M.Muthuselvan

134. Dr.K.Umapathi

135. Dr.M.Manirathinam

136. Dr.P.Keerthi

137. Dr.K.Vijayabharathi

138. Dr.S.Priyadharshini

139. Dr.R.Iswarya

140. Dr.M.Deepan

141. Dr.T.Lakshanadharshini

142. Dr.K.Muthu Praveen

143. Dr.T.Kumaran

144. Dr.K.Ramalingam

145. Dr.G.Karthikeyan

146. Dr.R.Nithiarutselvan

147. Dr.E.Kittu

148. Dr.S.Deepa

149. Dr.S.Nandhini

150. Dr.M.Dhanalakshmi

151. Dr.A.Sivagami

152. Dr.S.Sumithira

153. Dr.M.Jasmine Fathima

154. Dr.M.Malathi

155. Dr.M.Mercyilinnevedega

156. Dr.B.Saraswathy

157. Dr.P.Ramabhai

158. Dr.G.Arunsivaram

159. Dr.S.Vigneswaran

160. Dr.S.Krishnakumar

161. Dr.B.Sivamani Senthilkumaran

162. Dr.M.Pamathi

163. Dr.S.Shyam Kumar

164. Dr.K.Silambu Selvi

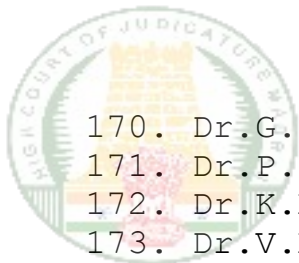
165. Dr.J.Sudhakar

166. Dr.V.Euginvijay

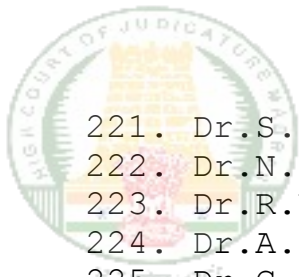
<https://hcservices.courts.gov.in/hcservices/>

168. Dr.K.Jeyaprakash

169. Dr.S.Padmaja



170. Dr.G.Kesava Perumal
171. Dr.P.Santhosh Kumar
172. Dr.K.Malathi
173. Dr.V.Murugan
174. Dr.M.Subha Nandhini
175. Dr.Ijin Jinita
176. Dr.K.S.Vigneshwar
177. Dr.R.Prabhakaran
178. Dr.T.Sharmila
179. Dr.R.Rajesh
180. Dr.S.P.Shamini
181. Dr.R.Asish
182. Dr.S.Kaviarajan
183. Dr.M.Pavithra Ravi
184. Dr.P.Tamilzagan
185. Dr.C.Deepak
186. Dr.S.Aarthy
187. Dr.M.Gopinath
188. Dr.N.Manjunath
189. Dr.S.Bharath
190. Dr.R.Cresen Cabrina
191. Dr.S.Sharukesh
192. Dr.T.Chandraprakash
193. Dr.P.Gangatharan
194. Dr.S.Boscopremkumar
195. Dr.M.Kanimozhi
196. Dr.D.N.Dhiliban
197. Dr.M.S.Lemiya Parveen
198. Dr.L.Subramanian
199. Dr.A.Renuka Devi
200. Dr.R.Dhanalakshmi
201. Dr.A.Sam Kirubakaran
202. Dr.G.Kannan
203. Dr.M.R.Choban Venkatesh
204. Dr.S.Archana
205. Dr.R.Sivasubramanian
206. Dr.G.L.K.Harish
207. Dr.R.Abirami
208. Dr.Steffi Amrita Selvaraj
209. Dr.G.Priyadarshini
210. Dr.P.Arun Prakash
211. Dr.S.Umarani
212. Dr.B.Padmapriya
213. Dr.M.Sushila
214. Dr.J.Selvi
215. Dr.B.Subha
216. Dr.Tharanipriyankadevi
217. Dr.O.Maniprasath
218. Dr.S.Srikanth
219. Dr.S.Srikanth
220. Dr.S.Monisha



221. Dr.S.Sarath Kumar
222. Dr.N.Illavenil
223. Dr.R.Niveditha
224. Dr.A.Shanmugapriya
225. Dr.C.Gomathi Saranya
226. Dr.T.Keerthana
227. Dr.R.Murugavalli
228. Dr.N.Inbarasan
229. Dr.K.Karthick
230. Dr.T.Priyanka
231. Dr.A.Manoj
232. Dr.R.Iswarya
233. Dr.B.Naresan

234. The Director
Department of Public Health
and Preventive Medicine
359, DMS Building
Anna Salai
Chennai 600 006
(R123 to R 234 are impleaded vide Court
order dated 02.08.2017 in W.M.P. (MD)
Nos.11052 & 11065 of 2017)

.. Respondents

Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Declaration, declaring that the action of the respondents resorting to fill up the 2500 posts of Assistant Civil Surgeon (General) based on the earlier recruitment process undertaken by them pursuant to the notification No.12/MRB/2016 dated 10.11.2016 without issuing fresh notification and without following the due recruitment process as illegal, arbitrary and unconstitutional and consequently direct the respondents to select candidates to the post of Assistant Civil Surgeon (General) by issuing a fresh notification/advertisement calling for applications from the eligible candidates and by following due recruitment process.

For Petitioner :: Mr.M.Ajmal Khan
Senior Counsel for
Mr.K.K.Samy

For Respondents :: Mr.D.Muruganantham
Additional Government Pleader for
R1, 2 & 234
Mr.T.S.Mohamed Mohidheen
Additional Government Pleader for R3
Mr.T.Lajapathi Roy
for R4 to 122
Mr.Veera Kathiravan
Senior Counsel for
M/s Veera Associates for R123 to 233

**ORDER**

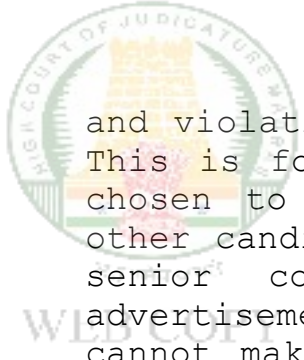
The petitioner has filed this writ petition seeking issuance of a Writ of Declaration, declaring that the action of the respondents resorting to fill up the 2500 posts of Assistant Civil Surgeon (General) based on the earlier recruitment process undertaken by them pursuant to the notification No.12/MRB/2016 dated 10.11.2016 without issuing fresh notification and without following the due recruitment process as illegal, arbitrary and unconstitutional and consequently direct the respondents to select candidates to the post of Assistant Civil Surgeon (General) by issuing a fresh notification/advertisement calling for applications from the eligible candidates and by following due recruitment process.

2. Mr.M.Ajmal Khan, learned senior counsel appearing for the petitioner submitted that the petitioner, having completed the M.B.B.S. Course in 10+2+4 pattern and also the House Surgeon course (CRRI), registered his name in the Tamil Nadu Medical Council on 25.11.2016. Since he completed his CRRI on 15.10.2016, he was unable to register his name immediately with the Tamil Nadu Medical Council, for the reason that he was unable to get the said certificate from the medical college. At this stage, the Medical Services Recruitment Board, the third respondent herein, which is an agency created for selection of candidates to be appointed to various posts in Tamil Nadu Medical Services by direct recruitment including the post of Assistant Surgeon (General) issued the notification No.12/MRB/2016 dated 10.11.2016 inviting applications from the eligible candidates to fill up 1223 vacancies in the post of Assistant Surgeon (General) including 144 backlog vacancies earmarked for the physically challenged persons as well, informing the last date for submission of the online applications being 30.11.2016 and the last date for making online payment of fee being 2.12.2016. In the said notification, it was further clarified that the selection to be made based on the objective type written examination for the maximum marks of 100 with 200 objective type questions relating to medical science and also fixing the minimum qualifying marks for selection at 30 for SC/SCA/ST candidates and 35 for others. In view thereof, the petitioner also applied to the said post through online and making the payment of fee of Rs.375/- on 30.11.2016 again through online deposit. But the third respondent did not issue any hall ticket to the petitioner to write the written examination which was held on 12.2.2017, on the ground that the petitioner registered his name with the Tamil Nadu Medical Council only on 25.11.2016, which is after the date of notification issued on 10.11.2016. Even some of the candidates who are similarly placed were also not allowed to appear for the examination, on the ground that they did not register their names with the Tamil Nadu Medical Council before 10.11.2016.



3. The learned senior counsel, continuing his arguments, submitted that after completing the written examination, the third respondent published the results in their website in the order of merit and thereupon called the candidates for certificate verification between 28.2.2017 and 15.3.2017. After completion of the certificate verification, the third respondent submitted the list of selected candidates to the respondents 1 to 3 and 234 and they also issued the appointment and posting orders to all the selected candidates in March, 2017. Consequently, all the selected candidates also joined duty at the respective place of postings. In view of the belated registration of the petitioner's name on 25.11.2016, which is beyond the cut-off date (10.11.2016), the petitioner purely missed his chance to take part in the written examination for the post of Assistant Surgeon (General) as per the notification dated 10.11.2016. However, he was following the official website of the third respondent with the hope as to when they are going to issue the fresh notification for the post. While following the official website of the third respondent, to his shock and surprise, he learnt that the third respondent has also issued the time schedule for certificate verification of the candidates who had already written the examination on 12.2.2017 pursuant to the notification dated 10.11.2016 without issuing a fresh notification and also without issuing any advertisement in any newspaper inviting eligible candidates for the post of Assistant Surgeon (General). Now the third respondent is proceeding to fill up 2500 vacancies in the post of Assistant Surgeon (General). When the law is well settled that no one can be appointed to any civil post even on temporary or adhoc basis without inviting applications from the eligible candidates, as such appointment will not meet the requirement of Articles 14 and 16 of the Constitution, it is not permissible for the respondents to fill up 2500 vacancies in the post of Assistant Surgeon (General). Taking support from the judgment of the Apex Court in the case of **State of Orissa and another v. Mamata Mohanty, (2011) 4 MLJ 692 (SC)**, it was stated that once the selection process based on any notification has already come to an end and the selection list was prepared, based on which appointment orders were issued by the competent authority based on the selection list, the above recruitment process again cannot be re-opened, even if the candidates who applied for appointment to the post of Assistant Surgeon (General) based on the notification dated 10.11.2016, for appointment to the vacancies which arose and are available, after the appointment orders were issued to the candidates who were earlier selected. Therefore, the third respondent cannot call for certificate verification to fill up the post of Assistant Surgeon (General), without issuing a fresh notification calling for applications from the eligible candidates including the candidates who had already applied pursuant to the notification dated 10.11.2016.

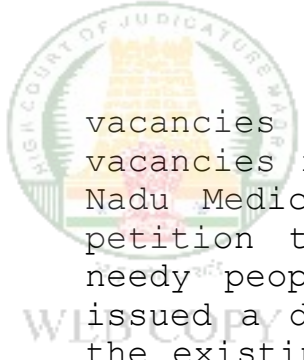
4. Mr.Ajmal Khan further submitted that the terms and conditions stipulated in the notification dated 10.11.2016, particularly in paragraph-4(b) that although the number of vacancies notified was only tentative and indicated as 1223 and the said number of vacancies are liable to change or vary with reference to the vacancy position, any vacancy which arose after finalisation of selection for appointment could be filled up only by issuing a fresh notification. Otherwise, the other eligible candidates who are waiting for invitation to apply would be deprived of their chances to equal opportunity and equal protection as guaranteed under Articles 14 and 16 of the Constitution of India. Again the learned senior counsel submitted that if at all the candidates who are kept in the reserve waiting list are to be considered, the respondents 1 to 3 and 234 will have to issue a fresh notification making them also to write the examination and securing minimum eligible marks and only thereafter, these candidates can claim for appointment. On the other hand, if the respondents 1 to 3 and 234 are allowed to proceed further based on the certificate verification process from 5.7.2017 to 18.7.2017, such action would result in depriving the chances to other candidates who are also eligible and waiting for making applications to the said post. Taking support from an unreported decision in W.P.(MD) Nos.10783 & 10820 of 2015 dated 2.9.2016 (M.Pradeepa v. The Secretary to Government, Hindu Religious and Charitable Endowments Administration Department and others), the learned senior counsel submitted that when it is the settled legal position that a candidate 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 the post and as per the statutory proviso to Rule 10(a)(i) of the Tamil Nadu State and Subordinate Service Rules, the candidates in the reserve list have a right to get appointed if the selected candidates failed to join duty in time for one reason or other, however, once the vacancies for which the notification was issued are filled up by appointing the candidates from the reserve list, then the rest from the reserve list cannot be utilised to fill up the further vacancies without issuing a fresh notification. In support of this submission, he pressed into service the ratio decidendi laid by the Apex Court in **Arup Das and others v. State of Assam and others, (2012) 3 MLJ 529 (SC)**, wherein it is held that the selection/appointment made beyond the number of posts advertised even on availability of vacancies is arbitrary and violative of Articles 14 and 16 of the Constitution of India and any deviation from the advertisement can be made only on existence of extra-ordinary or exceptional circumstances warranting filling up of the vacancies available. Explaining further the principle behind the said decision, he has stated that the authority cannot make any selection or appointment beyond the number of posts advertised, even if there were large number of vacancies available than those advertised, because, if that was allowed to be done, such action would be entirely arbitrary



and violative of Articles 14 and 16 of the Constitution of India. This is for the reason that since other candidates who have not chosen to apply for the post could have also applied with the other candidates for being considered for appointment. The learned senior counsel also argued that if the requisition and advertisement are for certain number of posts only, the State cannot make more appointments than the number of posts deviating from the advertisement. He has also relied upon yet another judgment of the Apex Court in the case of **Rakhi Ray and others v. High Court of Delhi and others**, AIR 2010 SC 932 in support of his submission.

5. Mr.T.S.Mohamed Mohidheen, learned Additional Government Pleader for the third respondent-Medical Services Recruitment Board prayed for dismissal of the writ petition, on the ground that the petitioner has no locus standi to maintain the writ petition, since on the date of issuance of the notification, he was neither eligible nor applied for the same. Therefore, a person who has no locus standi and not even eligible to apply to the post of Assistant Surgeon (General) on the relevant date, cannot maintain his writ petition. Adding further, he submitted that the original notification No.12/MRB/2016 dated 10.11.2016 was issued for recruitment of 1223 vacancies in the post of Assistant Surgeon (General) specifically mentioning therein that the competitive examination for the said post would be held on 22.1.2017. However, due to large scale agitation of student community supporting the jallikattu, the date of examination originally scheduled was postponed to 12.2.2017 and after conducting the examination, the mark list was also published on 13.2.2017. Totally 5211 candidates got qualified in the competitive examination after proper selection process. The first eligible 1223 candidates as per merit and communal reservation was provisionally selected and the provisional selection list was also published in notification No.12/MRB/2016 dated 24.3.2017. Accordingly, the appointment orders were also issued by the Director of Public Health and Preventive Medicine, who is the competent authority. However, 453 candidates had not joined duty as per the report submitted by the appointing authority. Therefore, the provisional selection list of 453 candidates in respect of non-joined candidates was released by the Medical Services Recruitment Board in notification No.12/MRB/2016 dated 9.6.2017.

6. Prior to the initiation of the selection process, when public interest litigation petitions seeking a direction to fill up all the existing doctors vacancy in W.P.(MD) Nos.18208 and 22579 of 2016 and W.P.(MD) No.22975 of 2015 were taken up for consideration, by order dated 28.4.2017, the Hon'ble Division Bench, in its order, noted the report filed by the Principal Secretary to Government, Health and Family Welfare Department that 2666

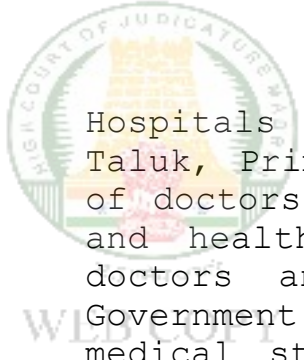


vacancies are lying vacant and action is taken to fill up 1223 vacancies for the post of Assistant Surgeon (General) in the Tamil Nadu Medical Services, considering the prayer made in the writ petition to ensure adequate and sufficient medical care to the needy people coming to the government hospitals in Tamil Nadu, issued a direction to the respondents 1 to 3 and 234 to fill up the existing doctors vacancy in Virudhunagar district Headquarters Government Hospitals and Aruppukottai, Srivilliputhur, Rajapalayam, Sathur, Tiruchuli, Kariapatty, Watrap and Tiruthangal Government Taluk Hospitals in Virudhunagar district. Since there was a specific direction given by the Hon'ble Division Bench to appoint sufficient number of specialised doctors in the Departments of Urology and Nephrology and also sufficient number of technicians and supporting staff, in an effort to honour the direction issued by the Division Bench, after filling up all the 1223 posts of Assistant Civil Surgeons (General), the Director of Public Health and Preventive Medicine also sent a proposal to the Government with a copy marked to the Medical Services Recruitment Board to fill up 1224 additional vacancies from the remaining qualified candidates for selection and appointment as Assistant Surgeon (General) in order to ensure uninterrupted health care services to the public.

7. Only after seeking permission, the certificate verification for the post of Assistant Surgeon (General) for the next qualified candidates was scheduled from 5.7.2017 to 18.7.2017 by the Medical Services Recruitment Board. Moreover, the respondents 1 to 3 and 234 have come forward to fill up the existing vacancies which were not notified in the previous notification by utilising the eligible candidates who were found selected and accommodated in the reserve list. Since the Hon'ble Division Bench of this Court in the case of **K.Vijayaraj and others v. K.Kumaran and others, (2013) 2 MLJ 175** has held that the State can deviate from the advertisement and make appointment for the post falling vacant in exceptional circumstances or in emergent situation by taking a policy decision in that behalf, the State Government can deviate from the advertisement by appointing candidates from the reserve waiting list. In the present case, in view of the outbreak of dengue fever all over the State of Tamil Nadu, to contain the same, keeping in mind the direction issued by the Hon'ble Division Bench in the writ petitions to expedite the process of filling up of the further vacancies, the respondents 1 to 3 and 234 have utilised the reserve list containing the eligible and selected candidates. Therefore, no fault can be found with them, he pleaded.

8. As this Court has injuncted the respondents from proceeding further in the matter, by order dated 17.7.2017, the respondents 1 to 3 and 234 have filed a miscellaneous petition to vacate the said interim order. Mr.T.Lajapathi Roy, learned counsel

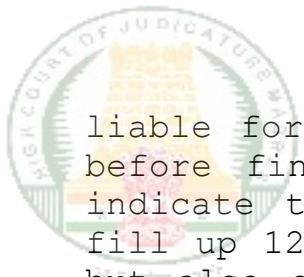
appearing for the respondents 4 to 122 submitted that the allegation made by the petitioner that the third respondent-Medical Services Recruitment Board, having issued the notification No.12/MRB/2016 dated 10.11.2016 calling for applications from the eligible candidates to fill up 1223 vacancies in the post of Assistant Surgeon (General) including 117 backlog vacancies earmarked for physically challenged persons, 11 backlog vacancies earmarked for MBC/DNC and 16 backlog vacancies earmarked for ST by fixing the minimum qualifying marks at 35 for others and 30 for SC/ST, after filling up the 1223 vacancies, when the purpose for which the notification was issued has come to an end, cannot resort to fill up the remaining vacancies, is totally false. When the variance clause clearly shows that the number of vacancies advertised is only an indicative number and is liable for change with reference to the vacancy position at any time before finalisation of vacant posts for appointment, the respondents 1 to 3 and 234 are fully justified in utilising the selected candidates found in the reserve waiting list. Taking support from the judgment of the Apex Court in the case of **Suvidya Yadav and others v. State of Haryana and others, (2002) 10 SCC 269**, Mr.Lajapathi Roy submitted that even though the notification specified the limited vacancies, the appointment made beyond the number of posts advertised on exceptional circumstances cannot be held as arbitrary and violative of Articles 14 and 16 of the Constitution of India. Again referring to an unreported decision of the Chhattisgarh High Court in W.P.No.3781 of 2005 dated 12.9.2005 (Smt.Vijaya Dayal v. Chhattisgarh Public Service Commission and others), he stated that when the first advertisement dated 19.8.2004 provided for a clause that the number of vacancies would be subject to variation, on the basis of the further requisition made by the State Government, issuing a second advertisement informing all the applicants that they would be considered for 61 vacancies in the post of Civil Judge Class II cannot be said to be illegal or discriminatory, will be equally applicable in the present case. Again pressing into service the judgment of the Hon'ble Division Bench of this Court in the case of **K.Vijayaraj and others v. K.Kumaran and others, (2013) 2 MLJ 175**, he contended that in exceptional circumstances and in emergent situation, the vacancies more than notified can be filled up as a policy decision. Referring to the notice issued by the National Human Rights Commission to the Government of Tamil Nadu over the reported plight of patients suffering due to the shortage of doctors in Government hospitals and taking suo motu cognizance of a media report indicating the shortage of doctors in government hospitals in Tamil Nadu, wherein 80% of the population depend upon the government hospitals for treatment, expressing serious concern over the situation, issuing notice to the Chief Secretary and Health Secretary calling for a report within eight weeks on the following, namely, (i) total number of hospitals run by the Government and functioning in the State of Tamil Nadu including



Hospitals and health care facilities at District Headquarters, Taluk, Primary Health Centre etc., (ii) total sanctioned strength of doctors and para-medical staff in all the Government hospitals and health care facilities, (iii) number of vacant posts of doctors and paramedical staff and (iv) steps taken by the Government to address the issue of shortage of doctors and para-medical staff in all the Government Hospitals and health care facilities, the learned counsel submitted that when 80% of the population living in Tamil Nadu are facing untold miseries due to the shortage of doctors in government hospitals in the State and the non-availability of doctors results in thousands of patients waiting in queue every day and even for surgery, patients have to wait for months leading to confrontation and clashes by them with the medical and para-medical staff, the State Government, after realising that they have notified only 1223 vacancies, taking note of the further future vacancies during the course of selection process from the date of notification till the date of issuing the selection list and reserve list, rightly came forward to fill up the existing vacancies by utilising the reserve list who are all found selected. Referring to the notice dated 07.06.2017 issued by the National Human Rights Commission to the Government of Tamil Nadu calling for a report from the Government to address the shortage of doctors in tackling the plight of patients in Government Hospitals, the learned counsel submitted that when the Commission in the said notice expressing serious concerns over the plight of patients due to shortage of doctors has indicated that the State would be failing in their duties and responsibilities if they do not provide qualitative health care people, realising the concern expressed by the National Human Rights Commission and taking note of media report dated 05.06.2017 that huge uncontrollable dengue hazards are being faced by the common people on account of shortage of doctors in the primary health medical centres, district headquarters hospitals etc., the Government have come forward to fill up the vacancies that would definitely constitute extraordinary situation to deviate from the notification. Therefore, when the respondents 1 to 3 and 234 have come forward to appoint the eligible and selected candidates from the waiting list, in view of the exceptional circumstances, the vacancies more than notified can be filled up, as per the judgment of the Apex Court. Therefore, the writ petition is liable to be dismissed, he pleaded.

9. Mr.Veera Kathiravan, learned senior counsel appearing for the respondents 123 to 233 also submitted that the writ petitioner has no locus standi to file this writ petition, since he had not enrolled his name in the Tamil Nadu Medical Council before the cut-off date on 10.11.2016.

<https://hcservices.ecourts.gov.in/hcservices/> During his arguments, he would submit that the notification dated 10.11.2016 which specifically mentions that the number of vacancies advertised is only an indicative number and is



liable for change with reference to vacancy position at any time before finalisation of selection for appointment, would clearly indicate that the said notification has been issued not only to fill up 1223 vacancies in the post of Assistant Surgeon (General), but also other backlog vacancies, hence the selection of doctors made to fill up the backlog vacancies over and above 1223 vacancies taking into account the subsequent development cannot be questioned by the petitioner who has no locus standi.

11. Heard the learned counsel for the parties.

12. The Medical Services Recruitment Board issued the notification No.12/MRB/2016 dated 10.11.2016 calling for applications through online from the eligible candidates to fill up 1223 vacancies in the post of Assistant Surgeon (General) including 117 backlog vacancies earmarked for physically challenged persons, 11 backlog vacancies earmarked for MBC/DNC and 16 backlog vacancies earmarked for SC/ST by fixing the minimum qualifying marks at 35 for others and 30 for SC/ST on temporary basis in the Tamil Nadu Medical Service. The scale of pay for the said post is Rs.15600-39100+Grade Pay Rs.5400. A perusal of the notification also shows that the rule of reservation is made applicable as per the rules in force and detailed instructions with regard to reservation are also given in Annexure-2 and 3 of the notification. Paragraph-4(b) specifically mentions that the number of vacancies advertised is only an indicative number and is liable for change with reference to vacancy position at any time before finalisation of selection for appointment. The educational qualification for the post of Assistant Surgeon (General) is a MBBS Degree, must be a registered practitioner within the meaning of the Madras Medical Registration Act, 1914 and must have served as House Surgeon (CRRI) for a period of not less than twelve months. Candidates also should have registered their names in the Tamil Nadu Medical Council before the date of notification. Candidates also should possess adequate knowledge in Tamil. However, it is stated that the candidates who do not possess adequate knowledge in Tamil may also apply, but they should pass the Second Class Language Test (Full Test) in Tamil within a period of two years from the date of their appointment, failing which they will be discharged from service. Paragraph-5C says about the citizenship, among other conditions, etc. However, the case of the petitioner with reference to paragraph-4(b) of the notification needs consideration and the same reads as under:-

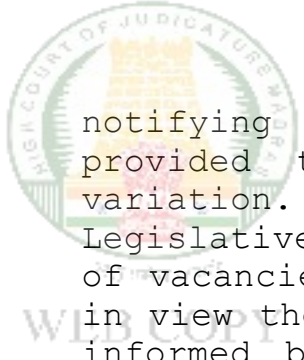
"4b. The number of vacancies advertised is only an indicative number and is liable for change with reference to vacancy position at any time before finalisation of selection for



13. It is an admitted case that the notification dated 10.11.2016 has invited applications only through online mode for direct recruitment to the post of Assistant Surgeon (General) on temporary basis in Tamil Nadu Medical Service to fill up 1223 vacancies including the backlog vacancies earmarked for Differently Abled, Most Backward Class/Denotified Community, Scheduled Caste/Scheduled Tribe. Now the crux of the issue is that when the entire selection process based on the notification No.12/MRB/2016 dated 10.11.2016 for filling up of the aforementioned 1223 vacancies of Assistant Surgeon (General) has come to an end, after preparation of the selection list to the said post, can the Medical Services Recruitment Board resort to fill up the non-notified vacancies beyond 1223, utilising the candidates already selected and kept in the reserve or waiting list, without issuing a fresh notification.

14. Equally, can the Medical Services Recruitment Board once again be directed to invite applications from the eligible candidates for the post of Assistant Surgeon (General) and make them to undergo the selection process wasting the time and money of the Department and others. The answer cannot be in the affirmative. A similar situation arose in the State of Haryana on 16.12.91, when the Haryana Public Service Commission issued an advertisement indicating the number of posts of Principal to be filled up as 18. The said advertisement further stated that the number of posts would be subject to variation to any extent. While so, on 1.6.93 before the finalisation of selection procedure, the State Government made a fresh requisition to Public Service Commission indicating the number of vacancies as were available for 1991, which was more than 18. On receipt of the same, the Haryana Public Service Commission recommended the names of 30 persons for the post of Principal on 1.10.93. When a similar challenge was made before the High Court of Punjab and Haryana, a learned single Judge, proceeding on the footing that filling up of the vacancies over and above the number of vacancies advertised was arbitrary, held that the selection of persons beyond 18 was bad. The order passed by the learned single Judge was upheld by the Division Bench in the intra-Court appeal. Then the matter was taken up to the Apex Court in the case of **Suvidya Yadav and others v. State of Haryana and others, (2002) 10 SCC 269**. The Apex Court, accepting the recommendation made by the Haryana Public Service Commission to fill up more than the vacancies advertised, held that the recommendations made by the Commission are in accordance with law. Therefore, any vacancies in excess of the number of posts advertised can be validly filled up.

15. Almost a similar issue visited the High Court of Chhattisgarh at Bilaspur. Originally, advertisement No.02/2004 dated 19.02.2004 was issued inviting applications from the eligible candidates for appointment to the post of Civil Judge Class-II by

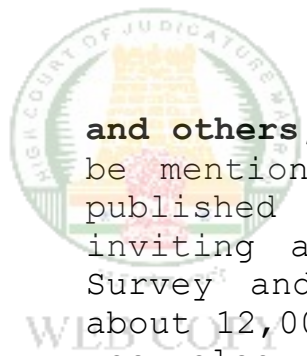


notifying the vacancies as 30. The said advertisement further provided that the number of vacancies would be subject to variation. On the basis of the requisition sent by the Law and Legislative Affairs Department, Government of Chhattisgarh, number of vacancies of Civil Judge Class-II was increased to 61, keeping in view the availability of the vacancies upto December, 2005, as informed by the Registrar General of the High Court dated 28th December, 2004 to the effect that there will be further requirement of 31 or more Civil Judges Class-II by the end of next year i.e., 2005, a special notice was also published on 15th February, 2005, which was challenged in the writ petition. One of the candidates, namely, Smt.Vijaya Dayal, who appeared in the selection process was unsuccessful in the result declared on 19.2.2005. Hence she filed the writ petition in W.P.No.3701 of 2005 praying for an order to cancel the advertisement dated 15.2.2005 relating to 31 posts of Civil Judge Class-II which was increased later on, on the ground that the respondent therein had no authority to increase the number of vacancies of Civil Judge Class-II from 30 to 61 once it is advertised that the number of vacancies would be 30. By the unreported judgment in W.P.No.3701 of 2005 dated 12.9.2005 (Smt.Vijaya Dayal v. Chhattisgarh Public Service Commission and others), the High Court, following the judgment of the Apex Court in *Suvidya Yadav & others v. State of Haryana and others*, (2002) 10 SCC 269, has held as follows:-

"21. The first advertisement dated 19.8.2004 clearly provided for variation clause that number of vacancies would be subject to variation. On the basis of the requisition made by the State Government that the requirement of Civil Judges Class-II by the end of 2005 would be 31, a second advertisement was issued informing to all the applicants that they would be considered for 61 vacancies of Civil Judge Class-II. There is no illegality or discrimination and the process of selection for 61 posts of Civil Judges Class-II is valid and legal.

22. The contention of learned counsel for the petitioner that she would have got one more opportunity, had a new process of selection for increased 31 posts, be taken up separately is untenable and rejected.

23. For the reasons stated above, the petition is dismissed. No order as to costs."



and others, (2012) 3 MLJ 529. The facts of that case in brief may be mentioned as follows. An advertisement dated 4.11.2006 was published by the Director of Land Records and Survey, Assam inviting applications for selection for admission in the Assam Survey and Settlement Training Institute for 160 seats. Thus, about 12,000 candidates applied for the said seats. A written test was also conducted followed by a viva voce examination. The restriction of the viva voce test to only 560 candidates was challenged before the Gauhati High Court in W.P.(C) No.3419 of 2007, which was dismissed and Writ Appeal No.413 of 2007 preferred from the order of the learned single Judge was also dismissed. At this stage, the Director of Land Records and Survey, Assam published a select list of 160 candidates and sent the candidates for training. Subsequently, the Director sent three more lists, namely, second list, third list and fourth list, but they were not approved by the Government. Since the Government refused to approve the second, third and fourth lists against the seats available, the same was also challenged on the ground that when vacancies were available, there was no bar in the same being filled up from the select list of 560 candidates. The said contention was resisted by the respondents therein stating that even though there were seats available, the same could not have been filled up beyond the number of seats advertised as such action would be contrary to the law laid down by the Apex Court relating to deviation from the contents of the advertisement. After hearing the parties, the learned single Judge rejected the contentions of the petitioners therein holding that if any appointment was to be made beyond the number of seats advertised, the Director was required to publish a fresh advertisement for selecting the next batch of candidates in accordance with Rule 20 of the Rules in this regard. The learned Judge also observed that when 560 candidates were called for the viva voce test for the 160 seats which had been advertised and if other candidates from the second, third and fourth lists were to be admitted, it would amount to depriving other candidates, who had not been called for the viva voce test because of the Government's decision to limit the number of candidates in the written test, of an opportunity of being selected. The learned single Judge further held that filling up of vacancies over and above the number of vacancies advertised would be contrary to the provisions of Articles 14 and 16 of the Constitution of India. The Division Bench also, concurring with the order of the learned single Judge, dismissed the writ appeal. Finally, the matter came before the Supreme Court in Arup Das and others case (cited supra). The Hon'ble Apex Court has held that the issue raised before them was no longer res integra and has been well settled by a series of decision of the Court, namely, **Prem Singh and others v. Haryana State Electricity Board and others, 1996-II-LLJ 786**, wherein it is held as follows:-

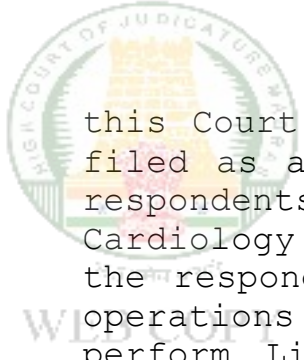


"It is well-established that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action would be entirely arbitrary and violative of Articles 14 and 16 of the Constitution, since other candidates who had chosen not to apply for the vacant posts which were being sought to be filled, could have also applied if they had known that the other vacancies would also be under consideration for being filled up."

17. From the above ratio, this Court can cull out the principle that the authority cannot make any selection or appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. However, the other principle that could be culled out from the above ratio is that in a situation where posts in excess of those advertised had been filled up in extra-ordinary circumstances, in such a case, instead of invalidating the excess appointments, the relief could be moulded in such a manner so as to strike a just balance, if it is in the interest of the State and in the interest of the person seeking public employment, to the facts of such case.

18. Taking cue from the above, in the present case, paragraph 4(b) clearly says that number of vacancies advertised is only an indicative number and is liable for change with reference to vacancy position at any time before finalisation of selection for appointment. Therefore, 1223 vacancies shown in the advertisement No.12/MRB/2016 dated 10.11.2016 is only an indicative number for filling up of the post of Assistant Surgeon (General) in the Tamil Nadu Medical Service.

19. In the meanwhile, public interest litigation petitions in W.P.(MD) Nos.22979 of 2015, 18208 & 22579 of 2016 were filed with the following prayers. Writ petition in W.P.(MD) No.22979 of 2015 has been filed as a Public Interest Litigation seeking a direction to the respondent No.1 to conduct inspection in all the Government Hospitals in Tamil Nadu and to ensure adequate and sufficient medical care to the needy people coming to the Government Hospitals in Tamil Nadu as early as possible within the time stipulated by this Court. Writ petition in W.P.(MD) No.18208 of 2016 has been filed as a Public Interest Litigation seeking a direction to the respondents to fill the existing doctors vacancy in Virudhunagar district Head Quarters Government Hospitals at Arupukottai, Srivilliputhur, Rajapalayam, Sathur, Tiruchuli, Kariapatty, Watrap and Tiruthangal Government Taluk Hospitals in Virudhunagar district within the time stipulated by



this Court. Writ petition in W.P.(MD) No.22579 of 2016 has been filed as a Public Interest Litigation seeking a direction to the respondents (a) to provide heart lung machine, Cardiac Cath Lab in Cardiology department in Respondent No.3 hospital. (b) To direct the respondent No.3 to perform by pass and cardiac stent fixing operations in night times. (c) To direct the respondent No.3 to perform Linear Accelerator treatment to the cancer patients in Oncology Department as performing in Madurai Balarangapuram Government Hospital. (d) To direct the respondent No.3 to perform Cochlear Implant Surgery in Ear, Nose and Throat (ENT) department in respondent No.3 hospital. (e) To direct the respondents to provide adequate number of staff nurses on the basis of the inpatients and out patients in respondent No.3 hospital. (f) To direct the respondents to take immediate action to reduce infant mortality rate in respondent No.3 hospital, by way of conducting death auditing by the officials deputed by the respondent No.1 and other appropriate methods as this Hon'ble Court may deem fit. (g) To direct the respondents to renovate and construct sufficient number of toilets in the old building of respondent No.3 hospital. (h) to direct the respondents to effectively implement kidney, liver, heart and other organ transplantation program in respondent No.3 hospital within the time stipulated by this Hon'ble Court. (i) To direct the respondents to create centralised communication system between all Government Hospitals in the State of Tamil Nadu to ensure availability of bed in an emergency on the basis of the direction issued by the Hon'ble Supreme Court of India in Paschim Bang Khet Mazdoor Samity and others Vs. State of West Bengal case, reported in (1996) 4 SCC 37 and (j) to direct the respondents to extend the diagnosis by MRI scan, also in night hours in respondent No.3 hospital. The Hon'ble Division Bench, by order dated 28.4.2017, directed the Government to appoint sufficient number of specialist doctors in the Department of Urology as well as Nephrology and also sufficient number of technicians and supporting staff.

20. Secondly, the National Human Rights Commission also issued a notice dated 07.06.2017 to the State Government taking suo motu cognizance of a media report about the plight of patients due to the shortage of doctors in Government Hospitals of Tamil Nadu to submit a report on the total number of vacant posts of doctors, total sanctioned strength of doctors and the steps taken by the Government to address the issue of shortage of doctors in all the Government Hospitals. In the light of the above, the Government had taken a policy decision to fill up the backlog vacancies by utilising the selected candidates found in the waiting list made pursuant to the notification dated 10.11.2016. Therefore, the action taken by the respondents 1 to 3 & 234 is in order. In fact, the Hon'ble Division Bench of this Court in the case of **K. Vijayaraj and others v. K. Kumaran and others, (2013) 2 MLJ 175**, while referring to the judgment of the Apex Court in *Prem*



Singh v. Haryana State Electricity Board (supra) holding that the State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances or in emergent situation and that too by taking a policy decision in that behalf, held as follows:-

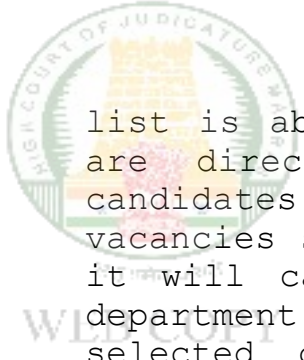
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"48. Considering the submissions made by the learned counsel appearing for writ petitioners and selected candidates and also the dictum laid down in the judgments, we come to the following conclusions:

- (i) it is, no doubt, vacancies cannot be filled up for non-notified posts; but when there is an emergent situation and exceptional circumstances, the posts can be filled up by making policy decision.
- (ii)
- (iii)
- (iv)
- (v)....."

21. A reading of the above judgment clearly shows that the State can fill up the vacancies than those advertised, if there is an emergent situation and exceptional circumstances. In the present case, when there was an outbreak of dengue fever all over the State of Tamil Nadu and many poor and innocent people started dying due to shortage of doctors to attend them in the primary health medical centres, district headquarters hospitals, etc, taking note of this dangerous situation through media report dated 05.06.2017 that calls for immediate action, the National Human Rights Commission, New Delhi, expressing serious concerns over the situation has also issued notice to the State Government on 07.06.2017 calling for a report on the total number of hospitals run by the Government and functioning in the State of Tamil Nadu including Hospitals and health care facilities at District Headquarters, Taluk, Primary Health Centre etc; total sanctioned strength of doctors and para-medical staff in all the Government hospitals and health care facilities; number of vacant posts of doctors and paramedical staff and the steps taken by the Government to address the issue of shortage of doctors and para-medical staff in all the Government Hospitals and health care facilities. In addition thereto, direction issued on a PIL by a Division Bench in W.P(MD)Nos.22979 of 2015, 18208 and 22579 of 2016 etc., to fill up the doctors vacancies would clearly constitute extraordinary situation to deviate from the notification to fill up the vacancies for the post of Assistant Surgeon (General) from the waiting list of the selected candidates.

<https://hcservices.mca.gov.in/hcservices/> the considered view that the action taken by the respondents in filling up of the posts of Assistant Surgeon (General) by considering the selected candidates from the waiting



list is absolutely in order. The reason is, if the respondents are directed to issue fresh notification inviting eligible candidates for the backlog vacancies after filling up of the vacancies specified in the previous notification dated 10.11.2016, it will cause more agony, problem and financial burden on the department that would also lead to wasteful exercise since the selected candidates are kept in the waiting list. Without operating the waiting list to fill up the backlog vacancies, as contended by the petitioners, if new notification is directed to be issued that would cause delay. Secondly, the selected candidates who are in the waiting list would also apply and most probably, they will be selected again, may be, fresh candidates who are subsequently qualified also would apply and get selected, as a result, they would also stand benefitted, but that is not going to take care of the extraordinary crisis faced by the poor patients waiting in Government General Hospitals without doctors. The larger purpose of saving innocent lives would be defeated. Since public interest would suffer in view of long delay in filling up of the said vacancies, the action of the respondents in appointing selected candidates from the waiting list cannot be found fault with. Hence, I do not find any infirmity at all in filling up of the existing vacancies in the post of Assistant Surgeon (General) by appointing only the eligible and selected candidates pursuant to the notification, as they are not outsiders.

22. For all the aforementioned reasons, I do not find any merit in the writ petition. Accordingly, W.P.(MD)No.13171 of 2017 stands dismissed. Consequently, interim order stands vacated and the W.M.P.(MD) Nos.10246 & 11288 of 2017 are also dismissed. In view of the above order, W.M.P.(MD) No.10922 of 2017 is dismissed as unnecessary. No costs.

Sd/-
Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

1. The Secretary to Government of Tamil Nadu
Health and Family Department
Fort St.George
Chennai 600 009
2. The Director of Medical and
Rural Health Services
D.M.S.Buildings
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Teynampet
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3. The Member Secretary
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4. The Director
Department of Public Health
and Preventive Medicine
359, DMS Building
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+1cc to The Spl.Government Pleader SR.No.77193
+1cc to Mr. T.Lajapathi Roy, Advocate SR.No.77063
+1cc to Mr.K.K.Samy , Advocate Sr.No.77066
+1cc to M/s Veera Associates, Sr.No.77087

SS

VB/SKN/RSK/SAR2/07/09/2017/22P/9C

Order in
W.P. (MD) No.13171 of 2017
06.09.2017