Ranjeet Singh and Others Vs State of Jharkhand and Others

Court: Jharkhand High Court

Date of Decision: Aug. 2, 2012

Acts Referred: Constitution of India, 1950 â€" Article 14, 141, 16, 16(1), 211

Citation: (2013) 1 AJR 258

Hon'ble Judges: Dhirubhai Naranbhai Patel, J

Bench: Single Bench

Advocate: S.N. Pathak, Ananda Sen and Nagmani Tiwary, in both the cases, for the Appellant; Ajit Kumar, A.A.G. and Mr. Kumar Sundaram, JC to A.A.G. in both the cases, for the Respondent

Judgement

D.N. Patel, J.
The issues involved in both the writ petitions, being common, they have been heard together and are being disposed of by

this common judgment. However, for the practical purposes, W.P.(S) No. 5900 of 2011 shall be treated as main writ petition for referring

annexures hereinbelow. These writ petitions have been preferred firstly for getting employment to the posts of Sub Inspector of Police, Sargent and

Company Commander, pursuant to public advertisement bearing No. 1 of 2008, on the basis of the actual vacancies, as on date available in the

State of Jharkhand; secondly for issuing directions upon the respondents to the effect that the posts, actually advertised, should be enhanced to the

actual vacancies, available in the State of Jharkhand and thirdly: to appoint the petitioners on the posts of Sub Inspector of Police, Sargent and

Company Commander.

2. Factual Matrix:

Ã¯Â¿Â½ The State of Jharkhand has issued a public advertisement bearing no. 1 of 2008 on 1st March. 2008 for fulfilling the vacancies of different

posts in the Police Department, namely, Sub Inspector of Police, Sargent and Company Commander, in total 384. The said advertisement is at

Annexure 1 to the memo of petition.

Ã¯Â¿Â½ In the advertisement it is mentioned that the number of vacancies can be increased or decreased. So far as minimum and maximum age limits

are concerned, the advertisement speaks as under:

Ã¯Â¿Â½ Thereafter, another public advertisement was issued, which is dated 23rd May, 2009. as per the learned counsels appearing in both the writ

petitions, and the said advertisement is at Annexure 2 to the me(sic)o of petition, wherein, the age limits now prescribed are as under:

Ã¯Â¿Â½ The relaxation of age, thus, is prescribed by the advertisement, but this relaxation is given as a one time measure. It is also mentioned in the

advertisement that in future (be minimum and maximum age limit will be as per the circular bearing No. 2029 dated 7.5.2008. According to this,

the age relaxation is not a permanent phenomenon. With the aforesaid rider, second advertisement was issued and except this, there is no other

material change in the second advertisement Total number of vacancies advertised is 384 for the posts of Sub Inspector of Police, Sargent and

Company Commander.

Ã¯Â¿Â½ Examination, pursuant to the aforesaid advertisements, was conducted on 11th September. 2011: interviews were taken on and from 9th

January, 2012 and thereafter, the result was published on 25th February, 2012.

Ã¯Â¿Â½ These petitioners applied for information, under Right to Information Act, whereupon, information was given to them vide Memo No. 3467

dated 15.12.2011, which is at Annexure B to the rejoinder affidavit filed by the petitioners, that as on date there are total available vacancies of the

post of Sub Inspector of Police are 1492 whereas total available vacancies of the post of Sargent are 82. Further, in para 10 of the rejoinder

affidavit it has been pointed out that there are 103 vacant posts of Company Commander. Earlier advertisement was given in 1994 for the

aforesaid three posts.

3. Arguments canvassed by the counsel for the petitioners:

(i) All vacancies available as on the date of interview must be filled up from the very same examination.

(ii) There is no statutory embargo for not to fill up all the existing vacancies and the total number of existing vacancies as on the date of interview,

as alleged by the counsel for the petitioners, is 1595, which is slightly higher than what is given by the respondent State under the Right to

Information Act

(iii) The State of Jharkhand is in a habit of filling up more posts than what is advertised. For example, in past, advertisement was given for

appointment of 6796 Constables whereas the posts filled up were 8430.

(iv) The advertisement has been given after long lapse of time i.e. approximately 17 years and therefore, the vacancies, which are existing as on

date of interview, must be filled up, because these vacancies can not be termed as future vacancies. After giving advertisement four years have

been taken by the respondents in fining up of the vacancies.

(v) The doctrine of legitimate expectation has also been invoked for increase in number of seats, because advertisement has been given for only

384 posts. It is expected from the State that when the State is not taking examination for the posts, in question, for a longer time, then the existing

vacancies should be filled up, otherwise the right vested in these candidates under Article 16 of the Constitution of India will be violated. All these

1595 posts are also sanctioned posts. Counsels for the petitioners in support of their contention, have placed reliance on the following judgements.

(i) Sandeep v. State of Haryana, 2001 (1) ALD (Crl.) 620 (SC),

(ii) Express Hotels Private Ltd. Vs. State of Gujarat and Another, ;

(iii) Tritiya Snatak Astar Pratiyogita Chainit Sangh and Others Vs. The State of Bihar and Others,

(iv) Amlan Jyoti Borooah Vs. State of Assam and Others, and

(v) Manish Kumar Vs. The State of Bihar and Others,

On the basis of the aforesaid decisions it is vehemently submitted by the learned counsels for the petitioners in both the writ petitions that there are

enough number of vacancies, which are sanctioned, and since long recruitment process was never commenced and, therefore, from the very same

examination all these vacancies, namely, 1595, for all the three posts, may be directed to be filled up by the State and on the basis of merits, the

candidates may be selected.

4. Arguments canvassed by the counsel for the State of Jharkhand:

(i) Mr. Ajit Kumar, learned Additional Advocate General, appearing on behalf of the respondent-State pointed out that in the first advertisement,

the total number of posts were mentioned as 384 and as the advertisement was published after few years, age relaxation was given to the

candidates, by virtue of the second advertisement, which is at Annexure 2 to the memo of the petition. The first advertisement was given on 1st

March, 2008 whereas the second advertisement was given on 23rd May, 2009. For the candidates belonging to General Category, the age

relaxation in the upper age limit was enhanced from 24 years to 35 years; for the candidates, belonging to Other Backward Class, the upper age

limit was enhanced from 27 years to 38 years; and for the candidates, belonging to Scheduled Castes/Scheduled Tribes, the upper age limit was

enhanced from 29 years to 40 years. This age relaxation has been given by virtue of the second advertisement, i.e. Annexure 2 to the memo of the

petition, with a rider that these age relaxations have been given as one time measure and in future, the age limit will be applicable as per

Government Circular No. 2029 dated 7th May, 2008. Except age relaxation, no other relaxation has been given in the second advertisement It is

vehemently submitted by the learned Additional Advocate General that the posts, which are not advertised, can not be filled up from the same

examination.

(ii) Learned Additional Advocate General further submitted that there is no legal obligation, vested in the State of Jharkhand, to fill up all the

vacancies, available as on the date of advertisement or on the date of interview. Correspondingly, there is no legal right vested in the candidates to

get themselves appointed on the vacant posts, though they have not been advertised.

(iii) It is a power of the State to decide as to how many vacancies are to be filled up and for this power there is no corresponding duty vested in

the State to fill up all the vacant posts. This power is also commonly known as policy decision of the State and normally policy decision of the

State will not fall within the judicial review/power, vested in the Court, as because there may be several vacancies in the State for several posts,

but, the State can not be compelled to fill up all the vacancies for all the posts.

(iv) It is further contended by the Additional Advocate General that in the first advertisement, it has been mentioned that vacancies may increase or

decrease. This aspect of the matter has already been clarified in paragraph no. 5 of the counter affidavit, filed by the respondent State that the

respondent State is going to fill up only 384 number of posts, so advertised. Already a decision has been taken by the State not to fill up more than

what is advertised and for ""other vacancies"", i.e. other than what is advertised, decision will be taken for recruitment, in future.

(v) The Government cannot be compelled to increase the advertised posts, merely because some vacancies are still in existence.

(vi) It is further contended by the learned Additional Advocate General of the State that if these advertised posts are to be reshuffled, then there

will be uncertainty about the number of the posts advertised. It may happen that the employer, which is the State in the case on hand, may not

recruit all the persons at a time. That all depends upon several factors like infrastructure, filling up the supporting staff, salary of supporting staff,

training facility etc., because if one post is filled up several other infrastructures and incidental things are to be kept in mind.

(vii) Learned Additional Advocate General, appearing on behalf of the State, in support of his contention, has relied upon the following decisions:

(i) Manish Kumar Vs. The State of Bihar and Others,

(ii) The State of Haryana Vs. Subash Chander Marwaha and Others,

(iii) Jatinder Kumar and Others Vs. State of Punjab and Others,

(iv) All India SC and ST Employees Assn. and Another etc. Vs. A. Arthur Jeen and Others etc.,

(v) Abhilasha and Anr. v. State of Rajasthan and others reported at, (2000) 10 SCC 237

(vi) State of U.P. and Others Vs. Rajkumar Sharma and Others,

(vii) S.S. Balu and Another Vs. State of Kerala and Others,

(viii) Rakhi Ray and Others Vs. The High Court of Delhi and Others,

(ix) (2010) 6 SCC 777;

(x) Smt. K. Lakshmi Vs. State of Kerala and Others,

(xi) Arup Das and Others Vs. State of Assam and Others, ; and also (he judgments, delivered by this Court in W.P.(S) No. 6321 of 2009,

decided on 15th September, 2011 and W.P.(S) No, 1667 of 2008, decided on 20th March, 2009.

On the basis of the aforesaid decisions, it is vehemently submitted by the learned Additional Advocate General that no appointment can be made

for the posts, which are not advertised, even though there is vacancy with the State Government. Further, there is no legal obligation on the part of

the State to fill up all the vacancies, in existence. How many posts are to be filled up is left at the discretion of the State. Looking to the

administrative exigencies, public need, infrastructure facilities, finance etc. the State, in its wisdom, has taken a policy decision not to appoint more

than 384 candidates (for which advertisement has been given) for all the aforesaid three cadres and on the basis of the aforesaid decision, the State

may not be compelled to fill up all the vacancies, which were in existence on the date of advertisement or on the date of interview and therefore,

the writ petitions may not be entertained by this Court.

5. Findings:

Having heard learned counsels for both the sides and looking to the facts and circumstances of the case, I see no reason to entertain both the writ

petitions, mainly for the following facts and reasons:

(i) Public Advertisement No. 1 of 2008 was published on 1st March, 2008, which is at Annexure 1 to the memo of the petition, for total 384

vacancies of the posts of Sub-Inspector. Sargent and Company Commander, as stated herein above. Initially, the maximum age limit was 24

years, 27 years and 29 years for the candidates, belonging to General Category, Other Backward Class and S.C./S.T. Categories respectively.

(ii) It appears that thereafter this advertisement was amended and new advertisement was published on 23rd May, 2009, which is Annexure 2 to

the Memo of the petition, whereby the maximum age limits, prescribed for the candidates, belonging to different categories, have been enhanced

and they have been made 35 years, 38 years and 40 years for the candidates, belonging to General category, Other Backward Class and

Scheduled Caste/Scheduled Tribe Category respectively. It has been mentioned in the amended advertisement that this age relaxation has been

given as onetime measure and henceforth, in future, the age limit will be as per Government Circular No. 2029 dated 7th May, 2008 viz. it will

remain 25 years, 28 years and 30 years for the candidates belonging to General category, Other Backward Class and S.C./S.T. Categories

respectively. From these two advertisements, the following facts are very clear:

(a) The total number of advertised posts were 384; and

(b) The age limits for the candidates, belonging to General Category, Other Backward Class and S.C/S.T. Categories, have been substantially

enhanced by way of second advertisement so as to cover all those candidates, who might have become overage, because in the first advertisement

the maximum age limit was only 24 years, 27 years and 29 years for the candidates belonging to General Category, Other Backward Class and

S.C./S.T. Categories respectively. Thus, for general category candidates 11 years have been increased, meaning thereby all the candidates who

are overage by 11 years by virtue of the first advertisement, can prefer applications for the aforesaid posts, due to the age relaxation given in the

second advertisement Similarly, for OBC candidates, the age limit has been enhanced from 27 years to 38 years vide the second advertisement

This is also because those candidates, belonging to Other Backward Class, who were otherwise overage by approximately 11 years, can also

prefer applications for the posts, in question. Similar is the case with the candidates belonging to S.C/S.T. Categories, Their age limit has also been

increased by 11 years.

Thus, the State has taken care of all the candidates, who have become overage. Had there been no second advertisement several candidates

would have become ineligible to prefer applications for the posts, in question, because since last several years, these posts were never advertised.

Keeping in mind the interest of those candidates, who have been, otherwise over aged. they were brought within the age limit by enhancing the

upper age limit or by giving relaxation in the upper age limit by 11 years. However, this is a onetime measure. In fact, this is not necessary but the

State, being a newly separated State, appears to be overcautious in pointing out as to what will be the future maximum age limit, otherwise the

same is not required to be mentioned in the present advertisement Be as it may the fact remains that as far as possible, the State has taken all care

of those candidates, who were otherwise over aged, for their appointments on the aforesaid posts. What more relaxation is to be given that is not

within the domain of this Court The age limit has already been relaxed.

(iii) The contention of the learned counsel for the petitioners that similar relaxation ought to have been given in the number of vacancies, so

advertised, is not accepted by this Court because there may be types and types of relaxations and relaxation is a matter of policy decision. By

virtue of the second advertisement only the age has been relaxed or only the maximum age has been enhanced. There is no enhancement in the

number of posts, which are earlier advertised. This Court is not sitting in appeal over the policy decision. It is for the employer to decide as to how

many posts are to be filled up out of the total vacancies. This Court cannot decide the posts, to be filled up merely because there are more

vacancies. There cannot be any State in whole of the country, in which, in each and every category there is full strength of the employees, because

retirement/resignation/termination/dismissal of the employee is a continuous phenomenon. Daily some vacancy will arise and, therefore, vacancies

are bound to be there in each and every cadre, but, that does not mean that the State must fill up all those vacancies. It is always left at the

discretion of the State. This discretion in the Service Jurisprudence is known as a ""Power of the State"" and thus, there is no corresponding ""right

vested in any candidate.

(iv) It is vehemently contended by the learned counsel for the petitioners that the advertised posts are lesser than the actual vacancies for the posts,

in question and, therefore, a writ of mandamus may be issued upon the respondent-State to advertise all those posts and to fill them up.

This submission appears to be very attractive, but is not accepted by this Court, because there is no legal obligation on the part of the State to

advertise all the vacant posts and to fill them up. How many posts are to be filled up, that depends upon:

(a) Financial capability or budgetary provisions;

(b) Infrastructures for the posts, in question;

(c) The need of filling up of the posts;

(d) Administrative exigencies;

(e) Any other similarly situated reasons.

Thus, variety of factors are affecting the policy decision of the State that how many posts are to be filled up out of total vacancies. Vacancies may

be many more, but State may not fill up all the vacancies. Correspondingly, there is no right vested in the candidates that though advertisement and

select list are only for 384 posts, all those subsequent candidates may be arranged in a seriatum, as per their merits up to serial number 1595, and

they should be given appointment since the vacancy is of 1595 posts.

This argument to fill more posts, than what is advertised, is running counter to several decisions rendered by the Hon''ble Supreme Court.

(v) It is vehemently contended by the learned counsels for the petitioners that these 1595 total vacancies, in the facts of the present case, are not

the ""future vacancies"" rather they are ""accumulated vacancies"" and, therefore, ""right"", if any, accrued to the present candidates, will be violated, if

these posts are treated as future vacancies.

This attractive contention is also not accepted by this Court mainly for the reason that all the posts other than the ""advertised posts"", are known as

future vacancies"". Future vacancies need not and necessarily, be the vacancies, which have arisen after the advertisement has been issued. Legally

the word ""future vacancy"" means ""vacancy other than the advertised vacancy"" which includes-

Ã¯Â¿Â½ The past vacancies or accumulated vacancies

Ã¯Â¿Â½ Existing vacancies; and

Ã¯Â¿Â½ vacancies which are going to be filled up in future i.e. after the advertisement

For all these three types of vacancies, a composite word ""future vacancy"" is used in the eyes of law and, therefore, the posts, which are not

advertised, are known as ""future vacancies"". Keeping in mind the aforesaid concept, in the facts of the present case, only 384 posts have been

advertised for all the aforesaid three categories and, therefore, rest of the posts, which are in the eyes of law known as ""fixture vacancies"" cannot

be filled up from this examination.

(vi) it has been held by the Hon''ble Supreme court in the case of The State of Haryana Vs. Subash Chander Marwaha and Others, at paragraphs

10 and 11 as under:

10. One fails to see how the existence of vacancies give a legal right to a candidate to be selected for appointment The examination is for the

purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is oven then to the

Government to decide how many appointments shall be made. 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. The

true effect of Rule 10 in Part C is that if and when the State Government propose to make appointments of Subordinate Judges the State

Government (i) shall not make such appointments by travelling outside the list, and (ii) shall make the selection for appointments strictly in the order

the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed

by the Government They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints on the power to

make the appointments, Rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a

Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence.

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.

(Emphasis supplied)

In view of the aforesaid decision, there is no legal right vested in the petitioners to be selected for appointment In the aforesaid case, even the

selected candidates had no right to be appointed. Selected candidates have only ""a right to be considered"" whereas in the facts of the present case,

these petitioners are not even selected for the posts, in question. Here they are seeking enhancement of the advertised posts and thereafter

selection and appointment. The pendulum of Service Jurisprudence has gone absolutely on another end. When selected candidates cannot claim,

as a matter of right, to be appointed, then where is the question of appointment of those, who are not even selected. Merely because a candidate''s

name appears in the select list it will not entitle him to be appointed. Thus, the facts of the present case is worse than the aforesaid decided case.

The present petitioners are not even falling within the category of select list Thus, they are not entitled to be appointed for the vacancies, which are

yet to be advertised.

(vii) It has been held by the Hon''ble Supreme court in the case of Shankarsan Dash Vs. Union of India, , at paragraphs 7 to 9 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. Subhash Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab.

8. In State of Haryana v. Subhash Chander Marwaha 15 vacancies of Subordinate Judges -were advertised, and out of the selection list only 7,

who had secured more than 55 per cent marks, were appointed, although under the relevant rules the eligibility condition required only 45 per cent

marks. Since the High Court had recommended earlier, to the Punjab Government that only the candidates securing 55 per cent marks or more

should be appointed as Subordinate Judges, the other candidates included in the select list were not appointed. They filed a writ petition before the

High Court claiming a right of being appointed on the ground that vacancies existed and they were qualified and were found suitable. The writ

application was allowed. While reversing the decision of the High Court, it was observed by this Court that it was open to the government to

decide how many appointments should be made and although the High Court had appreciated the position correctly, it had ""somehow persuaded

itself to spell out a right in the candidates because in fact there were 15 vacancies"". It was expressly ruled that the existence of vacancies does not

give a legal right to a selected candidate. Similarly, the claim of some of the candidates selected for appointment, who were petitioners in Jatendra

Kumar v. State of Punjab, was turned down holding that it was open to the government to decide how many appointments would be made. The

plea of arbitrariness was rejected in view of the facts of the case and it was held that the candidates did not acquire any right merely by applying

for selection or even after selection. It is true that the claim of the petitioner in the case of Neelima Shangla v. State of Haryana, was allowed by

this Court but, not on the ground that she had acquired any right by her selection and existence of vacancies. The fact was that the matter had been

referred to the Public Service Commission which sent to the government only the names of 17 candidates belonging to the general category on the

assumption that only 17 posts were to be filled up. The government accordingly made only 17 appointments and suited before the court that they

were unable to select and appoint more candidates as the Commission had not recommended any other candidate. In this background it was

observed that it is of course, open to the government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily

restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates and, there must be a conscious

application of mind by the government and the High Court before the number of persons selected for appointment is restricted. The fact that it was

not for the Public Service Commission to take a decision in this regard was emphasised in this judgment None of these decisions, therefore,

supports the appellant.

9. Mr Goswami appearing in support of the appeal has contended that in view of the relevant statutory rules, the authorities were under a duty to

continue with the process of filling up all the vacancies until none remained vacant Reference was made to Rule 4 of the Indian Police Service

(Cadre) Rules, 1954, Rules 3, 4, 6 and 7 of the Indian Police Service (Recruitment) Rules, 1954 and Regulations 2(1)(a), 2(1)(c), 8 and 13 of the

Indian Police Service (Appointment by Competitive Examination) Regulations, 1965. We do not think any of these rules comes to the aid of the

appellant Rule 3 of the Cadre Rules directs constitution of separate cadres for States or group of States, and Rule 4 empowers the Central

Government to determine the strength in consultation with the State Governments. The strength has to be re-examined at intervals of 3 years. Rule

3 of Recruitment Rules deals with the constitution of the Service, and Rule 4 the method of recruitment Rules 6 and 7 give further details in this

regard The learned counsel could not point out any provision indicating that all the notified vacancies have to be filled UP. Similar is the position

with respect to the Competitive Examination Regulations. Regulation 2(1)(a) defines available vacancies as vacancies determined by the Central

Government to be filled on the results of the examination, described in Regulation 2(1)(a). Regulation 8 prescribes that the candidates would be

considered for appointment to the available vacancies subject to provisions 9 to 12 and Regulation 13 clarifies the position that a candidate does

not get any right to appointment by mere inclusion of his name in the list The final selection is subject to satisfactory report on the character,

antecedent and suitability of the candidates. We therefore, reject the claim that the appellant had acquired a right to be appointed against the

vacancy arising later on the basis of any of the rules.

(Emphasis supplied)

The aforesaid decision is delivered by a Constitutional Bench and by virtue of this judgment also, even successful candidates, forming part of (he

select list have no indefeasible right to be appointed. The public advertisement, which is referred to in the aforesaid decision is a notification,

wherein, a number of vacancies have been advertised, which is nothing but an invitation to qualify for the posts, in question. Thus, even those, who

are selected for the advertised posts have no right to be appointed because advertisement is an invitation to become a qualified candidate, but a

qualified candidate (in common parlance forming part of the select list) has no right to be appointed. There is no legal duty, vested in the State that

even though the posts are advertised and even though the select list is prepared, all the candidates must be appointed. As per example; if the

advertisement is given for ""X"" number of posts and select list is prepared for ""Y"" number of candidates, then also State has all power to appoint

X"" ""Y"" number of posts. In the light of the aforesaid decision, this is an exclusive power of the State, which has no corresponding ""right"" or ""duty"".

Thus, even for the advertised posts, there is no legal obligation upon the State to appoint all the selected candidates, because select list is

technically, in the eye of law, known as list of the ""qualified candidates"". The facts of the present case is worse than the aforesaid facts because the

present petitioners are never forming part of the select list for the 384 posts, so advertised. The present petitioners are in search of their

appointment towards the vacancies which are not advertised and though they are not forming part of the Select list for those unadvertised posts,

namely 1595 posts, they are seeking appointments which is definitely not permissible in the eye of law and in the light of the aforesaid decision.

One more fact has been highlighted in para-9 of the aforesaid decision that there was a statutory rule and under the said rule it was the duty of the

concerned ""State"" to continue with the process of filling up the vacancies, until none remains vacant Despite this rule, more than advertised

vacancies cannot be filled up. Thus, even in presence of such rule that every single vacancy should be filled up and no posts in a particular cadre

should remain vacant, such type of rule also cannot be operated for filling up more posts than what is advertised. If these facts are compared with

the facts of the present case, perhaps, there is no case with the petitioners at all, because here number of advertised posts is only 384 and the State

is not ready to fill up more posts than what is advertised. In view of these facts, contention raised by the counsel for the petitioners that writ of

mandamus be issued upon the State to advertise all the posts which are vacant i.e. 1595 posts must be filled up from the said examination, is not

accepted by this Court in the light of the aforesaid decision.

(viii) It has been held by the Hon''ble Supreme Court in the case of Hoshiar Singh Vs. State of Haryana and Others, , at paragraph 10 as under:-

10. The learned counsel for these appellants have not been able to show that after the revised requisition dated January 24, 1991 whereby the

Board was requested to send its recommendation for 8 posts, any further requisition was sent by the Director General of Police for a larger

number of posts. Since the requisition was for eight posts of Inspector of Police, the Board was required to send its recommendations for eight

posts only. The Board, on its own, could not recommend names of 19 persons for appointment even though the requisition was for eight posts only

because the selection and recommendation of larger number of persons than the posts for which requisition is sent. The appointment on the

additional posts on the basis of such selection and recommendation would deprive candidates who were not eligible for appointment to the posts

on the last date for submission of applications mentioned in the advertisement and who became eligible for appointment thereafter, of the

opportunity of being considered for appointment on the additional posts because if the said additional posts are advertised subsequently those who

become eligible for appointment would be entitled to apply for the same. The High Court was, therefore, right in holding that the selection of 19

persons by the Board even though the requisition was for 8 posts only, was not legally sustainable.

(Emphasis supplied)

In the aforesaid case, requisition was sent only for eight posts. They were also pertaining to police personnel. Later on, Director General of Police

sent another requisition for 19 posts but the Examining Body, i.e. the selection Board, sent the names of only eight persons as selected candidates.

Rest of the candidates from serial No. 9 onwards filed a writ petition for their selection on the basis of further requisition, made by the Director

General of the Police of the State of Haryana. The Hon''ble Supreme Court has decided that only eight candidates can be appointed because the

advertisement was only for eight candidates and not more. Subsequent requisition, to fill up back log or to fill up accumulated vacancies or to fill up

existing posts is of no value, in the eye of law. All these vacancies, in the eve of law, will be known as ""Future vacancies"" and, therefore, only eight

candidates will be selected and not 19 candidates. In the facts of the present case also advertised posts are 384. The petitioners are seeking

appointments up to 1595 vacancies. This calculation of vacancies appears to be five times more than the total number of vacancies, advertised i.e.

384. Be that as it may, what is not advertised cannot be filled up. Though there was further requisition, then also more than eight posts could not be

filled up, as directed in the aforesaid case. In the present case, neither there is advertisement for more than 384 posts, nor, there is any requisition,

for more than 384 posts and therefore, the case of the present petitioners is much weaker than the case of the those candidates, who are referred

to in the aforesaid reported decision,

(ix) It has been held by the Hon''ble Supreme Court in the case of Gujarat State Dy. Executive Engineers'' Association Vs. State of Gujarat and

Others, , at paragraphs 9 and 10 as under;-

9. A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment It is operative only for the

contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the

vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from

the waiting list But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from

the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become

eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments,

there is a danger that the State Government may resort to the device of not holding an examination for years together and pick UP candidates from

the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which

may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates

either from the open or even from service.

10. How a waiting list is to operate in the State is clear from a circular issued by the State Government on 27-12-1983. The relevant portion of the

circular is extracted below:

According to the instructions issued by the department often and often, waiting list prepared by the Gujarat Public Service Commission over and

above the number of posts requisitioned shall remain in force up to 2 years or under circumstances up to the declaration of the result of next

examination. The basic purpose of the preparation of waiting list is when sufficient candidates are not available from the merit list prepared for

requisition of particular year, shortfall can be met with from waiting list or for making recruitment during emergent condition, waiting list cannot be

considered as merit list for that year or of next year, similarly waiting list cannot be used as a substitute to the requisition of next year. Further as the

requisition statement for the particular year is sent for the post allocable to direct recruitment for that year as per provision in relevant rules,

naturally the requirement of subsequent year cannot be incorporated. Considering on the above facts it is not fair to stop the regular procedure of

recruitment or not to give new advertisement for the reason that merit list or waiting list prepared as part of merit list of previous year is in force.

Although the circular was issued in 1983 but it only attempted to clarify what was the implied purpose of a waiting list Even without it, the

operation of a waiting list should be confined to the vacancies notified for that examination and not for any vacancy arising in future unless a policy

decision is taken by the Government to that effect. Appointment in future vacancies from waiting list prepared by the Commission should be

exception rather than the rule. It has many ramifications. In any case, the High Court should not have assumed upon itself the role of appointing

authority unless it found that the Government was acting arbitrarily. No rule has been shown that selection of direct recruits was to take place every

year. In absence of such rule, the proviso could not apply. However, its validity was not challenged either in the High Court or in this Court. It has,

therefore, to be construed so as not to defeat the objective of its enactment For its working reasonably it has to be understood that once

recruitment by direct selection has been made in any year then the quota of direct recruits till then should be deemed to have been exhausted and if

any vacancy could not be filled for any reason then it should be deemed to have lapsed and could not be carried forward. Read in this manner the

quota of direct recruits till 1980 got exhausted. But it could not affect quota of 1981-82 and 1982-83, therefore, no appointments on the quota of

direct recruits for 1981-82 and 1982-83 could be made from the waiting list of 1980. The entire exercise undertaken by the High Court of finding

out number of vacancies was thus an exercise in futility. Further, what the High Court has done is that it has not worked out the vacancies only till

the examinations were held but it went further to hold that since the result of the next examination was declared in 1983 the vacancies for direct

recruits arising between the date the result of 1980 examination was declared and before the result of 1982 was declared could be filled from the

waiting list of 1980. In other words, the waiting list instead of being a list for filling the vacancy in exigencies arising out of non-joining of a

candidate for the year for which the examination was held became a source of recruitment for the vacancies which were to arise between 1980

and 1983. And if the vacancies which arose in 1981-82 and 1982-83 are filled by this method then the examination of 1982 was held for which

vacancy as normally the Government sends the requisition for the vacancies existing on the date of sending the requisition. We can appreciate the

anxiety of the High Court that if examinations are not held regularly as has happened between 1983 to 1993 it may result in depriving fresh

candidates from being selected and their post may be filled by promotees. But such concern could not result in nullifying entire procedure. The

better course would have been to direct the Government to work out the vacancies and fill them by holding an examination, if necessary, in

addition to the examination already held. But the procedure adopted by the High Court of giving such vacancies to candidates who were in the

waiting list does not appear to be correct. There was no contingency nor the State Government had taken any decision to fill the vacancies from

the waiting list as it was not possible for it to hold the examination nor any emergent situation had arisen except the claim of some of the candidates

from the waiting list that they should be given appointment for vacancies which arose between 1980 and 1983 and between 1983 and 1993. Such

claim of the appellants who had appeared in a particular examination and were placed in the waiting list could not be sustained. In fact, the action

of the State Government in not sending the requisition every year or at the most every second year to the Commission for holding an examination

for vacancies which had arisen or were likely to arise was liable to be commented upon and the State Government should have been directed to

take care in future that the examinations are held regularly. But in no case the vacancies arising in future should have been offered to the candidates

in the waiting list of the earlier year. The direction of the High Court, therefore, to appoint the candidates from the waiting list in the vacancies

which, according to its calculation, arose between the years 1980 to 1983 and between 1983 to 1993 cannot be upheld.

(Emphasis supplied)

In the aforesaid decided case, an argument was canvassed before the concerned High. Court that though the advertisement was for ""X"" posts, but

there were some more vacancies with the State Government The counsel at the High Court has recalculated the vacancies for the posts of Deputy

Executive Engineer. The concerned High Court allowed the writ petition by re-calculating the vacancies, as ""X + Y"" posts, which were more than

the advertised vacancies. An error in law has been committed in recalculating the vacancies. Perhaps it is not within the domain of the High Court

More than the advertised posts were declared by the concerned High Court as vacant posts. Waiting list was operated. ""Waiting list candidates

were pushed up in ""the select list"", because as per the concerned High court more than advertised posts were vacant There was an order by the

concerned High Court to appoint all those wait listed candidates because the vacant posts were enhanced by the High Court by way of re-

calculation. This judgment and order was challenged before the Hon''ble Supreme Court and by virtue of the aforesaid two paragraphs, it has been

decided by the Hon''ble Supreme Court that the exercise undertaken by the High Court of recalculating the vacancies and thereby to issue a writ of

mandamus, directing the State to fill up more posts than what is advertised, is an exercise in ""futility"". A detailed judgment has been given also

narrating the circumstances where waiting list can be operated. Once, the selected candidates are appointed as per the advertisement, for no

reason whatsoever (by enhancing the vacancies, either by the State itself or by the court), waiting list cannot be operated except in exceptional

cases. Those exigencies have also been pointed out in para 9 of the aforesaid decision, otherwise any-waitlisted candidate will be appointed under

the guise of recalculation of the vacancies. If such type of arguments are allowed that from very same examination, though the advertised posts are

filled up, still, there are vacancies, and, therefore, all the rest of the candidates may be appointed, then it will lead to an arbitrariness on the part of

the State because as for example; though advertisement is given for 100 posts, a list of 5000 candidates will be prepared and always, whenever

there is need for appointment of any candidate, from serial no. 101 up to 5,000 the list will be operated. This is not permissible in the eyes of law.

One generation has no monopoly upon the future generation. Lots of candidates, who are selected in one particular year cannot be appointed for

all time to come. It may also be noted that if the advertised posts are 100 and the list of selected candidates is prepared for 5000 candidates, then,

after 100 candidate it will be deemed to be ""the waiting list"". First 100 candidates'' list is known as ""the select list"". Sometimes, this terminology is

not clear to those who are taking examination and publishing the result Therefore, in the aforesaid decision, it has been clarified that those who are

forming part of ""the waiting list"", meaning thereby those, whose numbers are beyond the number of advertised posts, cannot be appointed against

the future vacancies automatically, as they are known as waitlisted candidates. Here also, in the facts of the present case, advertisement is only for

384 posts. The candidates will be arranged in serial numbers after their examinations are over and these candidates from serial number 1 to 384

will be appointed and the candidates from serial no. 385 onwards will be known as the waitlisted candidates"". These candidates will be forming

part of the waitlisted candidates, who, as a matter of right cannot claim appointment for the posts, which are not advertised (which, in the eves of

law, is known as ""future vacancies""). Thus, though the aforesaid paragraph nos. 9 and 10 are pertaining to waitlisted candidates, the ratio

decidendi of the aforesaid decision is equally applicable to the present case, because technically they are known as waitlisted candidates who are

beyond serial No. 384. A competitive examination is not like a B.A./B.Com./B.Sc. examinations. In a competitive examination there is nothing like

passing the standard of 35 marks etc. All the candidates will be arranged in a serial number as per their marks. Cut off line in between ""the select

list"" and ""the wait list"" will be the number of posts advertised. If, the number of posts advertised is 384, first merit-wise arranged 384 candidates

will be known as the merit list candidates. Even though no waiting list is published, rest of the candidates in the eyes of law will be known as

waitlisted candidate. They are technically known as waitlisted candidates. In the facts of the present case, since all the petitioners, who are not

falling within the first merit-wise arranged candidates i.e. from Serial No. 1 to 384, in the eyes of law, are waitlisted candidates. As such, in the light

of para nos. 9 and 10 of the aforesaid decision, petitioners of the present case cannot, as a matter of right, pray for a writ of mandamus to be

issued upon the State for their appointments. One more crucial aspect, which has been decided in the aforesaid case, is the modus operandi to be

followed by the concerned High Court It has been suggested in para 10 of the aforesaid decision that the better course would have been to direct

the Government to work out the vacancies and fill them up by holding examinations, if necessary, in addition to the examination already held. But

the procedure adopted by the High Court of giving such vacancies to the candidates, who were in the waiting list, does not appear to be correct

Meaning thereby, better course is to direct the Government to take another examination by another fresh requisition, but, in no circumstance, High

Court can direct the Government to fill up those vacancies, which are not advertised and for which no examination has been taken. This is not

permissible in the eyes of law.

(x) It has been held by the Hon''ble Supreme Court in the case of Banaras Hindu University and Another Vs. Dr N.N. Pandita, , at paragraph 7 as

under :-

7. Having carefully considered the advertisement and the various averments in the affidavits and the counter-affidavits, we are of the view that the

crucial question is whether in fact the advertisement and the initial decision of the High Court were meant to fill up only 32 vacancies and whether

accordingly the High Court called for only 129 candidates from the list, who appeared for the written test in the ratio of 1 : 4 and whether

consequently the whole selection process was confined to fill up only those 32 vacancies? If the answer is in the affirmative then the question of the

same list subsisting for one more year for filling up the subsequent vacancies did not arise in spite of the resolution of the High Court dated

November 24, 1990. As noted above in the reply affidavit, the Registrar of the High Court categorically stated that 32 vacancies were available

and to fill up the same, 129 candidates were called for interview namely four times of the number of vacancies and that the rest of the vacancies

arose later on. To satisfy ourselves, we have also called for the relevant records from the High Court and the same is placed before us in a sealed

cover. A perusal of the records shows that in the Full Court meeting on May 5, 1990 it was resolved that on the basis of the result of the

preliminary screening test, four times of number of candidates to be selected for appointment be called for interview. From the proceedings of

another Full Court meeting held on September 15, 1990 it is clear that it was resolved that 128 candidates alone in order of merit should be called

for interview. The proceedings of the Full Court meeting dated November 24, 1990 would show that the Full Court finalised the selection for filling

up 32 vacancies only and sent a list of 32 candidates in order of merit. However, a further resolution was passed that if any further vacancy in the

quota of the direct recruits was required to be filled up within a period of one year the same be filled up by recommending the candidates in order

of merit from amongst the remaining candidates in the merit list. It is therefore crystal clear that the advertisement and the whole selection process

that ensued were meant only to fill up 32 vacancies. Learned counsel for the respondents relying on the decisions of this Court in Kailash Chander

Sharma v. State of Haryana and O.P. Garg v. State of U.P. contended that when there are temporary vacancies, the direct recruits should have

their share of quota in respect of temporary vacancies also. As noted above, the temporary vacancies arose subsequently but even otherwise in the

view we are taking namely that the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not

to fill up the other vacancies, the merit list prepared on the basis of the written test as well as the viva voce will hold good only for the purpose of

filling up those 32 vacancies and no further because the said process of selection for those 32 vacancies sot exhausted and came to an end. If the

same list has to be kept subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights of other

candidates who would have become eligible subsequent to the said advertisement and selection process.

(Emphasis supplied)

In the aforesaid decision, it has been held by the Hon''ble Supreme Court that the candidates, who have been selected, cannot be appointed over

and above ""the other vacancies. Here, the word used by the Hon''ble Supreme Court is ""other vacancies"" meaning thereby other than what is

advertised. Thus, one more word has been used in the service jurisprudence. Earlier word is ""future vacancies"" and now, by virtue of this decision,

one more phraseology is used by the Hon''ble Supreme Court i.e. ""other vacancies"", because there was some arguments about the ""future

vacancies"", as argued in the present case also. It is contended by petitioners that the vacancies of 1595 posts are not, in fact, ""future vacancies

because they are accumulated backlogs and past vacancies. Thus, by virtue of the aforesaid decision, the posts, which are not advertised, cannot

be filled up. The posts which are not advertised are known as ""other vacancies"". Thus, Hon''ble Supreme Court has used the words ""other

vacancies"" in place of ""future vacancies"". Here, in the cases in hand, only 384 vacancies have been advertised and thus, rest of the vacancies.

which may be past accumulated vacancies, existing vacancies or future vacancies, will be known as ""the other vacancies"". These ""other vacancies

cannot be filled up, because there is no advertisement for these ""other vacancies"" and therefore, the contention about the literal meaning of the

word ""future vacancies"", which was creating some confusion, has also been brought to an end. Now, these type of vacancies, namely past

backlog, existing vacancies and future vacancies are now known as ""other vacancies"". A golden thread running throughout all the aforesaid

decisions is that even though there may be a rule not to keep any vacancy and to fill up all the posts, but what is not advertised, cannot be filled up.

Therefore, the contention raised by the learned counsel for the petitioners is not accepted by this Court

(xi) It has been held by the Hon''ble Supreme Court in the case of Madan Lal and Others Vs. State of Jammu and Kashmir and Others, , at

paragraphs 23, 24 and 27 as under :-

23. It is no doubt true that even if requisition is made by the Government for 11 posts the Public Service Commission may send merit list of

suitable candidates which may exceed 11. That by itself may not be bad but at the time of giving actual appointments the merit list has to be so

operated that only 11 vacancies are filled up because the requisition being for 11 vacancies, the consequent advertisement and recruitment could

also be for 11 vacancies and no more. It is easy to visualise that if requisition is for 11 vacancies and that results in the initiation of recruitment

process by way of advertisement, whether the advertisement mentions filling up of 11 vacancies or not the prospective candidates can easily find

out from the Office of the Commission that the requisition for the proposed recruitment is for Filling, up 11 vacancies. In such a_ case a given

candidate may not like to compete for diverse reasons but if requisition is for larger number of vacancies for which recruitment is initiated, he may

like to compete. Consequently the actual appointments to the posts have to be confined to the posts for recruitment to which requisition is sent by

the Government In such an eventuality, candidates in excess of 11 who are lower in the merit list of candidates can only be treated as wait-listed

candidates in order of merit to fill only the 11 vacancies for which recruitment has been made, in the event of any higher candidate not being

available to fill the 11 vacancies, for any reason. Once the 11 vacancies are filled by candidates taken in order of merit from the select list that list

will set exhausted having served its purpose.

24. It is now time to refer to Rule 41 as pointed out by the learned counsel for the petitioners. The said rule reads as under:

Security of the list.-- The list and the waiting list of the selected candidates shall remain in operation for a period of one year from the date of its

publication in the Government Gazette or till it is exhausted by appointment of the candidates whichever is earlier, provided that nothing in this rule

shall apply to the list and the waiting list prepared as a result of the examination held in 1981 which will remain in operation till the list or the waiting

list is exhausted.

A mere look at the rule shows that pursuant to the requisition to be forwarded by the Government to the Commission for initiating the recruitment

process, if the Commission has prepared the merit list and the waiting list of selected candidates such list will have a life of one year from the date

of publication in Government Gazette or till it is exhausted by the appointment of candidates, whichever is earlier. This means that if requisition is

for filling UP of 11 vacancies and it does not include any anticipated vacancies, the recruitment to be initiated by the Commission could be for

selecting 11 suitable candidates. The Commission may by abundant caution prepare a merit list of 20 or even 30 candidates as per their inter se

ranking on merit But such a merit list will have a maximum life of one year from the date of publication or till all the required appointments are made

whichever event happened earlier. It means that if requisition for recruitment is for 11 vacancies and the merit list prepared is for 20 candidates, the

moment 11 vacancies are filled in from the merit list the list gets exhausted or if during the span of one year from the date of publication of such list

all the 11 vacancies are not filled in the moment the year is over the list sets exhausted In either event thereafter, if further vacancies are to be filled

in or remaining vacancies are to be filled in after one year, a fresh process of recruitment is to be initiated giving a fresh opportunity to all the open

market candidates to compete. This is the thrust of Rule 41. It is in consonance with the settled legal position as we will presently see. We cannot

agree with the learned counsel for respondents that during the period of one year even if all the 11 vacancies are filled in for which requisition is

initiated by the State in the present case and if some more vacancies arise during one year, the present list can still be operated upon because the

Commission has sent the list of 20 selected candidates. As discussed above, the candidates standing at Serial Nos. 12 to 20 in the list can be

considered only in case within one year of its publication, all the 11 vacancies do not get filled up for any reason. In such a case only this additional

list of selected candidates would serve as a reservoir from which meritorious suitable candidates can be drawn in order of merit to fill up the

remaining requisitioned and advertised vacancies, out of the total 11 vacancies. If that cannot be done for any reason within one year of the

publication of the list, even this reservoir will dry up and the entire list will get exhausted. We asked learned counsel for respondent-State to point

out whether after the letter at page 87, there was any further communication by the State to the Commission to initiate the process for recruitment

to additional anticipated vacancies. He fairly stated that no further request was sent. That letter at page 87 is the only material for this purpose since

that is the basis for the recruitment made by the Commission in the present case. In this connection, we may usefully refer to a decision of this

Court in the case of State of Bihar v. Madan Mohan Singh. In that case appointments to the posts of Additional District and Sessions Judges were

being questioned. The question was whether appointments could be made to more than 32 posts when the selection process was initiated for filling

up 32 vacancies and whether the merit list of larger number of candidates would remain in operation after 32 vacancies were filled in. Negativing

the contention that such merit list for larger number of candidates could remain in operation after 32 advertised vacancies were filled in, K.

Jayachandra Reddy, J. made the following pertinent observations: (AIR head note)

Where the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other

vacancies, the merit list of 129 candidates prepared in the ratio of 1 : 4 on the basis of the written test as well as viva voce will hold good only for

the purpose of filling up those 32 vacancies and no further because said process of selection for those 32 vacancies got exhausted and came to an

end. If the same list has to be kept subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights

of other candidates who would have become eligible subsequent to the said advertisement and selection process.

27. In the present case as the requisition is for 11 posts and even though the Commission might have sent list of 20 selected candidates,

appointments to be effected out of the said list would be on 11 posts and not beyond 11 posts, as discussed by us earlier. This contention will

stand accepted to the extent indicated hereinabove.

(Emphasis supplied)

In the facts of the aforesaid case, only 11 posts were advertised. Merit list of 11 candidates was prepared and the Hon''ble Supreme Court has

held that only 11 candidates can be appointed and no more. In the aforesaid case, the arguments canvassed by the waitlisted candidates was that

the select list will remain operative for one year and for one year, if there is any more vacancies than what is advertised, then in that case

candidates should be appointed. The Hon''ble Supreme Court has not accepted this contention and has decided that beyond 11 vacancies, which

are advertised, no appointment can be made from the waitlisted candidates.

(xii) It has been held by the Hon''ble Supreme court in the case of Prem Singh v. Haryana State Electricity Board, reported in (1996) 4 SCC 319,

at paragraphs 23 to 26 as under :-

23. In State of Bihar v. Madan Mohan Singh this Court has in terms held that if the advertisement and the consequent selection process were

meant only to fill up a certain number of vacancies then the merit list will hold good for the purpose of filling up those notified vacancies and no

further. In that case 32 vacancies were advertised but a select list of 129 candidates was prepared. A question arose whether more candidates

could be appointed on the basis of the said select list This Court held that once the 32 vacancies were filled up the process of selection for those

32 vacancies got exhausted and came to an end. It was further held that if the same list has to be kept subsisting for the purpose of filling up other

vacancies also that would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the said

advertisement and selection process.

24. One of the questions which fell for consideration in Madan Lal v. State of J & K was whether preparation of merit list of 20 candidates was

bad as the vacancies for which the advertisement was issued by the Commission were only 11 and the requisition that was sent by the Government

for selection was also for those 11 vacancies. This Court held that the said action of the Commission by itself was not bad but at the time of giving

actual appointments the merit list had to be so operated that only 11 vacancies were filled up. The reason given by this Court was that as the

requisition was for 11 vacancies the consequent advertisement and recruitment could also be for 11 vacancies and no more. This Court further

observed:

It is easy to visualise that if requisition is for 11 vacancies and that results in the initiation of recruitment process by way of advertisement, whether

the advertisement mentions filling up of 11 vacancies or not, the prospective candidates can easily find out from the Office of the Commission that

the requisition for the proposed recruitment is for filling up 11 vacancies. In such a case a given candidate may not like to compete for diverse

reasons but if requisition is for larger number of vacancies for which recruitment is initiated, he may like to compete. Consequently the actual

appointments to the posts have to be confined to the posts for recruitment to which requisition is sent by the Government. In such an eventuality,

candidates in excess of 11 who are lower in the merit list of candidates can only be treated as wait-listed candidates in order of merit to fill only the

11 vacancies for which recruitment has been made, in the event of any higher candidate not being available to fill the 11 vacancies, for any reason.

Once the 11 vacancies are filled by candidates taken in order of merit from the select list that fist will get exhausted, having served its purpose.

It may also be stated that while making the aforesaid observations this Court agreed with the contention that while sending a requisition for

recruitment to posts the Government can keep in view not only actual vacancies then existing but also anticipated vacancies.

25. From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started

for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of

posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more

candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances

only or in an emergent situation and that too by taking a policy decision in that behalf Even when filling up of more posts than advertised is

challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a

manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be

granted in such cases would depend upon the facts and circumstances of each case.

26. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62

clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in

making more than 62 appointments pursuant to the advertisement published on 2-11-1991 and the selection process which followed thereafter.

But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement

etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess

of 62. However, the appointments which were made against future vacancies -- in this case on posts which were newly created -- must be

recorded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of

deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through

oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made

against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be

quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on

those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the

view it has taken, we modify its order to the aforesaid extent These appeals are allowed accordingly. No order as to costs.

(Emphasis supplied)

It has been stated in the aforesaid decision that for calculating the vacancies and for sending the requisition, the State may appreciate the past

backlog and clear vacancies and also the anticipated vacancies. This is the correct method of calculation. But if the requisition and advertisement

are for certain number of posts only, the State cannot make more appointments than the number of posts advertised, even though Selection

Board/Committee has prepared a select list of more candidates. Thus, looking to the aforesaid paragraph no. 25, there may be many more

vacancies, in the facts of the present case, namely 1595. but there may be advertisement for lesser number of posts, in the facts of the present case

384. Once exact and certain number of posts are advertised, no more appointments can be made by the State and ""the vacancies thus cannot be

made ""fluctuating vacancies"". Vacancies to be filled up must be advertised with fixed number. State cannot advertise ""fluctuating vacancies"" to be

filled up, e.g. there cannot be advertisement that advertised posts are ""X"" but State will fill up, as per its desire, ""X + Y"" vacancies. Such type of

power is not vested in the State. If this is permitted by this court, it will lead to arbitrariness on the part of the State. A detailed logic has been given

in the aforesaid decision that some times some meritorious candidates are not applying keeping in mind the lesser number of posts advertised and

they are waiting for large number of vacancies to be advertised. If lesser number of posts, which are advertised, are subsequently converted into a

large number posts, then it will cause injustice to those candidates, who are meritorious, but, have not applied. Sometimes candidates are assessing

their own ability. They are thinking that if very less number of posts are advertised, perhaps they may not be selected and, therefore, these

advertised posts cannot be enhanced by the order of the Court nor the State is empowered to appoint more than number of persons against the

posts which are not advertised. Thus, if the advertised posts are inflated by the order of the Court, as for example in the present case, if it is made

1595 from 384, it will be an injustice to those, who have never applied for the posts, in question, keeping in mind lesser number of vacancies and,

therefore, in all the aforesaid decisions, it has been held that those vacancies, which are backlogs and which are existing or which are going to be

vacant in future, but, not advertised. which are now known as ""future vacancies"" or ""other vacancies"" cannot be filled up.

(xiii) It has been held by the Hon''ble Supreme Court in the case of All India SC and ST Employees Assn. and Another etc. Vs. A. Arthur Jeen

and Others etc., , at paragraph 10 as under :-

10. Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any

indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid

down by the Constitution Bench of this Court, after referring to earlier cases in Shankarsan Dash v. Union of India. Para 7 of the said judgment

reads thus:

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, Neelima Shangla v. State of Haryana or Jatinder Kumar v. State of Punjab.

(Emphasis supplied)

(xiv) Similarly It has been held by the Hon''ble Supreme Court in the case of Union of India (UOI) and Others Vs. B. Valluvan and Others, , at

paragraphs 10 and 17 as under :-

10. Recruitment process, as is well known, must be commensurate with the statute or the statutory rule operating in the field. We have noticed

hereinbefore, advertisement was made for three posts. Ft was not indicated therein that another panel for filling up of the future vacancies was to

be prepared by the Selection Committee. In the select list prepared by the Selection Committee, the name of the 1st respondent was at Sl. No. 4.

Recommendations were made containing the names of 19 persons for future vacancies. Only because a panel has been prepared by the Selection

Committee, the same by itself, in our opinion, would not mean that the same should be given effect to irrespective of the fact that there was no such

rule operating in the field. The Selection Committee was bound to comply with the selection process only in terms of the extant rules. It was bound

to follow the stipulations made in the advertisement itself. Even in the advertisement it was not indicated that a select list would be prepared for

filling up of future vacancies. The Selection Committee, having been appointed only for recommending the names of suitable candidates, who were

fit to be appointed, could not have embarked upon the question as regards likelihood of future vacancy.

17. The life of a panel ordinarily is one year. The same can be extended only by the State and that too if the statutory rule permits it to do so. The

High Court ordinarily would not extend the life of a panel. Once a panel stands exhausted upon filling up of all the posts, the question of enforcing a

future panel would not arise. It was for the State to accept the said recommendations of the Selection Committee or reject the same. As has been

noticed hereinbefore, alt notified vacancies as also the vacancy which arose in 2000 had also been filled up. As the future vacancy had already

been filled up in the year 2000, the question of referring back to the panel prepared in the year 1999 did not arise. The impugned judgment,

therefore, cannot be sustained.

(Emphasis supplied)

In the aforesaid two decisions, it has been decided by the Hon''ble Supreme Court that once the selected candidates have been appointed, the

select list comes to an end. It cannot be operated thereafter at all for any type of left out vacancies, which may be backlog/existing vacancies/future

vacancies.

(xv) It has been held by the Hon''ble Supreme court in the case of Mukul Saikia and Others Vs. State of Assam and Others, at paragraph 33 as

under :-

33. At the outset it should be noticed that the select list prepared by APSC could be used to fill the notified vacancies and not future vacancies. If

the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised, even though APSC

had prepared a select list of 64 candidates. 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 fact that evidently and

admittedly the names of the appellants appeared in the select list dated 17-7-2000 below the persons who have been appointed on merit against

the said 27 vacancies, and as such they could not have been appointed in excess of the number of posts advertised as the currency of select list

had expired as soon as the number of posts advertised are filled up therefore, appointments beyond the number of posts advertised would amount

to filling up future vacancies meant for direct candidates in violation of quota rules. Therefore, the appellants are not entitled to claim any relief for

themselves. The question that remains for consideration is whether there is any ground for challenging the regularisation of the private respondents.

(Emphasis supplied)

In the aforesaid decided case, the advertised vacancies were only 27, whereas Andhra Pradesh Public Service Commission prepared a select list

of 64 candidates. It has been held by the Hon''ble Supreme Court that the select list comes to an end or it ceases to exist no sooner did the

advertised posts get filled up. i.e. 27 candidates are appointed. Thus, the very selected candidates from serial number 28 to 64 cannot claim their

right to be appointed even though there is ""any type of vacancies"". There may be some vacancies, but, there was no advertisement for those posts.

In the facts of the present case also, more than 384 candidates cannot be appointed, even though there is ""any type of vacancies"".

(xvi) It has been held by the Hon''ble Supreme Court in the case of S.S. Balu and Another Vs. State of Kerala and Others, , at paragraph 12 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. Rata Narasaiah Zangiti.) 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.) In

Shankarsan Dash v. Union of India 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.

(Emphasis supplied)

In view of the aforesaid decision, there is no right vested even in a candidate, who is forming part of the select list to be appointed. It has been

further held by the Hon''ble Supreme Court that State as an employer has a right to fill up all the posts or not to fill them up. In fact, in the opinion

of this Court, it is a prerogative power vested in the State either to fill up the posts or not to fill them up and as per Service Jurisprudence there is

no corresponding ''right'' or ''duty'' of the word ""power"". There is several prerogative ""powers"" of the State, which have no corresponding ""legal

obligations"" or ""a right"" vested in any person. One of them is either to fill up all the posts, which are vacant or to fill them up partly. All this depends

upon the public need: administrative exigencies or looking to the availability of infrastructure or looking to the budgetary provisions. Above all even

if other factors are positive, then also it is a prerogative power of the State not to fill up all the vacancies, despite there being enough infrastructure

etc. This power, vested in the State, cannot be labelled as a ""public duty"" to fill up all the vacancies. Citizens may be capable of holding those

posts; they may be more helpful to the State; their ability may be very useful to the public at large, had they been appointed on the posts of Sub

Inspector, Sargent Company Commander, but, the State has all power not to appoint them and not to fill up all the vacancies, There is no legal

obligation on the part of the State that whatever vacancies are falling vacant they must be filled up immediately. Article 16 of the Constitution of

India never creates any right to the citizens that at one stretch or in one go all the vacancies must be filled up- It may be a strategic method of the

State that if phase-wise public posts are filled up they may get better candidates because they have studied latest technology or latest knowledge

had been gathered by them, otherwise all the police inspectors will be employed having no knowledge of latest technology. There may be a

circumstance, which has been kept in mind by (he State that if the posts of Sub Inspector are filled up in a phase-wise manner, the new candidates

who are oven fresh graduates having forensic science degrees may apply. It is not obligatory on the part of the State to disclose its mind. The

thinking process is a complex phenomenon of the State. High Court in its power under Article 226 of the Constitution of India can not go beyond

the thinking process of the State and, therefore, it is technically known as ""policy decision"", which in the political science, is known as ""the exclusive

power of the State"". Neither the policy decision can be altered by this Court nor this Court can issue a writ of mandamus to exercise ""the exclusive

power of the State."" because this power is not a legal obligation at all.

(xvii) It has been held by the Hon''ble Supreme Court in the case of High Court of Judicature For The High Court of Judicature for Rajasthan Vs.

Veena Verma and Another, , at paragraph 25, 27 and 29 to 31 as under :-

25. Since only seven posts were advertised, only seven appointments could be made. However, even assuming that more than seven appointments

could be made, since the Full Court of the High Court recommended only seven persons, the Government could not appoint more than seven. The

practice followed by the authorities in recruitment was that vacancies in the RHJS were determined for filling every fourth post by direct

recruitment and these were advertised. At the relevant time, when the vacancies were advertised in the quota of direct recruits, there were twenty

eight vacancies, therefore seven posts were advertised for direct recruitment in RHJS. Hence in our opinion advertisement of seven vacancies was

rightfully done. The Selection Committee was called upon to make the recommendation for seven posts. The list forwarded by the Selection

Committee was considered and all the seven persons who were recommended by the Selection Committee were recommended by the Full Court

to be appointed.

27. As regards the process of selection and the provision for keeping a list ready for appointment on the fourth post in our opinion the writ

petitioner had no right to get appointment since the advertisement was only for seven posts and the writ petitioner has not challenged the

advertisement

29. The appellants also point out that the advertisement only stated that the number of posts could be increased, but no such increase in fact was

made. We are of the opinion that the Court cannot issue a mandamus to increase the posts.

30. The High Court had appointed a Committee to determine the vacancies for the period 1-8-1991 to 31-7-1992. The Committee reported that

twenty-eight vacancies had occurred during the said period. On the recommendation of the said Committee, the Full Court of the High Court

resolved on 29-9-1993 that seven vacancies were to be filled by direct recruits. The said resolution is extracted below:

Having considered the report of the Promotion Committee, resolve that seven vacancies are determined for direct recruitment to the RHJS cadre

keeping reservation for Scheduled Castes/Scheduled Tribes as per Rules.

It is evident that the selection was only for seven posts. In the Full Court resolution it was nowhere mentioned that the posts were likely to

increase.

31. Subsequent ad hoc promotions were for subsequent vacancies and for that there was a fresh advertisement In our opinion, the writ petitioner

could not have any claim to he appointed against future vacancies in view of the decision in Shankarsan Dash v. Union of India wherein it was

observed:

9.... We therefore, reject the claim that the appellant had acquired a right to be appointed against the vacancy arising later on the basis of any of

the rules.

(Emphasis supplied)

It has been held by the Hon''ble Supreme court in the aforesaid decision that advertisement was given for a fixed number of posts and it has been

stated in this decision that court cannot issue a writ of mandamus to increase the advertised posts.

(xviii) It has been held by the Hon''ble Supreme Court in the case of Rakhi Ray and Others Vs. The High Court of Delhi and Others, , at

paragraph 7,11,12 and 24 as under :-

7. 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 emergent situation, such a rule can be deviated from and such

a deviation is permissible only after adopting policy decision based on some rationale"", otherwise the exercise would be arbitrary. Filling up of

vacancies over the notified vacancies amounts to filling up of future vacancies and thus, is not permissible in law.

11. In Mukul Saikia v. State of Assam 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 are filled up therefore, appointments beyond the number of posts

advertised would amount to filling up future vacancies"" and said course is impermissible in law.

12. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without

jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the

vacancies notified stand filled up the process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy

which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot

be pressed in service any more.

24. A person whose name appears in the select list does not acquire any indefeasible right of appointment Empanelment at the 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. In the instant case, once 13 notified vacancies were filled

up, the selection process came to an end, thus there could be no scope of any further appointment.

(Emphasis supplied)

In the aforesaid decision, it has been stated by the Hon''ble Supreme Court that it is a settled legal position that the vacancies cannot be filled up

over and above the number of vacancies advertised. For not doing so, a detailed reason has been given based upon Article 14 and Article 16 of

the Constitution of India. It has been further held by Hon''ble Supreme Court that if this eventuality is allowed by this Court, namely, selection of

the candidates over and above the advertised posts, it will tantamount to deprivation of the constitutional right under Article 14 to be read with

Article 16 of the Constitution of India to all those candidates, who acquired eligibility subsequent to the date of the public advertisement Apart

from the aforesaid reasons, given by the Hon''ble Supreme Court the most crucial reason appears to this Court is that to recruit the candidates

phase-wise is also sometimes helpful to the State, as stated herein above. The fresh candidates from the universities will come with a fresh

knowledge, who are up to date in knowledge and may be more scientific in nature, especially those who are entrusted with the duty to perform

investigation in the criminal matters. The duty of those candidates sometimes is so crucial that it requires up to date knowledge. This may happen

even with doctors, but as we are not concerned with appointment of doctors, this Court is not forming any opinion for the posts of doctors. Thus,

contention raised by the counsel for the petitioners that 1595 vacancies, not being future vacancies or backlog, they may be filled up by the same

very advertisement or by the very same examination, though appears to be very attractive, but of no use at all, because it is not permissible in the

eyes of law. These may be backlog or there may be existing vacancies, they will be known as ""future vacancies""; they may also be known as ""other

vacancies"" (This terminology has been carved out in a decision reported in State of Bihar and another Vs. Madan Mohan Singh and others, or they

may be known as ""any other vacancies"". There is no right vested in these candidates, who are petitioners that as there being a back log only, they

have a right to be appointed and the future candidates may be appointed against future vacancies. As stated herein above, it is the prerogative

power of the State to appoint or to recruit the candidates phase-wise. There is no legal obligation on the part of the State to fill up all the posts at a

time, irrespective of the fact that they are backlogs/ existing vacancies.

(xix) It has been held by the Hon''ble Supreme Court in the case of State of Orissa v. Rajkishore Nanda, reported in (2010) 6 SCC 777, at

paragraphs 11 to 18 as under :-

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 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.

12. In State of Punjab v. Raghbir Chand Sharma 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:

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 Assam 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 ""sot 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 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 India 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.

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.

17. The instant case is required to be examined in view of the aforesaid settled legal proposition. The 1985 Rules provide for determining the

number of vacancies and holding competitive examination ordinarily once in a year. The select list prepared so also is valid for one year. In the

instant case, 15 vacancies were advertised with a clear stipulation that the number of vacancies may increase. The authorities had taken a decision

to fill up 33 vacancies, thus, a select list of 66 persons was prepared. It is also evident from the record that some more appointments had been

made over and above the 33 determined vacancies. Thus, once the selection process in respect of number of vacancies so determined came to an

end, it is no more open to offer appointment to persons from the unexhausted list.

18. It is the exclusive prerogative of the employer/State Administration to initiate the selection process for filling up vacancies occurred during a

particular year. There may be vacancies available but for financial constraints, the State may not be in a position to initiate the selection process for

making appointments. Bona fide decision taken by the appointing authority to leave certain vacancies unfilled, even after preparing the select list

cannot be assailed. The courts/tribunals have no competence to issue direction to the State to initiate selection process to fill up the vacancies. A

candidate only has a right to be considered for appointment, when the vacancies are advertised and selection process commences, if he possesses

the requisite eligibility.

(Emphasis supplied)

In the aforesaid decision, it has been held by the Hon''ble Supreme Court that a select list cannot be treated as a reservoir for the purposes of

appointment beyond the advertised posts. What is not advertised cannot be filled up and for that better course is to direct the State to re-calculate

the vacancies and if there is any need of the State, to give fresh advertisement and to hold fresh examination and thereafter, to select the

candidates. But select list of one examination is not a reservoir for future vacancies or other vacancies or for any other type of vacancies. In para

number 18 of the aforesaid decision, the Hon''ble Supreme Court has used the words ""exclusive prerogative of the employer/State Administration"".

Thus, one more phraseology has been used by the Hon''ble Supreme Court that it is ""an exclusive prerogative of the employer/State administration

that how many vacancies are to be filled up. There is no duty vested an the State to fill up all the vacancies. All depends upon the facts and

circumstances of the case and the situations prevailing with the State itself,

(xx) It has been held by the Hon''ble Supreme Court in the case of Smt. K. Lakshmi Vs. State of Kerala and Others, , at paragraphs 25 to 29 as

under :-

25. The legal position regarding the power of the Government to fill up vacancies that are notified is settled by several decisions of this Court Mr.

Rao relied upon some of those decisions to which we shall briefly refer.

26. In Rakhi Ray v. High Court of Delhi this court declared that the vacancies could not be filled up over and above the number of vacancies

advertised as recruitment of the candidates in excess of the notified vacancies would amount to denial of equal opportunity to eligible candidates

being violative of Articles 14 and 16 (1) of the Constitution of India. This court observed:

It is settled law that vacancies cannot be filled up over and above the number of vacancies advertised as recruitment of the candidates in excess of

the notified vacancies is a denial being violative of Articles 14 and 16(1) of the Constitution of India.

27. In the Hoshiar Singh v. State of Haryana also this court held that appointment to an additional post would deprive candidates, who were not

eligible for appointment to the post on the last date for submission of the applications mentioned in the advertisement and who became eligible for

appointment thereafter, of the opportunity of being considered for such appointment This Court observed;

10. ... The appointment on the additional posts on the basis of such selection and recommendation would deprive candidates, who were not

eligible for appointment to the posts on the last date for submission of applications mentioned in the advertisement and who became eligible for

appointment thereafter of the opportunity of being considered for appointment on the additional posts...

28. In State of Haryana v. Subash Chander Marwaha this court held that the Government had no constraint to make appointments either because

there are vacancies or because a list of candidates has been prepared and is in existence. So also this court in Shankarsan Dash v. Union of Inida,

UPSC v. Gaurav Dwivedi, All India SC& ST Employees" Assn. v. A. Arthur Jeen and Food Corporation of India v. Bhanu Lodh held that mere

inclusion of a name in the select list for appointment does not create a right to appointment even against existing vacancies and the State has no

legal duty to fill up all or any of the vacancies.

29. In the light of the above pronouncements the power vested in the Government under Rule 39 could not have been invoked for filling up the

vacancies which had not been advertised and which had occurred alter the issue of the initial advertisement much less could that be done for the

purposes of protecting the service of someone who had found a place in the merit list on account of additional marks given to him and who was

bound to lose that place by reason of the judgment of the court

(Emphasis supplied)

In view of the aforesaid decision, even though there is a recommendation of the candidates for appointment to the posts, over and above the

advertised posts, they cannot be appointed because this type of attitude of enhancing the advertised vacancies will subsequently become

detrimental to the rights, as vested under Article 14 and 16 of the Constitution of India, of those candidates, who are going to become eligible after

the advertisement is published,

(xxi) It has been held by the Hon"ble Supreme Court in the case of Arup Das and Others Vs. State of Assam and Others, at paragraph 17 as

under :-

17. It is well established that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a

larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action

would be entirely arbitrary and violative of Articles 14 and 16 of the Constitution since other candidates who had chosen not to apply for the

vacant posts which were being, sought to be filled, could have also applied if they had known that the other vacancies would also be under

consideration for being filled up.

(Emphasis supplied)

In view of the aforesaid decision, there is no authority to select more than the advertised posts or beyond the number of advertised posts, even if

there were a large number of posts available. In the facts of the present case, similar is the argument canvassed by the learned counsel for the

petitioners that over and above the advertised posts i.e. 384, there are large number of vacancies available with the State.

Let there be any number of vacancies, but if the State in its prerogative power has decided not to fill them up no writ of mandamus can be issued

upon the State to fill up all vacancies. because there is no legal obligation on its part and, therefore, the Hon''ble Supreme Court has used the word

exclusive prerogative power of the employer/State administration"". As per the decision, as reported in (2010) 6 SCC 777. Moreover, the words

exclusive power"" has no corresponding ""duty"" or ""right"" no writ of mandamus can be issued without there being any violation of the public duty.

Similarly, no writ of mandamus, can be issued for directing the Government/State to exercise its ""exclusive power"".

(xxii) It has been held by the Hon''ble Supreme Court in the case of Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College, , at

paragraph 5 as under :-

5. A great deal of controversy was raised before us as to whether the Statutes framed by the University u/s 20 of the University of Bihar Act have

or have not the force of law and whether a writ under Article 226 of the Constitution can issue against the Governing Body of the College i.e.

whether the appellant has a legal right to the performance of a legal duty by the respondents. In order that mandamus may issue to compel the

respondents to do something it must be shown that the Statutes impose a legal duty and the appellant has a legal right under the Statutes to enforce

its performance. It is, however, wholly unnecessary to go into or decide this question or to decide whether the Statutes impose on the Governing

Body of the College a duty which can be enforced by a writ of mandamus because assuming that the contention of the appellant is right that the

College is a public body and it has to perform a public duty in the appointment of a Principal, it has not been shown that there is any right in the

appellant which can be enforced by mandamus. According to the Statutes all appointments of teachers and staff have to be made by the Governing

Body and no person can be appointed, removed or demoted except in accordance with Rules but the appellant has not shown that he has any right

entitling him to get an order for appointment or reinstatement. Our attention has not been drawn to any article in the Statutes by which the appellant

has a right to be appointed or reinstated and if he has not that right he cannot come to court and ask for a writ to issue. It is therefore not necessary

to go into any other question.

(Emphasis supplied)

In view of the aforesaid decision, no writ under Article 226 of the Constitution of India can be issued against the governing body of the college,

because there is no legal duty vested in it For issuance of a writ of mandamus, there bound to be an existence of legal duty. For every duty vested

in someone, there is corresponding right vested in another. When there is nonperformance of duty by some one, there is violation of right of

another. For this violation of right of another, a writ of mandamus can be issued compelling someone to perform his/its duty. As stated herein

above, it is a ""prerogative power"" of the State to fill up the vacancies or not to fill them up and hence, the petitioners have no right to be appointed

for the posts, which are not advertised, therefore, no writ of mandamus can be issued upon government to appoint petitioners

(xxiii) Learned counsels for the petitioners have relied upon a decision rendered in the case of Sandeep v. State of Haryana, 2001 (1) ALD (Crl.)

620 (SC), , especially paragraph no. 3 thereof. The crucial words in paragraph no. 3, upon which there is a lot of emphasis supplied by the learned

counsel for the petitioners by way of reiteration, also read as under:

That apart, even on first principle, it appeals to us to commend that the vacancies available in any particular service till the date of interview at least

should be filled up from the very same examination unless there is any statutory embargo for the same.

Similarly learned counsel for the petitioners have also heavily relied upon the decision, rendered by Hon''ble Supreme Court in the case of Amlan

Jyoti Borooah Vs. State of Assam and Others, , paragraph no. 40 whereof reads as under:

40. The State in an emergent situation would subject to constitutional limitations is entitled to take a decision which subserves a greater public

interest. While saying so, we are not unmindful of the fact that the Constitution also demands that candidates who had acquired eligibility for

recruitment to the post in the meantime should also be given opportunities to participate in the selection process. This Court time without number

had lamented the lackadaisical attitude on the part of the State to treat the matter of selection for appointment to services in a casual and cavalier

manner. If no appointment could be made from 1997 to 2001, it is the State alone who could thank itself therefor, but, unless there exists a

constitutional or statutory interdict so as to compel the superior court to set aside the selection which has otherwise been validly made; in exercise

of their power of judicial review the same would not ordinarily be interfered with.

(Emphasis supplied)

Learned counsel for petitioners have also relied upon heavily on a decision, rendered by Hon''ble Patna High Court in the case of Manish Kumar

Vs. The State of Bihar and Others,

On the basis of these three judgments, it has been submitted that there may be any number of vacancies advertised, but, this is a fluctuating

vacancies and what is in existence up to the date of interview should be filled up.

(xxiv) The aforesaid contention is not accepted by this Court, mainly for the following reasons:

(a) Looking to the catena of decisions, cited above, including that of Constitutional Bench, it appears that these judgments have not been cited in

the aforesaid three decisions. There is a principle enunciated by the Hon''ble Supreme Court know as per incuriam judgment

It has been held by the Hon''ble Supreme Court in the case of Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs., , at

paragraph no. 7 as under:

7. Certainty of the law, consistency of rulings and comity of courts- all flowering from the same principle- coverage to the conclusion that a

decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious

inadvertence or oversight a Judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result

reached, it may not have the sway of binding precedents. It should be a glaring case: an obtrusive omission. No such situation presents itself here

and we do not embark on the principle of judgment per incuriam.

(Emphasis supplied)

It has further been held by the Hon''ble Supreme Court in the case of A.R. Antulay Vs. R.S. Nayak and Another, , at paragraph no. 42 as under:

42. It appears that when this Court gave the aforesaid, direction on February 16, 1984, for the disposal of the case, against the appellant by the

High Court, the directions were given oblivious of the relevant provisions of law and the decision in Anwar Ali Sarkar case. See Halsbury''s Laws

of England, 4th edn., Vol 26, page 297, para 578 and page 300, the relevant notes 8, 11 and 15; Dias on Jurisprudence, 5th edn, pages 128 and

130, Young v. Bristol Aeroplane Co. Ltd. Also see the observations of Lord Goddard in Moore v. Hewitt and Penny v. Nicholas. ""Per incuriam""

are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned,

so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably

wrong. See Morelle v. Wakeling. Also see State of Orissa v. Titaghur Paper Mills Co. Ltd. We are of the opinion that in view of the clear

provisions of Section 7(2) of the Criminal Law Amendment Act 1952 and Articles 14 and 211 of the Constitution, these directions were legally

wrong.

(Emphasis supplied)

It has also been held by the Hon''ble Supreme Court in the case of Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs.

Presiding Officer, Labour Court, Chandigarh and Others, , at paragraph no. 40 as under.

40. We now deal with, the question of per incuriam. by reason of allegedly not following the Constitution Bench decisions. The Latin expression

per incuriam means through inadvertence A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a

previous decision of its own or when a High Court has acted in ignorance of a decision of this Court It cannot be doubted that Article 141

embodies, as a rule of law, the doctrine of precedents on which our judicial system is based. In Bengal Immunity Company Ltd. v. State of Bihar,

it was held that the words of Article 141, ''binding on all courts within the territory of India"", though wide enough to include the Supreme Court, do

not include the Supreme Court itself, and it is not bound by its own Judgments but is free to reconsider them in appropriate cases. This is necessary

for proper development of law and Justice. May be for the same reasons before judgments were given in the House of Lords and Re Dawson''s

Settlement Lloyds Bank Ltd. v. Dawson, on July 26, 1966 Lord Gardiner, L.C. Made the following statement on behalf of himself and the Lords

of Appeal in Ordinary:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual

cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly

development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case

and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former

decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal

arrangements have been entered into and also the especial need for certainty as to the criminal law.

(Emphasis supplied)

It has further been held by the Hon''ble Supreme Court in the case of Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, , at

paragraph nos. 128 and 138 as under:

128. Now we deem it imperative to examine the issue of per incuriam raised by the learned counsel for the parties. In Young v. Bristol Aeroplane

C. Ltd. The House of Lords observed that ""in curia"" literally means ""carelessness"". In practice per incuriam appears to mean per ignoratium.

English courts have developed this principle in relaxation of the rule of stare decisis. The ""quotable in law"" is avoided and ignored if it is rendered in

ignoratium of a statute or other binding authority. The same has been accepted, approved and adopted by this Court while interpreting Article 141

of the Constitution which embodies the doctrine of precedents as a matter of law.

In Halsbury"s Laws of England (4th Edn) Vol. 26: Judgment and Orders: Judicial Decisions as Authorities (pp. 297-98, Para 578) per incuriam

has been elucidated as under.

A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate Jurisdiction

which covered the case before it in which case it must decide which case to follow (Young v. Bristol Aeroplane Co, Ltd., KB at p. 729 All ER

300). In Huddersfield Police Authority v. Watson, or when it has acted in ignorance of a House of Lords decision, in which case it must follow that

decision; or ""when the decision is given in ignorance of the terms of a statute or rule having statutory force.

Thus, in view of the aforesaid decisions, if any earlier decision is not cited of larger Bench, then the subsequent judgments are per incuriam and are

not binding, on the principle of per incuriam. It appears that several decisions, as stated herein above, like the decision of the Constitutional Bench,

rendered in the case of Shankarsan Dash Vs. Union of India, , etc. have not been even cited.

In the light of the aforesaid decisions, the judgments, upon which heavy reliance has been placed, are not helpful to the petitioners.

(b) Moreover, all these three judgments are based upon their peculiar facts and the facts of the present case are absolutely different Thus, on

factual aspect also these three decisions are not useful to"" the petitioner. Major different of facts is while exercising the prerogative power of the

State, as a policy decision, the State of Jharkhand has decided not to fill up more than the advertised posts, namely. 384 posts. Subsequently in a

second advertisement, as stated herein above, which is at Annexure 2, already sizable age relaxation has been given, namely, of eleven years.

Whereas, in all the aforesaid three decision, the State was ready and willing to make more appointments. This willingness is absent in the facts of

the present case. As an exceptional circumstance, there may be more appointments and it has been also decided by the Hon"ble Supreme Court

what to in case more than the advertised posts are to be filled up. Guidance has been given in the decision, reported in Prem Singh and Others Vs.

Haryana State Electricity Board and Others, especially at paragraph no. 25, that a Court has to ""strike a balance"". It is one thing to ""strike a

balance"" when more appointments are already made than advertised posts and it is altogether another thing to issue a writ of mandamus, though

the State is not ready and willing to appoint more candidates than the advertised posts, or compelling it to do, which is not permissible in the eyes

of law. Striking a balance after the appointment is a rule of wisdom may be the rule of equity, because the candidates have already been appointed.

Matters come to the Court after several months and they are decided after several years and by that time those candidates might have got

promotions, perhaps some of them might have even retired. In this eventuality rule of wisdom or the rule of equity demands the ""striking of balance

by the Court but unfortunately these are not the facts of the present case. This Court has not to strike a balance at all. By virtue of the aforesaid

three decision, which are heavily relied upon by the learned counsel for the petitioner, including the decision rendered by Hon''ble Patna High

Court, nowhere these type of facts were present namely, clear unwillingness on the part of the State to appoint more persons on the posts, which

are not advertised.

(c) Looking to the decision rendered by the Hon''ble Patna High Court, there was a fluctuating mind of the State. Initially ""X"" number of posts

were advertised- Thereafter, ""X"" + ""Y"" number of posts were further requisitioned, which was again reduced as ""X"" + ""Y"" - ""Z''. This has created

some difficulty in the said case. Thus, under the aforesaid peculiar facts, all those three cases, upon which heavy reliance has been placed by the

learned counsel for the petitioners, have been decided. But the facts of the present writ petitions are absolutely different and, therefore, I am not

inclined to hold that even though there are no advertised posts towards ""the future posts"" or towards ""other posts"" or towards ""any other posts"",

(which are used as a antonym of ""advertised posts""), the petitioners should be appointed. None of these petitioners can be appointed for these

type of posts even they are vacant as there is ""prerogative power"" of the State to fill up the post or not to fill up the posts despite vacancies.

(xxv) It is also contended by the learned counsel for the petitioners that for the posts of Constable, in past the State of Jharkhand advertised 6796

posts, but the State authorities have fill up 8430 posts. These facts have been stated in the rejoinder affidavit and, therefore, such type of relaxation

should also be given for these three cadres, in question, namely, Sub Inspector of Police, Sargent and Company Commander.

This is also very polite and attractive argument, but, it is also not accepted by this Court because it is a prerogative power of the State to fill up the

vacancies or not to fill them up. No writ of mandamus can be issued, unless there is statutory obligation, on the part of the State. It has been stated

by the learned Additional Advocate General, appearing on behalf of the State, that the State is not inclined to fill up any more vacancy than what is

advertised. There is advertisement for 384 posts and no more candidates are going to be appointed, as stated in paragraph nos. 5 and 11 of the

counter affidavit, filed by the State. It is further submitted by the learned counsel for the respondent-State that earlier illegality committed by the

State cannot be allowed to perpetuate and that cannot be a ground for issuance of a writ of mandamus, because there is no legal obligation on the

part of the State to maintain equality in illegality.

The State of Jharkhand is a novice State, bifurcated recently under the Bihar Re-organization Act 2000. There may be some errors in the initial

days, but the State does not want to repeat such error and no Court can compel the State Government by issuing a writ of mandamus to appoint

more candidates than what is advertised and, therefore, the contention raised by the learned counsel for the appellants is not accepted by this

Court

(xxvi) It is also contended by the learned counsel for the petitioners in both the writ petitions that the principle of legitimate expectation for increase

in the seats should be invoked by this Court which also tantamounts to a principle of protectable interest and they have relied upon a decision

rendered by the Hon''ble Patna High Court in the case of Tritiya Snatak Astar Pratiyogita Chainit Sangh and Others Vs. The State of Bihar and

Others, , as well as upon a decision, rendered by the Hon''ble Supreme Court in the case of Amlan Jyoti Borooah Vs. State of Assam and Others,

.

Looking to these two judgments and matching the facts of those cases with the facts of the present writ petitions, it appears that ""in not filling up all

the posts, which are not advertised"", there is no legitimate expectation from the respondent-State authorities that the State must fill up all the

existing vacancies or backlog. The protection of legitimate expectation is some thing else than what has been canvassed by the learned counsel for

the petitioners. This principle cannot be made applicable for the facts, in question. The principle of legitimate expectation appears to be very good

for academic study, but it has to be applied looking to the facts of the case. The petitioners have applied for appointment to the posts of Sub

Inspector of Police, Sargent and Company Commander and they are expecting that the State must fill up ""all the vacancies"". Their expectation is

not capable of invoking ""the legitimate expectation"" doctrine. In fact, doctrine of legitimate expectation is absolutely another principle, which is not

applicable to the facts of the present case. This argument of petitioners is fully based upon ""bare or mere expectation from the State"". Except the

word ""expectation"", nothing is common in between the two. Petitioners have mere expectation from the State that the State must fill up all the

vacancies, because they are waiting since long, but, that is not a legitimate expectation at all on the part of the State, which creates a legal

obligation to fill up the vacancies. The State has prerogative power to fill, part of the vacancies also. Remaining part of vacancies may be filled up

from other candidates, who may be fresh coming with a fresh knowledge of technology. This Court will not go behind the decision making process

of the State that why the State does not want to fill up the posts, which are not advertised. This exercise cannot be done by this Court, while

exercising powers of judicial review.

As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, I see no reason to entertain these writ petitions. Both the writ

petitions, therefore, fail and, hence, they are hereby dismissed, with no order as to costs.