

[2013] 10 S.C.R. 8

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MANOJ MANU & ANR.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 6707 of 2013)

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AUGUST 12, 2013

[ANIL R. DAVE AND A.K. SIKRI, JJ.]

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Service Law – Appointment/selection – Competitive examination - UPSC recommended names of candidates for appointment – 6 vacancies remained unfilled because 6 of the recommended candidates did not join – UPSC. was approached to recommend names for the 6 vacancies – UPSC recommended only 3 names – Two candidates who were next in the merit list and had secured same marks as

D *secured by one of the 3 recommended candidates, challenged the act of UPSC in non-recommending their names – Courts below dismissed their claim – On appeal, held: Though a person included in the select list, does not acquire any right to be appointed – But the decision of the*

E *Government not to fill up the advertised vacancies should not be arbitrary or unreasonable – In the instant case, decision of UPSC in forwarding 3 names against the requisition for 6 vacancies was inappropriate – Exclusion of the names of the appellants, even when the vacancies were available, has resulted in discrimination – Constitution of India, 1950 –*

F *Articles 14 and 16 – Office Memorandum dated 14th July, 1967 – Clause 4(c).*

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The appellants, who were working as Assistants in the Central Secretariat Service, appeared in Limited Departmental Competitive Examination for the next promotion to the post of Section Officer's Grade in that service. After the examination, UPSC recommended 184 candidates for appointment. Out of them, 6 candidates did not join. Thereafter 6 general category vacancies were

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requisitioned. UPSC recommended names of 3 candidates from out of the reserve list maintained by it. The two appellants, who were next in the merit list had secured the same marks as secured by one of the 3 recommended candidates. The appellants challenged their non-recommendation before Administrative Tribunal, which was dismissed. The writ petition against the order of Tribunal was also dismissed. Hence the present appeal. A B

Allowing the appeal, the Court C

HELD: 1. Though a person whose name is included in the select list, does not acquire any right to be appointed. The Government may decide not to fill up all the vacancies for valid reasons. Such a decision on the part of the Government not to fill up the required/ advertised vacancies should not be arbitrary or unreasonable but must be based on sound, rational and conscious application of mind. Once, it is found that the decision of the Government is based on some valid reason, the Court would not issue any Mandamus to Government to fill up the vacancies. [Para 14] [18-G-H; 19-A-B] D E

State of Haryana vs. Subhash Chander Marwah (1972)
111LLJ 266 SC – referred to. F

2. In the present case, however, after the UPSC sent the list of 184 persons/recommended by it, to the Government for appointment, six persons out of the said list did not join. It is not a case where the Government decided not to fill up further vacancies. On the contrary DoP&T sent requisition to the UPSC to send six names so that the remaining vacancies are also filled up. This shows that in so far as Government is concerned, it wanted to fill up all the notified vacancies. The requisition dated 20th November 2009 in this behalf was in G H

A consonance with its Clause 4(c) of O.M. dated 14th July 1967. Even when the Government wanted to fill up the post, the UPSC chose to forward names of three candidates. [Para 15] [19-B-D]

B 3. There is a sound logic, predicated on public
interest, behind O.M. dated 14th July 1967. The intention
is not to hold further selection for the post already
advertised so as to save unnecessary public expenditure.
At the same time, this very O.M. also stipulates that the
C Government should not fill up more vacancies than the
vacancies which were advertised. The purpose behind
this provision is to give chance to those who would have
become eligible in the meantime. Thus, the OM dated 14th
July 1967 strikes a proper balance between the interests
of two groups of persons. In the present case since the
D requisition of the DoP&T contained in communication
dated 20th November 2009 was within the permissible
notified vacancies, the UPSC should have sent the names
of six candidates instead of three. [Para 16] [19-D-G]

E *Sandeep Singh vs. State of Haryana and Anr. (2002) 10*
SCC 549; Virender S.Hooda and Ors. Vs. State of Haryana
and Anr. AIR 1999 SC 1701: 1999 (3) SCC 696 – relied on.

F 4. It is not the case of the UPSC that under no
circumstances the names are sent by way of
supplementary list, after sending the names of the
candidates equal to the vacancies. As per the UPSC itself,
names of “repeat/common” candidates are sent and in
the present case itself, three names belonging to such
category were sent. However, exclusion of the persons
G like the appellants has clearly resulted in discrimination
as one of those three candidates who had also secured
305 marks was appointed to the post in question, the
appellants with same marks have been left out even when
the vacancies were available. [Para 18] [20-C-E]

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5. The decision of UPSC in forwarding three names against requisition of DoP&T for six vacancies was inappropriate. Therefore, Mandamus is issued to the UPSC to forward the names of the next three candidates to the DoP&T for appointment to the post of Section Officer's Grade. They shall get the seniority from the date when one of the candidates recommended by UPSC was appointed to the said post. Their pay shall notionally be fixed, without any arrears of the pay and other allowances. [Para 19] [20-E-G]

Case Law Reference:

(1972) IILLJ 266 SC referred to Para 13

(2002) 10 SCC 549 relied on Para 17

1999 (3) SCC 696 relied on Para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6707 of 2013.

From the Judgment & Order dated 16.5.2011 of the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 3297 of 2011.

Satya Mitra Garg, Padma Kumar for the Appellants.

Naresh Kaushik, Vardhman Kaushik, Lalita Kaushik for the Respondents.

The Judgment of the Court was delivered by

A.K. SIKRI, J.1. Leave granted.

2. This appeal has been preferred by the present appellants questioning the validity of the judgment and order dated May 16, 2011 passed by the High Court, in Writ Petition which was filed by the appellants questioning the validity of the order dated 29th March 2011, of the Central Administrative

A Tribunal (hereinafter referred to as the "Tribunal"), Principal Bench, New Delhi. The Tribunal had dismissed the Original Application preferred by the appellants herein under Section 19 of the Administrative Tribunal Act against their non-appointment to the post of Section Officer's Grade of the Central Secretariat Service. The said O.A. was dismissed by the Tribunal vide order dated 29th March 2011 which has been upheld by the High Court.

3. There is no dispute about the facts, which may be briefly recapitulated to understand the controversy that has arisen in these proceedings. The appellants were working as Assistants in the Central Secretariat Service (CSS) and appeared in Limited Departmental Competitive Examination for the next promotion to the post of Section Officer's Grade in that service. There are two channels of promotion: one by way of seniority and other fast track in the form of Limited Departmental Competitive Examination (LDCE). The appellants appeared in the said LDCE 2005, which was conducted by the Union Public Service Commission (UPSC) on the requisition sent to it for 184 general category posts by the Department of Personnel and Training (DoP&T). After holding the examination the UPSC had recommended 184 candidates in two lots. First lot of 141 candidates who were found suitable candidates for the said post whereas in the second lot 43 successful candidates were recommended for appointment. Out of them 6 candidates did not join. The DoP&T thereafter vide its letter dated 20th November 2009 had requisitioned 6 general category vacancies. However, the UPSC recommended names of three candidates from out of reserve list maintained by it. These two appellants who were next in the merit list had secured 305 marks, same as secured by one Rajesh Kumar Yadav who was recommended by the UPSC in the supplementary list candidates.

4. The appellants felt aggrieved by their non-

recommendation, thereby denying them the appointment to the post of Section Officer's Grade. Under these circumstances, these appellants filed the O.A. before the Tribunal alleging that the UPSC had acted in an arbitrary and discriminatory manner in contravention of Article 14 and 16 of the Constitution of India denying them the right to get the appointment to the post to which they were not only selected but equally placed as another candidate who was given the appointment. A
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5. The Tribunal dismissed the O.A. primarily on the ground that ACR's are also seen for determining merit position inter-se candidates who had secured same marks in written test and it was because of this reason that these two appellants were not placed before Shri Rajesh Kumar Yadav. C

6. Before the High Court, the appellants submitted that they were not questioning the aforesaid reason given by the Tribunal determining inter-se merit position of the candidates who qualified the written test. Instead their argument was that the Tribunal lost sight of the actual plea taken viz. when there were sufficient vacancies available and even as per the letter sent by the DoP&T vide its letter dated 20th November 2009 names of 6 candidates were requisitioned, there was no reason not to forward the names of the appellants for the appointment. The appellants relied upon Clause 4(c) of the Office Memorandum dated 14th July 1967 in support of their aforesaid contention. This Clause is reproduced hereinbelow: D
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**"4(c) Once the results are published, additional persons should not normally be taken till the next examination. Nor should vacancies reported before declaration of the results, be ordinarily withdrawn after declaration of the results. If, however, some of the candidates recommended/allotted for appointment against the specific number of vacancies reported in respect of a particular examination do not become available for one reason or another, the Commission may be approached, within a reasonable time, with request G
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A **for replacements from reserved, if available.** When replacements may not be available, the vacancies that may remain unfilled should be reported to the Commission for being filled through the next examination.”

B (Emphasis supplied)

7. The submission of the appellants before the High Court was that the aforementioned Clause specifically provides that the vacancies which are reported have not to be ordinarily withdrawn after the declaration of results. Therefore, when there were vacancies, and the appellants who had passed the LDCE were available, their names should have been recommended by the UPSC for appointment to ensure that vacancies do not go unfilled. It was also submitted that from the recommended/allotted candidates by the UPSC in case some of them are not available for whatever reason; the concerned department could approach the Commission, within a reasonable time with request for placement from reserved, if available. It was, thus, stressed that in the instant case when some of the persons did not join with the result that some vacancies were still available out of the vacancies reported and even requisition was made, the UPSC should have forwarded the names of 6 persons thereby including the appellants.

8. The stand of the UPSC, on the other hand, was that whether or not UPSC should accept the said requisition was not the subject matter of the aforesaid Office Memorandum. The UPSC pleaded that it was the convention, followed throughout as a policy decision, that supplementary list is not to be issued except in two categories of cases, namely, “repeat” or “common” candidates. Repeat candidates are those candidates, who have participated in the same category in two LDCE and are successful in the first examination and results have not declared when the second Departmental Competitive Examination was held. Common candidates are those

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candidates, who get selected in more than one category in the LDCE. A

9. The High Court accepted the aforesaid contention of the UPSC with the observation that taking a different view would upset the policy or convention followed by UPSC and will create ambiguity which may also lead to confusion. The High Court observed that the examination in question was held for 196 vacancies as intimated by DoP&T and UPSC had nominated 184 candidates in two lots. 12 SC vacancies remained unfilled for want of suitable candidates. A supplementary list of three persons was also issued as three selected candidates were "common/repeat" candidates. B
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10. We are unable to agree with the approach of the High Court in the facts of the present case. It will be useful to point out that reason for sending the requisition by DoP&T for forwarding the names of persons in the reserve list was that some of the candidates whose names had been forwarded by the UPSC did not join the post for one or other reason. The DoP&T in its communication dated 20th November 2009 had itself stated so, giving the following reasons: D
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S. No.	Roll No.	Name	Category (S/Shri)	Reasons for the vacancies to arise
1.	001147	Sanjay Bora	General	Already appointed as PS vide OM No.5/2/ 2009-SC.II dt.16.3.09
2.	000713	Ms.Kitty	General	Already appointed as PS vide OM No.5/2/2009-CS.II dt.16.3.09
3.	001823	Devjyoti	General	Technically resigned Chakravarty on

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A				17th August 2007 i.e.prior to the declaration of the result.His lien is over on 17th August 2009.	
B	4.	001604	Sanjeev Jain	General	He has opted for appointment against seniority quota, 2005 instead of LDCE 2005.
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D	5.	001376	Vishwajit Kalynai	General	He has given his undertaking to remain as Personal Secretary.
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F	6.	001711	Jai Kishore	SC	Qualified in LDCE 2005 Exam.,however pursuant to a court direction, he has been adjusted against SL 2000 (LDCE)

In respect of each of the aforesaid six candidates DoP&T had given the reasons as to why those six persons opted not to join the post of Section Officer's grade.

11. It can be clearly inferred from the reading of the aforesaid that it is not the case where any of these persons initially joined as Section Officer and thereafter resigned/left/promoted etc. thereby creating the vacancies again. Had that been the situation viz. after the vacancy had been filled up, and caused again because of some subsequent event, position

would have been different. In that eventuality the UPSC would be right in not forwarding the names from the list as there is culmination of the process with the exhaustion of the notified vacancies and vacancies arising thereafter have to be filled up by fresh examination. However, in the instant case, out of 184 persons recommended, six persons did not join at all. In these circumstances when the candidates in reserved list on the basis of examination already held, were available and DoP&T had approached UPSC "within a reasonable time" to send the names, we do not see any reason or justification on the part of the UPSC not to send the names.

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12. We are conscious of the legal position that merely because the name of a candidate finds place in the select list, it would not give him/her indefeasible right to get appointment as well. It is always open to the Government not to fill up all vacancies. However, there has to be a valid reason for adopting such a course of action. This legal position has been narrated by this Court in *Ms. Neelima Shangla vs. State of Haryana* (1986) 3 SCR 785. In that case:

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The appellant was the candidate for appointment to the post of Subordinate Judge in Haryana. Under the scheme of the Rules, the Public Service Commission was required to hold first a written test in subjects chosen by the High Court and next a viva voce test. Unless a candidate secures 45% of the marks in the written papers and 33% in the language paper, he will not be called for the viva voce test. All candidates securing 55% of the marks in the aggregate in the written and viva voce tests are considered as qualified for appointment. The appellant though secured 55% of the marks was not appointed as her name was not sent by the Public Service Commission to the Govt. The Supreme Court in such fact situation found that the Public Service Commission is not required to make any further selection from the qualified candidates and is, therefore, not expected to withhold the name of any qualified candidate. The duty of the Public Service Commission is

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A to make available to the Govt., a complete list of qualified candidates arranged in order of merit. How should Govt., act is stated by the Supreme Court in the following words:

B “Thereafter the Government is to make the selection strictly in the order in which they have been placed by the Commission as a result of the examination. The names of the selected candidates are then to be entered in the Register maintained by the High Court strictly in that order and appointments made from the names entered in that Register also strictly in the same order. It is, of course, open to the Government not to fill up all the vacancies for a valid reason. The Government and the High Court may, for example, decide that, though 55 per cent is the minimum qualifying mark, in the interests of higher standards, they would not appoint anyone who has obtained less than 60 per cent of the marks.”

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(Emphasis supplied)

13. The Court after making reference to the decision of the Supreme Court in the case of *State of Haryana vs. Subhash Chander Marwah* reported in (1972) 11LLJ266 SC further observed as under:

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F “However, as we said, the selection cannot arbitrarily be restricted to a few candidates, notwithstanding the number of vacancies and the availability of qualified candidates. There must be a conscious application of the mind of the Govt., and the High Court before the number of persons selected for appointment is restricted. Any other interpretation would make Rule 8 of Part D meaningless.”

G (Emphasis supplied)

14. It is, thus, manifest that though a person whose name is included in the select list, does not acquire any right to be appointed. The Government may decide not to fill up all the vacancies for valid reasons. Such a decision on the part of the

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Government not to fill up the required/advertised vacancies should not be arbitrary or unreasonable but must be based on sound, rational and conscious application of mind. Once, it is found that the decision of the Government is based on some valid reason, the Court would not issue any Mandamus to Government to fill up the vacancies.

15. In the present case, however, we find that after the UPSC sent the list of 184 persons/recommended by it, to the Government for appointment six persons out of the said list did not join. It is not a case where the Government decided not to fill up further vacancies. On the contrary DoP&T sent requisition to the UPSC to send six names so that the remaining vacancies are also filled up. This shows that in so far as Government is concerned, it wanted to fill up all the notified vacancies. The requisition dated 20th November 2009 in this behalf was in consonance with its Clause 4(c) of O.M. dated 14th July 1967. Even when the Government wanted to fill up the post, the UPSC chose to forward names of three candidates.

16. There is a sound logic, predicated on public interest, behind O.M. dated 14th July 1967. The intention is not to hold further selection for the post already advertised so as to save unnecessary public expenditure. At the same time, this very O.M. also stipulates that the Government should not fill up more vacancies than the vacancies which were advertised. The purpose behind this provision is to give chance to those who would have become eligible in the meantime. Thus, this OM dated 14th July 1967 strikes a proper balance between the interests of two groups of persons. In the present case since the requisition of the DoP&T contained in communication dated 20th November 2009 was within the permissible notified vacancies, the UPSC should have sent the names of six candidates instead of three.

17. This Court in *Sandeep Singh vs. State of Haryana & Anr.* (2002) 10 SCC 549 commended that the vacancies available should be filled up unless there is any statutory

A embargo for the same. In *Virender S.Hooda & Ors. Vs. State of Haryana & Anr.* AIR 1999 SC 1701, 12 posts for direct recruitment were available when the advertisement for recruitment was made which was held in the year 1991. Some of the selected candidates did not join in this batch almost similar to the present case, the Court held that the appellant's case ought to have been considered when some of the candidates for reasons of the non-appointment of some of the candidates and they ought to have been appointed if they come within the range of selection.

C 18. It is not the case of the UPSC that under no circumstances the names are sent by way of supplementary list, after sending the names of the candidates equal to the vacancies. As per the UPSC itself, names of "repeat/common" candidates are sent and in the present case itself, three names belonging to such category were sent. However, exclusion of the persons like the appellants has clearly resulted in discrimination as one of those three candidates Rajesh Kumar Yadav had also secured 305 marks and once he was appointed to the post in question, the appellants with same marks have been left out even when the vacancies were available.

F 19. We are, therefore, of the opinion in the facts of the present case, the decision of UPSC in forwarding three names against requisition of DoP&T for six vacancies was inappropriate. We, accordingly, allow the present appeal; set aside the order of the High Court as well as Tribunal and issue Mandamus to the UPSC to forward the names of the next three candidates to the DoP&T for appointment to the post of Section Officer's Grade. They shall get the seniority from the date when Rajesh Kumar Yadav was appointed to the said post. Their pay shall notionally be fixed, without any arrears of the pay and other allowances.

20. No costs.

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Appeal allowed.