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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on 16.04.2025

+ W.P.(C) 10630/2018 & CM APPL. 48749/2023

ASHISH KUMAR

.....Petitioner

Through: Mr. Sarvesh Singh and Ms.
Rajeshwari Mitra, Advocates.

versus

UNION OF INDIA AND ANR.

.....Respondents

Through: Mr. Avnish Singh, SPC with Mr.
Devender Singh, Advocates for
UOI.
Mr. Manoj, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. The present writ petition pertains to a recruitment exercise conducted by respondent No. 2 - Food Corporation of India ["FCI"] in the year 2015.

2. By an advertisement/notification issued in February 2015, FCI invited applications for various posts, including for the post of Assistant Grade III (Depot). The vacancies were advertised by category and zone. The petitioner applied in the unreserved category for the North Zone, for which 331 vacancies were advertised. He was originally placed in the wait list at S.No. 188.



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3. The petitioner filed this writ petition on 03.10.2018, contending that FCI had several vacancies for the concerned post in the North Zone, but was not filling the vacancies from the wait list. He, therefore, sought the following reliefs:

“a) Direct the Respondent No. 2 to consider the petitioner for the vacant posts of Assistant Grade (III), Depot;

b) In the alternative, direct the respondent corporation to permit the petitioner, having become overage on 12.06.2018 for being in the waiting list category in the exam conducted in 2015, to appear in the subsequent examination for the post of Assistant Grade (III), Depot conducted by the respondent Corporation;

c) Pass such other order or orders as the Hon'ble Court may deem just and proper under the facts and circumstances of the case.”

4. While issuing notice in the writ petition on 05.10.2018, the Court noticed that candidates empanelled in a waiting list, do not have an indefeasible right to appointment, even if vacancies are available, subject to the caveat that the decision not to fill up the vacancies should not be arbitrary. Notice was issued limited to this question.

5. I have heard Mr. Sarvesh Singh, learned counsel for the petitioner, and Mr. Manoj, learned counsel for FCI.

6. FCI has filed a counter affidavit dated 22.02.2019, in which it is stated that the number of vacancies in the unreserved category for Assistant Grade III (Depot)-North Zone was enhanced to 413. The select list was prepared to fill up these vacancies. However, document verification was conducted in respect of candidates numbering three times the number of vacancies, for preparation of a wait list. The wait list was operated to offer appointment if a selected candidate did not join the post, or resigned/vacated the post within one year after joining. It is clearly stated that the number of vacancies advertised were filled up, and



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candidates until S. No. 58 in the wait list were appointed. The petitioner was well below S. No. 58 in the wait list – in the counter affidavit, it is mentioned that he was at S. No. 184, rather than S. No. 188, but this does not bear much significance.

7. The petitioner's contention that vacancies continued to exist in the post of Assistant Grade III (Depot)-North Zone, is based upon cadre-wise manpower position for the quarter ending March 2018, which shows vacancies for various posts. However, FCI has stated in its counter affidavit and an application filed by it [CM APPL. 48749/2023], that the quarterly manpower position reflects the number of vacancies available in March 2018, three years after the advertisement in question. The information was required to determine the vacancies that were to be filled, as of March 2018, but did not have any bearing on the operation of the wait list prepared three years earlier. As far as the advertisement in question is concerned, it has been categorically stated that no vacancy exists against the posts advertised thereunder, as all the posts had been filled by selected candidates, and from the wait list, until S.No. 58. In fact, it is stated, relying upon an Office Memorandum ["OM"] dated 13.06.2000, issued by Department of Personnel and Training ["DoPT"], that vacancies are required to be filled from the reserved panel only if they arise within one year of the original selection. It is also stated in the application filed by FCI that FCI has carried out further recruitment for the same post in the year 2019.

8. As against this, the petitioner's submission is that the wait list must be exhausted completely, before fresh recruitment for the same post is carried out at any time in the future. In support of this submission, Mr.



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Singh relies upon a circular issued by FCI on 16.11.1982, which notes that the FCI (Staff) Regulations, 1971, is silent about the validity of a panel for direct recruitment in Category-III and IV posts, and provides as follows:

*"2. The matter has been considered and it has been decided to follow the instructions contained in deptt. of Food O.M.No. 22011/2/79-Estt (1) dated 8.2.82 (copy enclosed). According to the said O.M. **"there would be no limit on the period of validity of the list of selected candidates prepared to the extent of declared vacancies, either by the method of direct recruitment or through a Departmental Competitive Examination"**. It is clarified that the above instructions will apply in the case of direct recruitment in Category III and IV posts as per Regulation 9 (a) of FCI (Staff) Regulations, 1971. The procedure for Category I and II posts shall be followed in accordance with Regulations 9 (b) (i) of the FCI (Staff) Regulations, 1971."*¹

9. The OM dated 08.02.1982, referred to in the aforesaid circular, deals with the validity period of the list of selected candidates prepared on the basis of direct recruitment/departmental competitive examination.

As the petitioner's case rests upon an interpretation of the said OM, it is reproduced in full hereinbelow:

*"The undersigned is directed to say that references are being received from time to time from Ministries/Depts. enquiring as to what should be the **validity period of a list of selected candidates prepared on the basis of direct recruitment or Departmental Competitive Examination.***

*2. Normally, in the case of direct recruitment **a list of selected candidates is prepared to the extent of the number of vacancies (other persons found suitable being put on a reserve list, in case some of the persons on the list of selected candidates do not become available for appointment)**. Similarly, in the case of Departmental Competitive Examinations, the list of selected candidates has to be based on the number of vacancies on the date of declaration of results, as the examination is competitive and selection is based on merit. A problem may arise when there is a fluctuation in the vacancies after the list of selected candidates is announced.*

¹ Emphasis supplied.



3. The matter has been carefully considered. Normally, recruitment whether from the open market or through a Departmental Competitive Examination should take place only when there are no candidates available from an earlier list of selected candidates. However, there is a likelihood of vacancies arising in future; in case, names of selected candidates are already available, there should either be no further recruitment till the available selected candidates are absorbed or the declared vacancies for the next examination should take into account the number of persons already on the list of selected candidates awaiting appointment. Thus, there would be no limit on the period of validity of the list of selected candidates prepared to the extent of declared vacancies, either by the method of direct recruitment or through a Departmental Competitive Examination.

4. Once a person is declared successful according to the merit list of selected candidates, which is based on the declared number of vacancies, the appointing authority has the responsibility to appoint him even if the number of vacancies undergoes a change, after his name has been included in the list of selected candidate. Thus where selected candidates are awaiting appointment, recruitment should either be postponed till all the selected candidates are accommodated or alternatively intake for the next recruitment reduced by the number of candidates already awaiting appointment and the candidates awaiting appointment should be given appointments first, before starting appointments from a fresh list from a subsequent recruitment or examination.

5. Ministry of Finance etc, are requested to bring the above instructions to the notice of all the appointing authorities under them for information and guidance.”²

10. Mr. Singh relies on paragraph 4 above, to submit that the appointing authority must appoint all selected candidates prior to conducting a fresh recruitment. However, this argument misses the distinction between a “selected candidate” and a candidate in the “reserve list”, which is brought out in paragraph 2. The number of vacancies advertised are filled by “selected candidates”, and other suitable candidates are placed in the reserve list. It is clear from paragraph 2 that

² Emphasis supplied.



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the list of “*selected candidates*” is based upon the number of vacancies available, and paragraph 4 of the OM applies only to “*selected candidates*”. This interpretation also aligns with the intention of the circular of FCI dated 16.11.1982, as evident from paragraph 2 thereof. The petitioner was, at best, in the “*reserve list*”, and cannot claim an entitlement at par with “*selected candidates*”, whose number must accord with the number of vacancies advertised.

11. The petitioner’s contention would imply that no recruitment exercise can be carried out for a particular post until the entire pool of wait listed or reserve candidates is exhausted, regardless of the number of vacancies that were advertised in the advertisement in question. I find no basis for such a suggestion, which is contrary to the settled law that wait listed candidates can be appointed against vacancies for which they apply, in terms of the recruitment notification. Reference may be made, in this connection, to the observations of the Supreme Court in *Mukul Saikia & Ors. v. State of Assam & Ors*³, and *State of Orissa & Anr. v. Rajkishore Nanda & Ors*⁴. In the latter judgment, the Supreme Court has summarised the legal position thus:

“11. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as “the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution”, of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to “improper exercise of power and only in a rare and exceptional circumstance and in

³ (2009) 1 SCC 386 [paragraph 33].

⁴ (2010) 6 SCC 777.



emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational”, otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide State of Bihar v. Secretariat Asstt. Successful Examinees Union 1986⁵, Prem Singh v. Haryana SEB⁶, Ashok Kumar v. Banking Service Recruitment Board⁷, Surinder Singh v. State of Punjab⁸ and Rakhi Ray v. High Court of Delhi⁹

12. In State of Punjab v. Raghbir Chand Sharma¹⁰ this Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that the post can be filled up offering the appointment to the next candidate in the select list observing as under : (SCC p. 115, para 4)

“4. ... With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select panel prepared, the panel ceased to exist and has outlived its utility and, at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently.”

13. In Mukul Saikia v. State of Assam¹¹ this Court dealt with a similar issue and held that “if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised”. The select list “got exhausted when all the 27 posts were filled”. Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The

“currency of select list had expired as soon as the number of posts advertised were filled up, therefore, appointments beyond the number of posts advertised would amount to filling up future vacancies”

and the said course is impermissible in law.

14. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a

⁵ (1994) 1 SCC 126 : 1994 SCC (L&S) 274 : (1994) 26 ATC 500 : AIR 1994 SC 736.

⁶ (1996) 4 SCC 319 : 1996 SCC (L&S) 934.

⁷ (1996) 1 SCC 283 : 1996 SCC (L&S) 298 : (1996) 32 ATC 235 : AIR 1996 SC 976.

⁸ (1997) 8 SCC 488 : 1998 SCC (L&S) 65 : AIR 1998 SC 18.

⁹ (2010) 2 SCC 637 : (2010) 1 SCC (L&S) 652 : AIR 2010 SC 932.

¹⁰ (2002) 1 SCC 113 : 2002 SCC (L&S) 104 : AIR 2001 SC 2900.

¹¹ (2009) 1 SCC 386 : (2009) 1 SCC (L&S) 186 : AIR 2009 SC 747.



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.

15. A Constitution Bench of this Court in Shankarsan Dash v. Union of India¹² held that appearance of the name of a candidate in the select list does not give him a right of appointment. Mere inclusion of the candidate's name in the select list does not confer any right to be selected, even if some of the vacancies remain unfilled. The candidate concerned cannot claim that he has been given a hostile discrimination. (See also Asha Kaul v. State of J&K¹³, Union of India v. S.S. Uppal¹⁴, Bihar Public Service Commission v. State of Bihar¹⁵, Simanchal Panda v. State of Orissa¹⁶, Punjab SEB v. Malkiat Singh¹⁷, Union of India v. Kali Dass Batish¹⁸, Divisional Forest Officer v. M. Ramalinga Reddy¹⁹, Subha B. Nair v. State of Kerala²⁰, Mukul Saikia v. State of Assam²¹ and S.S. Balu v. State of Kerala²².

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. It is the settled legal proposition that no relief can be granted to the candidate if he approaches the court after the expiry of the select list. If the selection process is over, select list has expired and appointments had been made, no relief can be granted by the court at a belated stage. (Vide J. Ashok Kumar v. State of A.P.²³, State of Bihar v. Mohd. Kalimuddin²⁴, State of U.P. v. Harish Chandra²⁵, Sushma Suri v. Govt. of NCT of Delhi²⁶, State of U.P. v. Ram Swarup Saroj²⁷, K. Thulaseedharan v. Kerala State Public

¹² (1991) 3 SCC 47 : 1991 SCC (L&S) 800 : (1991) 17 ATC 95 : AIR 1991 SC 1612.

¹³ (1993) 2 SCC 573 : 1993 SCC (L&S) 637 : (1993) 24 ATC 576.

¹⁴ (1996) 2 SCC 168 : 1996 SCC (L&S) 438 : (1996) 32 ATC 668 : AIR 1996 SC 2340.

¹⁵ (1997) 3 SCC 198 : 1997 SCC (L&S) 775 : AIR 1997 SC 2280.

¹⁶ (2002) 2 SCC 669 : 2002 SCC (L&S) 369.

¹⁷ (2005) 9 SCC 22 : 2006 SCC (L&S) 235.

¹⁸ (2006) 1 SCC 779 : 2006 SCC (L&S) 225 : AIR 2006 SC 789.

¹⁹ (2007) 9 SCC 286 : (2007) 2 SCC (L&S) 410 : AIR 2007 SC 2226.

²⁰ (2008) 7 SCC 210 : (2008) 2 SCC (L&S) 409.

²¹ (2009) 1 SCC 386 : (2009) 1 SCC (L&S) 186 : AIR 2009 SC 747.

²² (2009) 2 SCC 479 : (2009) 1 SCC (L&S) 388.

²³ (1996) 3 SCC 320 : 1996 SCC (L&S) 707.

²⁴ (1996) 2 SCC 7 : 1996 SCC (L&S) 389 : (1996) 32 ATC 821 : AIR 1996 SC 1145.

²⁵ (1996) 9 SCC 309 : 1996 SCC (L&S) 1240 : AIR 1996 SC 2173.

²⁶ (1999) 1 SCC 330 : 1999 SCC (L&S) 208.

²⁷ (2000) 3 SCC 699..



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*Service Commission*²⁸, *Deepa Keyes v. Kerala SEB*²⁹ and *Subha B. Nair*³⁰.”

12. Mr. Manoj also points out that subsequently, the matter has been clarified expressly by a further circular dated 13.12.2019, which states that wait list/reserve panel, even for category III and IV posts will be only up to the initiation of the process for the next recruitment. As this circular has been issued during pendency of the writ petition, and after the exercise of the previous recruitment exercise was completed, I have not proceeded on the notification dated 13.12.2019, but on an interpretation of the OM relied upon by the petitioner himself.

13. In view of the above factual and legal position, I find no merit in the present petition, which stands dismissed, alongwith the pending application.

PRATEEK JALAN, J

APRIL 16, 2025
SS/AD/

²⁸ (2007) 6 SCC 190 : (2007) 2 SCC (L&S) 427.

²⁹ (2007) 6 SCC 194 : (2007) 2 SCC (L&S) 430.

³⁰ (2008) 7 SCC 210 : (2008) 2 SCC (L&S) 409.