REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 11360-11363 OF 2018
(Arising out of SLP (Civil) Nos.29668-29671/2017

DINESH KUMAR KASHYAP & ORS. ETC. …APPELLANT(S)

Versus

SOUTH EAST CENTRAL RAILWAY & ORS. ETC. …RESPONDENT(S)

WITH

CIVIL APPEAL NO. 11364 OF 2018
(@SLP (C) No. 6165 OF 2018)

J U D G M E N T

Deepak Gupta, J.

Leave granted.

2. Respondent No.1, South East Central Railway (for short the SECR) issued an advertisement on 15.12.2010 inviting applications for filling up 5798 posts in the pay scale of Rs.5200-Rs. 20,200 + Grade Pay of Rs.1800/- in Raipur, Bilaspur and Nagpur divisions and workshops. The claim of the original writ petitioners who filed applications

before the Central Administrative Tribunal (for short CAT) was that as per the existing instructions the select list was prepared with 20% extra candidates. Therefore, the result of 6995 candidates was declared who were successful. The appellants fall in the category of extra 20%. The SECR did not make the appointments from these 20% extra candidates though 624 posts remained unfilled in the general category itself. The appellants who fall in the 20% category of extra candidates filed applications before the CAT praying that the SECR be directed to fill in the unfilled vacancies from this list of 20% candidates. This application was rejected by the Tribunal. The writ petition filed by the appellants was also rejected. Hence these appeals.

3. To understand the issue at hand it would be pertinent to refer to the instructions relied upon by the appellants. The relevant portion of the instruction reads as follows :-

> "……..
> 3. The issue has been examined and it has now been decided by the Board that the number of candidates called for document verification shall be 20% over and above the number of vacancies.
> 4. This shall, however, be done with the following proviso.
> (i) It has to be brought out clearly in the Call Letter to the candidate that the purpose of calling 20%

candidates over and above the number of vacancies at the time of document verification is primarily to avoid shortfall in the panel and that merely calling a candidate for document verification does not, in any way, entitle him/her to an appointment in the railways.

(ii) Even where the number of candidates available after document verification exceeds the number of vacancies, the panel finalized by RRC (Railway Recruitment Cell) shall be equal to the number of vacancies only. In case, the Railway administration after giving stipulated joining time to the selected candidates, certifies that certain number of candidates have not turned up within the specific period, another panel equal to the number of candidates finally not turning up for taking appointment will be supplied by RRC. Before calling for replacement in -lieu of the candidates finally not turning up for taking appointment CPO shall personally satisfy himself that the procedure for cancellation of the offer of appointment to the originally empanelled candidates has been strictly followed. Under no circumstances, the number of candidates covered in the original as well as replacement panels shall exceed the number of vacancies indented by the railway; and

(iii) Replacement panels shall include only such number of reserved / un-reserved candidates as have not turned up as per original panel.

……."

4. From a reading of the order passed by the CAT it is apparent that the stand taken by the SECR before the Tribunal was that the purpose of declaring the result of 20% extra candidates is to ensure that in the eventuality of some of the candidates who are higher up in merit not turning up for document verification or being declared unfit in medical examination the unfilled posts can be filled from the

reserved panel. It was the stand of the SECR that the purpose of calling 20% candidates was to primarily avoid shortfall in the vacancies filled. It was also submitted that merely calling the candidate for document verification does not give any vested right to the candidate to be appointed. It was further submitted that after 10.01.2014 the system of maintaining replacement panels has been discontinued. According to the Tribunal the appellants had no right to be appointed.

5. Aggrieved, the appellants approached the High Court of Chhattisgarh in which they also took another plea that persons from the 20% extra replacement panel had been offered appointment by the Railways in many other zones and it was only in the 3 divisions of Bilaspur, Raipur and Nagpur that this was not done. The writ petition was dismissed holding that the appellants herein had no right and also that merely because some appointments have been made in other zones from the replacement panel, it would not create any right in the appellants.

6. The main issue which arises before us is whether the SECR could have ignored the 20% extra panel despite the letter dated 02.07.2008 without giving any cogent reason for the same. No doubt, it is true, that mere selection does not give any vested right to the selected candidate to be appointed. At the same time when a large number of posts are lying vacant and selection process has been followed then the employer must satisfy the court as to why it did not resort to and appoint the selected candidates, even if they are from the replacement panel. Just because discretion is vested in the authority, it does not mean that this discretion can be exercised arbitrarily. No doubt, it is not incumbent upon the employer to fill all the posts but it must give reasons and satisfy the court that it had some grounds for not appointing the candidates who found place in the replacement panel. In this behalf we may make reference to the judgment of this Court in ***R.S. Mittal*** vs. ***Union of India (UOI)***[1], wherein it was held as follows:-

10. .....

1 (1995) Suppl.2 SCC 230

> .....
> It is no doubt correct that a person on the select panel has no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government. No reason whatsoever, not to talk of a justifiable reason, was given as to why the appointments were not offered to the candidates expeditiously and in accordance with law. The appointment should have been offered to Mr Murgad within a reasonable time of availability of the vacancy and thereafter to the next candidate. The Central Government's approach in this case was wholly unjustified."

7. Our country is governed by the rule of law. Arbitrariness is an anathema to the rule of law. When an employer invites applications for filling up a large number of posts, a large number of unemployed youth apply for the same. They spend time in filling the form and pay the application fees. Thereafter, they spend time to prepare for the examination. They spend time and money to travel to the place where written test is held. If they qualify the written test they have to again travel to appear for the interview and medical examination etc. Those who are

successful and declared to be passed have a reasonable expectation that they will be appointed. No doubt, as pointed out above, this is not a vested right. However, the State must give some justifiable, non-arbitrary reason for not filling up the post. When the employer is the State it is bound to act according to Article 14 of the Constitution. It cannot without any rhyme or reason decide not to fill up the post. It must give some plausible reason for not filling up the posts. The courts would normally not question the justification but the justification must be reasonable and should not be an arbitrary, capricious or whimsical exercise of discretion vested in the State. It is in the light of these principles that we need to examine the contentions of the SECR.

8. On behalf of the SECR it has been contended that before calling for replacement candidates the CPO was to satisfy himself that the procedure for cancellation of the order of appointment of the original empanelled candidates has been strictly followed. It is urged that since this was not done the appellants could not be appointed. This

argument holds no merit. There is no indication in the pleadings that the vacancies were not to be filled up. If an official of the Respondent No. 1 fails to do his duty the appellants cannot suffer for the same. They are not at fault.

9. On behalf of the respondents it was urged before us that after the selection process in question 2 more selection processes were started in 2012 and 2013. Resultantly, three recruitment cycles were running concurrently and, therefore, the vacancies were filled up in the subsequent selections. This argument deserves to be rejected since it was not even raised before the Tribunal. Furthermore, the rights of the appellants who had appeared in the selection pursuant to the notification of 2010 could not be taken away by the selection processes started much later. They cannot be made to suffer for the delays on the part of the SECR.

10. The fact that three simultaneous selection processes were undertaken, itself proves that the Respondent No. 1 wanted to fill up all the posts and did not want any vacancies to be left unfilled. This negates the plea of the

Respondent No. 1 that it was not necessary to fill up the vacant posts.

11. It has been urged before us that the validity of the panel was only for two years and since the last merit list was published for March 2014, validity of the list has expired in March 2016. This submission is only to be rejected. The appellants herein who approached the CAT and the High Court with promptitude cannot suffer only because the matter was pending in Court.

12. Another submission raised on behalf of the SECR is that the appellants have obtained lower marks than the cut-offs prescribed in the selection processes held in the year 2012 and 2013. This amounts to comparing apples to oranges. Every selection process has a different examination with different level of assessment. By no stretch of imagination can comparison be made between the three different selection processes.

13. Another argument raised is that recruitment policy is an executive decision and the courts should not question the efficacy of such policy. Neither the appellants nor this

Court is questioning the efficacy of the policy contained in the letter dated 02.07.2008. All that has been done is to ensure implementation of the policy by the Respondent No. 1, especially when it has failed to give any cogent reason to justify its action of not calling for candidates from the replacement list of extra 20% candidates.

14. In view of the above, the appeals are allowed. The judgment of the High Court and CAT, Jabalpur Bench are set aside. The appellants are entitled to the benefit of the letter dated 02.07.2008. While allowing the appeals we issue the following directions:-

(i) The benefit of this judgment shall only be available to those appellants who had approached the CAT;

(ii) The appellants shall not be entitled to any back wages;

(iii) The appellants shall, for the purpose of seniority and fixation of pay be placed immediately above the first selected candidates of the selection process which commenced in the year 2012 and, immediately below the candidates of the selection list of 2010 in order of seniority;

(iv) The appellants shall be entitled to notional benefits from the date of such deemed appointment only for the purposes of fixation of pay and seniority.

15. The Respondent No. 1 is directed to comply with the judgment and offer appointment to the eligible appellants within a period of 3 months from today.

16. All pending application(s), shall also stand disposed of in the aforesaid terms.

.....J.
(KURIAN JOSEPH)

.....J.
(DEEPAK GUPTA)

New Delhi
November 27, 2018

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CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 11360-11363 OF 2018
(Arising out of S.L.P (C) NOS. 29668-29671 OF 2017)

Dinesh Kumar Kashyap & Ors. etc. .....Appellants

Versus

South East Central Railway & Ors. etc. .....Respondents

WITH

C.A.NO. 11364 of 2018
(Arising out of S.L.P (C) No. 6165 of 2018)

J U D G M E N T

Hemant Gupta, J.

I have gone through the Judgment authored by my learned brother Justice Deepak Gupta. Respectfully, I am not able to agree with the views expressed therein. My views are given hereunder:

2. The appellants are aspirants for appointment to the Group-D posts for which an advertisement was issued by the South East Central Railways for 5540 General category posts on 15.12.2010. The advertisement contemplated that 20% of the candidates would be called for documents verification as the extra candidates in terms of the instructions issued by the Railway Board on 02.07.2008 for placing the candidates in the extra list. The relevant conditions contained in the aforesaid circular read as under:

> "3. The issue has been examined and it has now been decided by the Board that the number of candidates called for document verification shall be 20% over and above the number of vacancies.
>
> 4. This shall, however, be done with the following proviso.
>
> (i) It has to be brought out clearly in the Call Letter to the candidate that the purpose of calling 20% candidates over and above the number of vacancies at the time of document verification is primarily to avoid shortfall in the panel and that merely calling a candidate for document verification does not, in any way, entitle him/her to an appointment in the railways.
>
> (ii) Even where the number of candidates available after document verification exceeds the number of vacancies, the panel finalized by RRC (Railway Recruitment Cell) shall be equal to number of vacancies only. In case, the Railway Administration after giving stipulated

> joining time to the selected candidates, certifies that certain number of candidates have not turned up within the specified period, another panel equal to the number of candidates finally not turning up for taking appointment will be supplied by RRC. Before calling for replacement in-lieu of the candidates finally not turning up for taking appointment CPO shall personally satisfy himself that the procedure for cancellation of the offer of appointment to the originally empanelled candidates has been strictly followed. Under no circumstances, the number of candidates covered in the original as well as replacement panels shall exceed the number of the vacancies indented by the railway; and
>
> (iii) Replacement panels shall include only such number of reserved/un-reserved candidates as have not turned up as per original panel."
>
> (emphasis supplied)

3. The process of appointment particularly in respect of extra candidates has been revised when Railway Board issued a circular No.6/RBE/2014 dated 10.01.2014. The said circular has done away with the procedure of replacing candidates as contemplated in the earlier circular dated 02.07.2008.

4. As per the information contained in Annexure P-2, as many as 509775 applications were received in response to the advertisement issued on 15.12.2010 and out of which 162229 candidates appeared for the written test. After

qualifying the written test, 10380 general candidates were called for physical efficiency test. Since the appellants are general category candidates, number of the candidates from the other categories called for physical efficiency test is not mentioned in the affidavit. The cut off marks in the written test was 40%. As many as 7697 general category candidates qualified in the physical efficiency test. The percentage of cut off marks obtained for document verification in respect of the general category is 40.98%. The appointments against the posts advertised were made on 11.3.2013; 9.7.2013 and in March 2014.

5. The appellants, who were not appointed against the Group-D posts against the aforesaid advertisement process, filed Original Applications under section 19 of the Administrative Tribunal Act, 1985 before the Central Administrative Tribunal, Jabalpur in the year 2014.

6. Such nine connected Original applications were dismissed by the Tribunal on 13.02.2015 inter-alia, holding as under:

> "The right of candidates in 20% extra list begins only after a demand is made for replacement panel to Railway Recruitment

> Cell after duly following aforesaid procedure. The procedure for working out requirement of replacement panel is not part of either the employment notification or selection procedure. The right of applicants for consideration starts only after certain appointment orders of originally empanelled candidates are cancelled and thereafter a demand is raised for replacement panel. Since no demand has been made in view of the procedure specified in notification dated 2.07.2008 (Annexure R-4) no right for consideration of the applicants has either acquiesced or been infringed."

7. The Writ Petition filed by the appellants before Chhattisgarh High Court remained unsuccessful vide judgment dated 05.08.2015. The Court held as under:

> "The only question for our consideration is that if the appellants were not in the original list of selected candidates on higher merit and were to be considered against non-joining vacancies or medical disqualification of selected candidates, then the procedure prescribed in the Railway Board's letter 02.07.2008 was required to be followed by preparation of a replacement panel. The Tribunal has arrived at a finding of fact that no process for initiation of the procedure under letter dated 02.07.2008 was ever commenced by the Respondents to fill up non-joining vacancies from any replacement panel. A candidate outside and beyond the merit list, has no vested legal right to such appointment as a matter of right because vacancies may exist. We do not find any reason to differ with the conclusions arrived at by the Tribunal".

8. Before this Court, learned counsel for the appellants relies upon the judgment reported as **R.S. Mittal v. Union of India,** 1995 Supp (2) SCC 230, to contend that though the appellants have no vested right to seek appointment but the respondents cannot act in arbitrary manner to deny the benefit of right of appointment as the State has to act in a non-discriminatory and non-arbitrary manner. Therefore, the denial of appointment to the appellants is not sustainable. It is also argued that out of 5540 posts in the general category as many as 624 posts have remained unfilled. Therefore, such posts could be very well filled up by the candidates who are in the category of replacement candidates (extra list) such as the appellants.

9. In the counter affidavit, it has been pointed out that two separate appointment processes were also initiated, one on 25.08.2012 to fill up 2017 posts of the general category and another on 14.12.2013 to fill up 1195 general category posts. In the said selection processes, 2839 candidates have been empanelled as against 3212 posts advertised. Such candidates have already joined. It

is also averred that three recruitment cycles i.e. one in respect of which appellants were the candidates and the two other recruitment processes were almost running concurrently. It is inter-alia, mentioned in the counter affidavit as under:

> "iii. In the instant case Replacement Panels were not issued primarily as there was no demand for issue of Replacement Panels from the Divisions/Units. While the Recruitment process to the Employment Notification No. SECR/02/2010 was underway, with the approval of Railway Board, two more Notifications under No. SECR/03/2012 dated 25.08.2012 for 2215 (198 Physically Handicapped + 2017 Non-PH) posts and SECR/04/2013 dated 14.12.2013 for 1206 (11 Physically Handicapped + 1195 Non-PH) posts were issue.
>
> iv. Against the above two Employment Notifications, SECR/03/2012 dated 25.08.2012 and SECR/04/2013 dated 14.12.2013, 1977 and 862 Non-PH candidates have been empanelled respectively. As such a total of 2839 Non-PH candidates have been empanelled against two subsequent cycles of Employment Notifications.
>
> v. Regarding the claim of the appellants and similarly placed candidates (who are candidates falling in 20% extra candidates zone against employment Notification No. SECR/02/2010) for issue of replacement panels against around 600 candidates who did not join, it is submitted that the effect of non-joining of 600 odd candidates was not felt since in a short time margin 2839 Non-PH

candidates were empanelled and the panels were supplemented to the Divisions/Units.

vii. Hence it goes without saying that the 2839 empanelled candidates against two subsequent employment notifications SECR/03/2012 and SECR/04/2013, are far superior in merit as compared to the appellants who are candidates falling in 20% extra zone against employment notification No. SECR/02/2010.

viii. As mentioned above two more cycles of recruitments were going on parallel to the Employment Notification No. SECR/02/2010, the necessity of replacement panels was not felt and not asked for as such."

10. In this factual basis, firstly, it needs to be examined as to what is the status of the appellants who were called for document verification over and above the number of posts advertised. The circular dated 02.07.2008 is to the effect that 20% candidates are to be called to avoid the shortfall in the panel and that merely calling a candidate for document verification does not, in any way, entitle him/her to an appointment in the railways. It is also contemplated that replacement panel shall include only such number of reserved / unreserved candidates as have not turned up as per original panel. Therefore, the 20% extra candidates were called to substitute the candidates

who do not report within the joining time granted to the selected candidates. Such candidates at best can be said to be the candidates in the waiting list of the candidates to be called for appointment if the selected candidates do not join for one or the other reason.

11. The next question is as to whether a candidate acquires any right to appointment being in the merit list. Such question has been examined in number of judgments time and again by this Court. In a judgment reported as **State of Haryana v. Subash Chander Marwaha**, (1974) 3 SCC 220, it has been held that the State has a right not to appoint a candidate even if his name appears in the merit list. The Court held as under: -

> " 7. In the present case it appears that about 40 candidates had passed the examination with the minimum score of 45%. Their names were published in the Government Gazette as required by Rule 10(1) already referred to. It is not disputed that the mere entry in this list of the name of candidate does not give him the right to be appointed. The advertisement that there are 15 vacancies to be filled does not also give him a right to be appointed. It may happen that the Government for financial or other administrative reasons may not fill up any vacancies. In such a case the candidates,

> even the first in the list, will not have a right to be appointed. The list is merely to help the State Government in making the appointments showing which candidates have the minimum qualifications under the Rules. The stage for selection for appointment comes thereafter, and it is not disputed that under the Constitution it is the State Government alone which can make the appointments. …..”

12. In a Judgment reported as **Jatinder Kumar v. State of Punjab,** (1985) 1 SCC 122, this Court held that the process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus. The Court held as under: -

> “ 12. ..... This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission. If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz. bad conduct or character. The Government also cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for

> selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus. We are supported in our view by the two earlier decisions of this Court in *A.N. D'Silva* v. *Union of India* AIR 1962 SC 1130 and *State of Haryana* v. *Subash Chander Marwaha* (1974) 3 SCC 220. The contention of Mr Anthony to the contrary cannot be accepted."

13. In **Shankarsan Dash v. Union of India**, (1991) 3 SCC 47, a Constitution Bench of this Court held that the notification for an appointment 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. It was held as under:

> "7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate

> reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana* v. *Subash Chander Marwaha* (1974) 3 SCC 220, *Neelima Shangla* v. *State of Haryana* (1986) 4 SCC 268, or *Jatindra Kumar* v. *State of Punjab* (1985)1 SCC 122".

14. In a Judgment reported as **S.S. Balu v. State of Kerala,** (2009) 2 SCC 479, it was held that the State as an employer has a right to fill up all the posts or not to fill them up. A candidate will have no legal right for claiming a writ in the nature of mandamus unless there is discrimination or arbitrariness in regard to the filling up of the vacancies. The Court held as under:

> "12. 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* v. *Raja Narasaiah Zangiti* [(2006) 10 SCC 261. 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 candidate concerned will have no legal right for obtaining a writ of or in the nature of mandamus. (See *Batiarani Gramiya*

Bank v. *Pallab Kumar* (2004) 9 SCC 100. In *Shankarsan Dash* v. *Union of India* (1991) 3 SCC 47 a Constitution Bench of this Court held: (SCC pp. 50-51, para 7)

> "*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."

* * *

14. In *Pitta Naveen Kumar* v. *Raja Narasaiah Zangiti* [(2006) 10 SCC 261, this Court held: (SCC p. 273, para 32)

> "*32*. … A candidate does not have any legal right to be appointed. He in terms of Article 16 of the Constitution of 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 necessary in a case where the rules operate only to the disadvantage of the candidates concerned and not otherwise."

15. In another judgment reported in **Kulwinder Pal Singh Vs. State of Punjab**, (2016) 6 SCC 532, this Court held that the name of a candidate may appear in the merit list but he has no indefeasible right to seek an appointment. It was held as under:

> "10. It is fairly well settled that merely because the name of a candidate finds place in the select list, it would not give him indefeasible right to get an appointment as well. The name of a candidate may appear in the merit list but he has no indefeasible right to an appointment vide *Food Corporation of India* v. *Bhanu Lodh* (2005) 3 SCC 618, *All India SC & ST Employees' Assn.* v. *A. Arthur Jeen* (2001) 6 SCC 380 and *UPSC* v. *Gaurav Dwivedi* (1999) 5 SCC 180.
>
> 11. This Court again in *State of Orissa* v. *Rajkishore Nanda* (2010) 6 SCC 777, held as under: (SCC p. 783, paras 14 & 16)
>
> > "*14.* A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate.

* * *

> *16.* A select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required."
>
> 12. In *Manoj Manu* v. *Union of India* (2013) 12 SCC 171, it was held that (SCC p. 176, para 10) merely because the name of a candidate finds place in the select list, it would not give the candidate an indefeasible right to get an appointment as well. It is always open to the Government not to fill up the vacancies, however such decision should not be arbitrary or unreasonable. Once the decision is found to be based on some valid reason, the Court would not issue any mandamus to the Government to fill up the vacancies. As noticed earlier, because twenty-two other candidates were declared successful by the Supreme Court pertaining to the selection of the years 1998, 1999, 2000 and 2001 as Civil Judges (Junior Division), they were to be accommodated, as rightly resolved by the Administrative Committee in the meeting dated 6-7-2011. The three resultant vacancies of the year 2007-2008 stood consumed with the joining of the said seventeen candidates and the same could not be filled up from the select list of that year. The decision of the Administrative Committee observing that the three resultant vacancies stood consumed is based on factual situation arising there and cannot be said to be arbitrary."

16. The stand of the Railways before the Tribunal was that the 20% extra candidates were called to take care for eventualities such as the unfitness of the candidates at

the stage of medical examination or not turning up of the candidates for document verification etc. It is also averred that in spite of vacancies remaining unfilled due to non-joining of selected candidates, no appointment from the extra candidates can be claimed in view of the instructions of the Railway Board. The stand of Railways in reply before the Tribunal was not that there was simultaneous selection process for Group-D posts and for which 2839 candidates were appointed but the fact remains that such an averment has been made before this Court and such an assertion has not been controverted.

17. The judgment in **R.S.Mittal** case (supra) deals with appointment of members of the Income Tax Appellate Tribunal by a Selection Committee chaired by a Judge of this Court. The Central Government has not passed any order on the recommendation of such Selection Committee. The said Judgment has been explained in another judgment reported as **Union of India v. Kali Dass Batish,** (2006) 1 SCC 779. This Court held as under:

> "20. The respondents have relied on the judgments of this Court in *R.S. Mittal* v. *Union of India* 1995 Supp (2) SCC 230 in support of

> their contentions. In our view, the said authority hardly advances their case. In the first place, all that the authority says is that where a Selection Board headed by a sitting Judge of the Supreme Court had recommended certain candidates for appointment as members of ITAT, it was not open to the Government of India to sit on the said recommendation without taking action. That was not a case where a decision taken not to appoint a candidate for good reason was concurred in by the Chief Justice of India."

18. However, in the present case, the appellants were called in for the verification of documents as extra candidates to replace the candidates selected who do not join for one or the other reason. Such candidates were called to meet out the necessity to fill up of posts if the meritorious selected candidates do not join. In terms of **Shankarsan Dash** case (supra), the State has a right not to appoint candidates even if they are in merit list. The appellants do not possess indefeasible right of appointment. It is not the case, that any candidate lower in merit has been appointed or the appointments have been made by pick and choose method ignoring merit. The reason given by the Railways in the counter affidavit

is that the requirement to fill 624 posts was not felt in pursuance of an advertisement in question as there was two simultaneous selection processes in which 2839 candidates were appointed. Such reason cannot be said to be wholly arbitrary which warrant a mandate to the respondents to appoint the appellants who are not in merit list but at best in the waiting list. The State has right not to fill up any vacancy advertised. The stand that the requirement to fill up 624 vacant posts was not felt cannot be said to be arbitrary warranting a mandamus to appoint the appellants. The State cannot be directed to appoint candidates, when it does not require the posts to be filled up. The decision not to fill up vacancies has been taken for appropriate reasons and is neither arbitrary nor discriminatory.

19. Still further, in exercise of power of Judicial Review, this Court is not to substitute the decision of the Railways and to direct candidates in the waiting list to be appointed. In three Judge Bench judgment reported as **Kali Dass Batish** case (supra), it has been held that mere inclusion of a candidate's name in the selection list

gave him no right, and if there was no right, there could be no occasion to maintain a writ petition for enforcement of a non-existing right. It has been also held that however vide the power of judicial review under Article 226 or 32 of the Constitution, there is self-recognised limit to exercise such power. The Court held as under: -

> "15. In this matter, the approach adopted by the Jharkhand High Court commends itself to us. The Jharkhand High Court approached the matter on the principle that judicial review is not available in such a matter. The Jharkhand High Court also rightly pointed out that mere inclusion of a candidate's name in the selection list gave him no right, and if there was no right, there could be no occasion to maintain a writ petition for enforcement of a non-existing right.
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> * * *
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> 17. In *K. Ashok Reddy* v. *Govt. of India* (1994) 2 SCC 303, this Court indicated that however wide the power of judicial review under Article 226 or 32 there is a recognised limit, albeit self-recognised, to the exercise of such power. This Court reiterated a passage from *Craig's Administrative Law* (2nd Edn., p. 291), vide SCC p. 315, para 21, as under:
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> > "The traditional position was that the courts would control the existence and extent of prerogative power, but not the manner of exercise thereof. … The traditional position has however now been modified by the decision in *GCHQ*

case [*Council of Civil Service Unions* v. *Minister for the Civil Service*, 1985 AC 374 : (1984) 3 All ER 935 : (1984) 3 WLR 1174 (HL)] . Their Lordships emphasised that the reviewability of discretionary power should be dependent upon the subject-matter thereof, and not whether its source was statute or the prerogative. Certain exercises of prerogative power would, because of their subject-matter, be less justiciable, with Lord Roskill compiling the broadest list of such forbidden territory….”

The observations of Lord Roskill, referred to above, are from *Council of Civil Service Unions* v. *Minister for the Civil Service* 1985 AC 374 : (1984) 3 All ER 935 : (1984) 3 WLR 1174 (HL)] (*GCHQ case*) as under: (All ER p. 956*d*-*e*)

“But I do not think that that right of challenge can be unqualified. It must, I think, depend on the subject-matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject-matter is such as not to be amenable to the judicial process.”

> 18. Finally, this Court emphasised judicial restraint by citing with approval a passage in *de Smith's Judicial Review of Administrative Action* (vide SCC p. 316, para 23) as under:
>
> > "Judicial self-restraint was still more marked in cases where attempts were made to impugn the exercise of discretionary powers by alleging abuse of the discretion itself rather than alleging non-existence of the state of affairs on which the validity of its exercise was predicated. Quite properly, the courts were slow to read implied limitations into grants of wide discretionary powers which might have to be exercised on the basis of broad considerations of national policy."
>
> Based on this reasoning, it was acknowledged that the transfer of a Judge of the High Court based on the recommendation of the Chief Justice of India would be immune from judicial review as there is "an inbuilt check against arbitrariness and bias indicating absence of need for judicial review on those grounds. This is how the area of justiciability is reduced…. [*Ibid.*, para 24] "
>
> 19. We, respectfully, reiterate these observations, and expect them to be kept in mind by all courts in this country invested with the power of judicial review."

20. Further in the written submissions submitted on behalf of the respondents, reliance is placed on the

circular dated 18.07.2005 to say that the currency of the panel published in the month of March, 2014 is for a period of two years. Such period can be extended by the General Manager by one year in case of administrative exigencies.

21. Somewhat similar question was considered in a recent Judgment dated 22nd November, 2018 of this Court in Civil Appeal No. 11149 of 2018 entitled **Uttar Pradesh Public Service Commission v. Surender Kumar & Ors.**, whereby the Government Order contemplated that the wait-list can be operated only for a period of one year, deciding the said aspect, the Court held as under:

> "12. Having heard the learned counsels on both sides, we have perused the order dated 18.05.2018 passed by the High Court and other material placed on record. For the purpose of operating wait-list, Government of Uttar Pradesh has issued instructions from time to time. It is clear from the various Government Orders that wait-list period is valid only for a period of one year. Though requisition is made for making selection for 178 number of posts, but appellant Commission, after delcaring results of the examination, has made initial recommendation for substantive number of posts, i.e., 156 posts vide letter dated 12.08.2010. It appears that the said list is prepared by including candidates who have submitted all the requisite documents within the period prescribed. Further recommendations were also made, but there is no reason for not computing the period of one year from 12.08.2010. When recommendations

> were made for substantive number of posts on 12.08.2010, we are of the view that period of one year for operating wait-list is to be computed from 12.08.2010 but not from the last recommendation made for one post, vide letter dated 28.08.2012. The reason for restricting 156 names in the initial recommendation vide letter dated 12.08.2010, is explained in paragraph 11 of the counter affidavit filed before the High Court".

22. Since the validity of the select panel has come to an end on the afflux of time, therefore, there cannot be any order to appoint the persons from such select list prepared wayback in the year 2014 in pursuance to the advertisement issued on 15.12.2010. Such panel cannot be a perennial source of appointment.

23. Thus, in exercise of power of judicial review, I do not find any reason to interfere in the decision-making process of the Railways, so as not to appoint the appellants against Group D posts advertised on 15.12.2010.

24. Consequently, I do not find any illegality in the order passed by the Tribunal and the High Court. The appeals are accordingly dismissed. No Costs.

.....J.
(HEMANT GUPTA)

New Delhi,
November 27, 2018.