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S.S. BALU & ANR.

v.

STATE OF KERALA & ORS.  
(Civil Appeal No.104 of 2009)

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JANUARY 13, 2009

**[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]**

*Service law – Appointment – Post of assistant – Names of appellants appearing in rank list but not appointed – Vacancies reported just before expiry of rank list as anticipated vacancies and as such non-issuance of letter of advise – Subsequently, Government Order that there was no vacancy – Challenged by petitioners – Appointment of petitioners – Claim of appointment by appellant – Held: Person does not acquire a legal right to be appointed only because his name appears in select list – It is only when there is discrimination or arbitrariness in filling up the vacancies – State as employer has right to fill up all posts or not to fill them up – First rank list as also second rank list exhausted and vacancies in terms thereof filled up – Appellant did not challenge Government Order – They impleaded themselves as parties only after writ petitions filed by others were allowed and State filed appeal thereagainst – Delay defeats equity – Thus, State or Commission cannot be directed to appoint appellants at this stage – Delay/Laches.*

**Appellants applied for the post of Assistants. State Public Service Commission prepared a rank list, which was in force for three years. Name of the appellants appeared therein. However, the vacancies were not filled up. Writ petitions were filed. Pursuant to the directions by the High Court, Deputy Director of Education reported 125 vacancies and further 50 vacancies just before the expiry of the rank list with a note that they were anticipated vacancies. As a result, the Commission could**

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not issue letter of advise against the said vacancies. Writ petitions were disposed of with a direction to the respondent-State to take decision. Respondent issued Government Order reporting that there was no vacancy. Few candidates filed writ petition for quashing of the Government Order and for a declaration that 175 vacancies should be filled from amongst the candidates whose names were there in the select list. High Court held that the 175 vacancies already reported were not anticipated vacancies but vacancies which had, in fact, occurred prior to the expiry of rank list and the candidates included therein are entitled to be advised for appointment against those vacancies; and that claim of the petitioners could not be denied for the reason that during the pendency of the writ petitions a new list came into operation. Respondent filed appeal. Appellants got themselves impleaded as parties. Writ Appeal was allowed directing the Commission to advise in respect of 18 petitioners who had filed the writ petition. However, no direction was issued in respect of appellants. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1 The matter might have been different, had the Single Judge as also the Division Bench of High Court come to a conclusion that in fact there existed 125 vacancies wherefor requisition was sent to the Commissioner. The existence of actual number of vacancies being in dispute, it is difficult to opine that all such vacancies existed. Before the Division Bench of the High Court, the State conceded that 18 original writ petitioners may be appointed stating that they were the actual beneficiaries of the judgment. Such a stand on the part of the State was accepted. The Division Bench of the High Court did not go into the other contentions raised by the parties thereto. Therefore, no factual foundation

A has been laid for arriving at the conclusion that all the 125 vacancies existed. [Para 14] [203-H; 204-A-C]

B 1.2. A person does not acquire a legal right to be appointed only because his name appears in the select list. The state as an employer has a right to fill up all the posts or not to fill them up. Unless a discrimination is made in regard to the filling up of the vacancies or an arbitrariness is committed, the concerned candidate will have no legal right for obtaining a writ of or in the nature of mandamus. [Paras 15 and 16] [204-D, E, F]

C 1.3. The rank list was valid for a period of three years. Its validity expired on 5.6.2000. Another Select List was published for the period from 16.9.2002 to 15.9.2005. Vacancies in terms of the said Select List have also been filled up. [Para 17] [207-C]

D *Pitta Naveen Kumar & Ors. vs Raja Narasaiah Zangiti & Ors. (2006) 10 SCC 261 and Batiarani Gramiya Bank vs Pallab Kumar & Ors. (2004) 9 SCC 100, relied on.*

E *Shankarsan Dash vs Union of India (1991) 3 SCC 47; State of Haryana vs Subash Chander Marwaha (1974) 3 SCC 220 and State of Rajasthan & Ors. vs Jagdish Chopra (2007) 8 SCC 161, referred to.*

F 2."Delay defeats equity". Government Order was issued on 15.1.2002. Appellants did not file any writ application questioning the legality and validity thereof. Only after the writ petitions filed by others were allowed and State of Kerala preferred an appeal thereagainst, they impleaded themselves as party respondents. Where the writ petitioner approaches the High Court after a long delay, reliefs prayed for may be denied to them on the ground of delay and laches irrespective of the fact that they are similarly situated to the other candidates who obtain the benefit of the judgment. Thus, it is not possible

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to issue any directions to the State of Kerala or the Commission to appoint the appellants at this stage. [Para 18] [207-D-F] A

*New Delhi Municipal Council vs Pan Singh & Ors. (2007) 9 SCC 278 and Virender Chaudhary vs Bharat Petroleum Corporation & Ors. 2008(15) SCALE 67, relied on.* B

**Case Law Reference:**

(2006) 10 SCC 261 Relied on. Para 15, 16

(2004) 9 SCC 100 Relied on. Para 16 C

(1991) 3 SCC 47 Referred to. Para 16

(1974) 3 SCC 220 Referred to. Para 16

(2007) 8 SCC 161 Referred to. Para 16 D

(2007) 9 SCC 278 Relied on. Para 18

(2008) 15 SCALE 67 Relied on. Para 18

CIVIL APPELLATE JURISDICTION : Civil Appeal No.104 of 2009. E

From the Judgment and Order dated 5.10.2005 of the High Court of Kerala at Ernakulam in W.A. No. 53 of 2005 (A).

Malini Poduval and Bahita Sant for the Appellants. F

Vipin Nair, P.B. Suresh, Vivek Sharma (for M/s. Temple Law Firm) and G. Prakash for the Respondents.

The Judgment of the Court was delivered by

**S.B. SINHA, J.** 1. Leave granted. G

2. Appellants herein are before us aggrieved by and dissatisfied with a judgment and order dated 5.10.2005 passed by a Division Bench of the High Court of Kerala at Ernakulam in Writ Appeal No. 53 of 2005 (A) and others whereby and H

A whereunder the Writ Appeals preferred by the State of Kerala from a judgment and order dated 25.8.2004 passed by a learned single judge of the said Court in O.P. No. 28082 of 2002 and others were allowed.

B 3. Appellants herein pursuant to or in furtherance of a requisition made by the State of Kerala before the Kerala Public Service Commission (for short, "the Commission") applied for the post of Lower Primary/Upper Primary School Assistants. On 5.6.1997, the Commission prepared a rank list, which was in force from 5.6.1997 to 5.6.2000. Appellants' name C figured therein. The vacancies, however, were not filled up. However, as no vacancy was filled up by the Deputy Director of Education, writ petitions were filed before the Kerala High Court praying for issuance of a writ of mandamus or any other D writ or order directing the Deputy Director of Education to report all the vacancies to the Commission so as to enable it to advise the respective candidates pursuant whereto and in furtherance whereof the appointing authority may issue offers of appointment. It is stated that the appellants were parties therein.

E 4. On or about 3.6.2000, pursuant to the direction of the High Court, dated 22.5.2000, the Deputy Director of Education reported 125 vacancies and on or about 5.6.2000, he reported further 50 vacancies just before the expiry of the rank list with a note that they were anticipated vacancies. However, as the F vacancies were shown as anticipated vacancies, the Commission could not issue letter of advise against those 175 vacancies reported by the Deputy Director of Education.

G 5. On or about 24.10.2001, the said writ petitions were heard and disposed of by the Division Bench of the High Court, holding:

H "We are of the view since there is controversy between the parties with regard to the number of vacancies it would be appropriate that a direction be given to first respondent to take a decision on the dispute raised in this proceeding."

6. In compliance of the said judgment, the State of Kerala issued a Government Order dated 15.1.2002 reporting that there was no vacancy. A

7. Another writ petition marked as O.P. No. 28082 of 2002 was filed by a few candidates praying for quashing of the said Government Order dated 15.1.2002 upon grant of a declaration that 175 vacancies reported by the Deputy Director of Education should be filled from amongst the candidates whose names find place in the select list and for consequential directions. B  
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8. By reason of a judgment and order dated 25.8.2004, the High Court held:

"26. At this stage, I consider it necessary to advert to the contention of the standing counsel of the Commission that after the expiry of Ext. P1 rank list a new list has come into operation and therefore candidates included in Ext. P1 rank list cannot be advised for appointment. I cannot agree to the above argument of the learned counsel. 175 vacancies were reported to the Commission before the expiry of Ext. P1 rank list. Since those vacancies were wrongly described as anticipated vacancies the Commission did not advise candidates against those vacancies. Thereupon, aggrieved candidates approached this Court. A Division Bench of this Court directed the 1st respondent to report the vacancies correctly. The 1st respondent, however, issued Ext. P3 order without taking into account all relevant aspect. As I have found that 175 vacancies already reported were not anticipated vacancies but vacancies which had, in fact, occurred prior to the expiry of Ext. P1, candidates included in Ext. P1 are entitled to be advised for appointment against those vacancies. The legitimate claim of the petitioners cannot be denied for the reason that during the pendency of the writ petitions a new list has come into operation. I am clearly of the view that what is legitimately due to the candidates in Ext. P1 should D  
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A be given to them."

Appellants were not parties to the said writ petitions.

B 9. The State of Kerala preferred an appeal thereagainst before the Division Bench of the said Court, which was marked as Writ Appeal No. 53 of 2005. Before the High Court, however, appellants got themselves impleaded as respondents 5 and 6 respectively. The said Writ Appeal was allowed by reason of the impugned judgment directing the Commission to advise in respect of 18 of the original petitioners who had filed the writ petition bearing O.P. No. 28082 of 2002 to quash the Government Order dated 15.1.2002. No direction was issued in respect of those who got themselves impleaded as parties therein including the appellants herein.

D 10. Appellants are, thus, before us, contending that as their names appeared in the 'rank list' and they being seniors to some of the original writ petitioners they should also be directed to be appointed.

E 11. Ms. Malini Poduval, learned counsel appearing on behalf of the appellants would submit:

F i. the High Court committed a serious error of law in passing the impugned judgment insofar as it failed to take into consideration that as the appellants are similarly situated with that of the original writ petitioners to whom the State Government agreed to give appointment.

G ii. There was absolutely no reason as to why they should have been discriminated against particularly when they had also got themselves impleaded as respondents in the writ appeal.

H 12. Mr. Vipin Nair, learned counsel appearing on behalf of the respondents, on the other hand, would urge that the respondents having filed no writ petition and keeping in view

of the fact that not only the rank list in question but also the 2nd rank list for the period between 16.9.2002 and 15.9.2005 are exhausted, the impugned judgment is wholly unassailable.

13. The legality and/or the validity of Government Order dated 15.1.2002, as noticed hereinbefore, was questioned, inter alia, on the premise that the actual vacancy position had been suppressed by the State. A finding of fact to that effect appears to have been arrived at by the learned single judge of the High Court in his judgment and order dated 25.8.2004, holding:

"24. Respondents 1 and 2 have got a contention that 65% of the N.J.D. vacancies alone shall be reckoned as reportable vacancies. I do not agree. As rightly submitted by the petitioners, vacancies had been reported based on the 65% set apart for direct recruitment and once those vacancies fall vacant consequent on the non joining duty of the candidates advised for appointment, a further deduction of 35% from the N.J.D. vacancies is not justified.

25. It is not disputed that total vacancies including N.J.D. vacancies reported to the Commission after 5.12.1997 was 580 (barring 175 vacancies described as anticipated vacancies). Therefore the number of unreported vacancies will come to 208. When state of affairs stood as above, the 2nd respondent reported 125 vacancies on 3.6.2000 and 50 vacancies on 5.6.2000 as directed by this Court. The reporting was done with the rider that the above 175 vacancies were only anticipated vacancies. As I have found that there were, at any rate, 208 reportable vacancies, I have no hesitation to hold that the 2nd respondent was not justified in informing the Commission that 175 vacancies were anticipated vacancies. Ext. P3 is therefore unsustainable."

14. The matter might have been different, had the learned

A single judge as also the Division Bench come to a conclusion that in fact there existed 125 vacancies wherefor requisition was sent to the Commissioner. The existence of actual number of vacancies being in dispute, it is difficult for us to opine as has been contended by the learned counsel that all such vacancies existed. Before the Division Bench of the High Court, the State conceded that 18 original writ petitioners may be appointed stating that they were the actual beneficiaries of the judgment. Such a stand on the part of the State was accepted. The Division Bench of the High Court did not go into the other contentions raised by the parties thereto. No factual foundation, therefore, has been laid before us for arriving at the conclusion that all the 125 vacancies existed.

15. There is another aspect of the matter which cannot also be lost sight of. A person does not acquire a legal right to be appointed only because his name appears in the select list. [See *Pitta Naveen Kumar & ors. vs. Raja Narasaiah Zangiti & ors.* (2006) 10 SCC 261].

16. The state as an employer has a right to fill up all the posts or not to fill them up. Unless a discrimination is made in regard to the filling up of the vacancies or an arbitrariness is committed, the concerned candidate will have no legal right for obtaining a writ of or in the nature of mandamus. [See *Batiarani Gramiya Bank vs. Pallab Kumar & Ors.* (2004) 9 SCC 100]

In *Shankarsan Dash vs. Union of India* [(1991) 3 SCC 47], a Constitution Bench of this Court held:

"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."

In *State of Haryana vs. Subash Chander Marwaha* [(1974) 3 SCC 220], this Court held:

"The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect..."

11. It must be remembered that the petition is for a mandamus. This Court has pointed out in *Dr Rai Shivendra Bahadur v. Governing Body of the Nalanda College* that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived."

In *Pitta Naveen Kumar vs. Raja Narasaiah Zangiti* [(2006) 10 SCC 261], this Court held:

"....A candidate does not have any legal right to be appointed. He in terms of Article 16 of the Constitution of

A India has only a right to be considered therefor.  
Consideration of the case of an individual candidate  
although ordinarily is required to be made in terms of the  
extant rules but strict adherence thereto would be  
B necessary in a case where the rules operate only to the  
disadvantage of the candidates concerned and not  
otherwise..."

In *State of Rajasthan & ors. vs. Jagdish Chopra* [(2007)  
8 SCC 161], this Court held:

C "9. Recruitment for teachers in the State of Rajasthan is  
admittedly governed by the statutory rules. All recruitments,  
therefore, are required to be made in terms thereof.  
Although Rule 9(3) of the Rules does not specifically  
D provide for the period for which the merit list shall remain  
valid but the intent of the legislature is absolutely clear as  
vacancies have to be determined only once in a year.  
Vacancies which arose in the subsequent years could be  
filled up from the select list prepared in the previous year  
and not in other manner. Even otherwise, in absence of any  
E rule, ordinary period of validity of select list should be one  
year. In *State of Bihar v. Amrendra Kumar Mishra* (2006)  
12 SCC 561, this Court opined: (SCC p.564, para 9)

F "9. In the aforementioned situation, in our opinion,  
he did not have any legal right to be appointed. Life  
of a panel, it is well known, remains valid for a year.  
Once it lapses, unless an appropriate order is  
issued by the State, no appointment can be made  
out of the said panel."

G It was further held: (SCC p.565, para 13)

H "13. The decisions noticed hereinbefore are  
authorities for the proposition that even the wait list  
must be acted upon having regard to the terms of  
the advertisement and in any event cannot remain

operative beyond the prescribed period."

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11. It is well-settled principle of law that even selected candidates do not have legal right in this behalf. (See *Shankarsan Dash v. Union of India* (1991) 3 SCC 47, and *Asha Kaul v. State of J&K* (1993) 2 SCC 573)"

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17. Furthermore, the rank list was valid for a period of three years. Its validity expired on 5.6.2000. Another Select List was published for the period from 16.9.2002 to 15.9.2005. Vacancies in terms of the said Select List have also been filled up.

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18. It is also well settled principle of law that "delay defeats equity". Government Order was issued on 15.1.2002. Appellants did not file any writ application questioning the legality and validity thereof. Only after the writ petitions filed by others were allowed and State of Kerala preferred an appeal thereagainst, they impleaded themselves as party respondents. It is now a trite law that where the writ petitioner approaches the High Court after a long delay, reliefs prayed for may be denied to them on the ground of delay and laches irrespective of the fact that they are similarly situated to the other candidates who obtain the benefit of the judgment. It is, thus, not possible for us to issue any direction to the State of Kerala or the Commission to appoint the appellants at this stage.

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In *New Delhi Minicipal Council v. Pan Singh and Ors.* (2007) 9 SCC 278, this Court held:

"16. There is another aspect of the matter which cannot be lost sight of. The respondents herein filed a writ petition after 17 years. They did not agitate their grievances for a long time. They, as noticed herein, did not claim parity with the 17 workmen at the earliest possible opportunity. They did not implead themselves as parties even in the

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A reference made by the State before the Industrial Tribunal. It is not their case that after 1982, those employees who were employed or who were recruited after the cut-off date have been granted the said scale of pay. After such a long time, therefore, the writ petitions could not have been entertained even if they are similarly situated. It is trite that the discretionary jurisdiction may not be exercised in favour of those who approach the court after a long time. Delay and laches are relevant factors for exercise of equitable jurisdiction."

C {See also *Virender Chaudhary vs. Bharat Petroleum Corporation & Ors.* [2008 (15) SCALE 67]}

19. For the reasons aforementioned, there is no merit in this appeal. It is dismissed accordingly. No costs.

D N.J. Appeal dismissed.