

VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR. JUSTICE C. JAYACHANDRAN

&

THE HONOURABLE MR. JUSTICE C. PRATHEEP KUMAR

THURSDAY, THE 5TH DAY OF SEPTEMBER 2024 / 14TH BHADRA, 1946

WA NO. 275 OF 2022

AGAINST THE JUDGMENT DATED 05.01.2021 IN WP (C)
NO.16927 OF 2020 OF THE HIGH COURT OF KERALA

APPELLANTS/WRIT PETITIONERS:

- 1 BINDU B.KUMAR,
AGED 31 YEARS
W/O.SAJI O.S., RESIDING AT OTTUPARAKKAL
HOUSE, THONNURKKARA P.O., CHELAKKARA,
THRISSUR DISTRICT-680 586.
- 2 SOUMYA P.,
AGED 30 YEARS, W/O.ANOOP V.,
RESIDING AT KAITHAKKATT HOUSE, KOTTAPPADI,
GURUVAYUR, THRISSUR DISTRICT-680 505.

BY ADVS.
M.R.ANISON
V.BHARGAVI (PANANGAD)
P.A.RINUSA

RESPONDENTS/RESPONDENTS:

- 1 GURUVAYUR DEVASWOM,
GURUVAYUR, THRISSUR DISTRICT-680 101,
REPRESENTED BY ITS ADMINISTRATOR.



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2 GURUVAYUR DEVASWOM MANAGING COMMITTEE,
REPRESENTED BY ITS CHAIRMAN,
GURUVAYUR, THRISSUR DISTRICT-680 101.

3 THE MANAGER,
SREEKRISHNA HIGHER SECONDARY SCHOOL,
GURUVAYUR, (ADMINISTRATOR, GURUVAYUR DEVASWOM) ,
THRISSUR DISTRICT-690 101.

4 HEADMISTRESS,
SREEKRISHNA HIGHER SECONDARY SCHOOL,
GURUVAYUR, THRISSUR DISTRICT-680 101.

BY ADV SHRI.T.K.VIPINDAS, SC, GURUVAYUR DEVASWOM BOARD

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
05.09.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



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"CR"

J U D G M E N T**Raja Vijayaraghavan, J.**

This appeal has been placed before the Full Bench following a reference made by a Division Bench of this Court. Before addressing the specific facts of the case, it is important to highlight the key questions that arise.

- a) Can the authorities that initiate processes for public employment legitimately fill more vacancies than initially advertised? If so, does this not constitute a violation of Articles 14 and 16(1) of the Indian Constitution, effectively denying the rights of those who did not apply? Furthermore, does this not unfairly disadvantage individuals who became eligible after the application deadline but were unable to apply because the vacancies were not advertised for them?
- b) Does a candidate on a waiting list possess the right to be appointed to vacancies that were not notified or available



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when the original select list was prepared? Can a waiting list be utilized as a reservoir to fill vacancies that arise after the advertisement is issued, thereby allowing candidates from the list to be selected as needed?

- c) Under what circumstances can the rule against recruiting candidates beyond the notified vacancies be relaxed? If such relaxation is to be considered, what are the critical factors that must be taken into account?

These issues strike at the very heart of the principles of fairness, equality, and the rule of law in the domain of public employment.

2. Now to the brief facts.

- a) The Guruvayur Devaswom runs a High School comprising an Upper Primary Section. The Administrator of the Devaswom is the Manager of the School. Two vacancies of Upper Primary School Teachers arose in the school on 18.6.2018 and 19.7.2019 respectively. Steps were taken by the Managing Committee of the Devaswom to fill up the said vacancies by issuing Ext.P1 notification on 16.10.2019. Ext.P2 select list was accepted by the Managing Committee on 31.12.2019 as per Ext.P3 resolution for filling up the notified vacancies alone. Pursuant to the said decision, the



candidates ranked 1 and 2 in the select list were appointed against the notified vacancies.

- b) While so, on 14.12.2019, the Headmistress of the School issued Ext.R2(a) letter requesting the Administrator to keep the select list in operation so as to fill up the future vacancies from the said list with a view to ensure that there is no disruption of classes for want of teachers. Based on the above request, the Managing Committee passed Ext.P4 resolution on 16.1.2020 deciding to extend the life of Ext.P2 select list by one year and to make appointments from the said list against future vacancies as well. Later, on 03.06.2020, the Headmistress of the school reported to the Manager that a vacancy arose in the Upper Primary Section of the school on account of the retirement of a teacher. It was also pointed out that three teachers in the Upper Primary Section are entitled to be promoted to the Higher Sections of the School and if the said promotions are effected at the appropriate time, four teachers may have to be appointed in the Upper Primary Section. Ext.P5 report was submitted by the Headmistress stating these aspects. The report was accepted and the Manager issued Exhibit P6 order appointing the candidates who were ranked 3 to 5 in Ext.P2 select list.



- c) Even before the selected candidates joined duty, the Managing Committee by Ext.P10 resolution dated 15.6.2020, resolved to revoke their appointment as according to the Committee, the appointments of the candidates in excess of the notified vacancies were made without their knowledge and permission. It was also mentioned that when appointments were made, there was only one vacancy as steps were not taken to effect the promotion of the existing teachers to the Higher Sections of the school. Pursuant to Ext.P10 resolution, Ext.P9 consequential order was issued by the Manager revoking the appointment.
3. Separate writ petitions were filed before the learned Single Judge challenging the cancellation of appointments consequent to Ext.P9 order. The learned Single Judge, after evaluating the contentions advanced by both sides, took note of the fact that the notification was issued for filling up two vacancies of UPSA. The ranked list was prepared pursuant to the notification for filling up the notified vacancies alone. The learned Single Judge also noted that a decision had already been taken as early as on 31.12.2019 to the effect that the ranked list would be operated only for the purpose of filling up the notified vacancy. On its basis, it was held that with the appointment of two persons to the post of UPSA, the list expired. The decision taken thereafter to extend the period of the list



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was held to be not proper and it was further held that the appointment of the teachers on the basis of the extension was without considering the factual aspect of the matter. It was conclusively held that the act of the respondents in having issued appointment orders from a ranked list that had already expired by extending the list was thoroughly improper. By holding so, the writ petitions were dismissed upholding the order of revocation.

4. Challenging the above judgment, Smt. Reema R., the petitioner in W.P.(C) No. 16197/2021, preferred W.A. No.488 of 2021. A Division Bench of this Court, relying on the observations made by the Apex Court in **Rakhi Ray and Others v. High Court of Delhi and Others**¹, came to the conclusion that the vacancy in respect of Smt. Reema had arisen in the same academic year as the filling up of the notified vacancies. It was further held that Ext.P10 revocation order related only to the appointments made in expectation of vacancies that were to arise in the subsequent academic year 2020-2021 and not to the vacancy pertaining to the very same academic year as the notified vacancies. It was held that the nature of vacancy to which Smt. Reema was appointed was different and distinct from that to which the other appointees were appointed and it was also prior in time to the expected vacancies. It was

¹ [(2010) 2 SCC 637]



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held that the differential treatment accorded by the Devaswom in the matter of filling up the vacancies cannot be seen as discriminatory or prejudicial in any manner. The Division Bench allowed the appeal and quashed the order impugned to the extent it pertained to Smt. Reema. She was held entitled to all consequential benefits flowing from the order of appointment.

5. After the judgment in W.A.No.488 of 2021 was rendered on 07.07.2021, the appellants approached this Court and have preferred the instant appeal on 29.9.2021. Their contention is that Smt.Reema and the appellants are similarly placed and therefore, they are entitled to the benefit of the judgment in W.A.No. 488 of 2021.
6. Their Lordships of the Division Bench took note of the aforesaid contention and were of the view that in view of the law laid down by the Apex Court in **Union of India and Ors. v. Ishwar Singh Khatri and Ors.**², **Gujarat State Dy. Executive Engineers' Association v. State of Gujarat and Ors.**³, **Asok Kumar and Ors. v. Chairman, Banking Service Recruitment Board and Ors.**⁴, **Prem Singh and Ors. v. Haryana State Electricity Board and Ors.**⁵ and **Rakhi Ray** (supra),

² [(1992) Supp. 3 SCC 84]

³ [1994 Supp. 2 SCC 591]

⁴ [(1996) 1 SCC 283]

⁵ [(1996) 4 SCC 319]



recruitment of candidates in excess of notified vacancies is a denial and deprivation of the rights guaranteed under Article 14 r/w. Article 16(1) of the Constitution of India to persons who did not get the opportunity to participate in the selection process and appointment of persons from the waiting list in vacancies that arose subsequent to the notification is unconstitutional. The Division Bench also held that they were not able to agree with the view taken by the Division Bench in W.A.No. 488 of 2021 on the legal aspect that the case dealt with therein would fall under the category of rare and exceptional or emergent situations where deviation from the rule that vacancies over and above the number of vacancies cannot be filled up could be made. The Division Bench took note of the resolution issued by the Managing Committee cancelling the appointment of Smt. Reema and the other petitioners and found that their appointment was decided to be cancelled not only for the reason that sufficient vacancies were unavailable at the time of their appointment but also that the same was made by the Administrator without the knowledge and permission of the Managing Committee. Finally, it was held that since deviation from the rule would result in an infringement of the constitutional rights of third parties, rare and emergent situations as mentioned in **Rakhi** (supra), are situations where an employer is not in a position to carry out a fresh selection for reasons beyond its control,



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where the post is such that a provisional or a temporary hand cannot occupy the same and whilst so, the requirement is such that it cannot brook the delay of the selection process and likewise. The Division Bench felt that in view of the settled position, it may not be possible for their Lordships to follow the view taken by this Court in W.A.No. 488 of 2021. It was in the said circumstances that the matter was placed before the Full Bench.

7. We have heard Smt. V.P.Seemanthini, the learned Senior counsel appearing for the appellant as instructed by Sri. M.R.Anison and Sri. T.K.Vipin Das, the learned counsel appearing for the respondents.
8. We shall now deal with the individual issues.
9. As we noted at the outset, the first question is whether the vacancies can be filled beyond the advertised number and whether recruiting candidates in excess of the notified vacancies constitutes a denial of rights to individuals who did not apply, thereby violating Articles 14 and 16(1) of the Constitution of India. We shall now refer to the binding precedents.
10. In **Prem Singh and Ors. v. Haryana State Electricity Board and Ors.**⁶, the facts were that as against 62 advertised posts, the State

⁶ [(1996) 4 SCC 319]



Electricity 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. The question posed before the Apex Court was whether it was open to the Board to prepare a list of as many as 212 candidates and appoint as many as 137 out of that list when the number of posts advertised was only 62. The Apex Court, after referring to the past precedents held as follows in paragraph No. 25 of the judgment.

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.



What was held was that the selection process can be initiated for clear and anticipated vacancies, but not for future vacancies. If the advertisement specifies a certain number of posts, the State cannot appoint more candidates than advertised, even if a larger select list has been prepared. Deviations from this rule, allowing appointments to posts that become vacant later, are permissible only in exceptional or emergent situations and must be supported by a policy decision. If such excess appointments are legally challenged, courts may not necessarily invalidate them but will tailor the relief to balance the interests of the State and those seeking public employment, with the specific relief depending on the unique facts of each case.

11. In **State of Bihar v. Madan Mohan Singh**⁷, the Apex Court has 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

⁷ [1994 Supp (3) SCC 308]



vacancies was 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, that would naturally amount to a deprivation of the rights of other candidates who would have become eligible subsequent to the said advertisement and selection process.

12. In **State of U.P. v. Rajkumar Sharma**⁸, the Apex Court, after referring to a catena of past precedents reiterated the law filling up of vacancies over and above the number of vacancies advertised would be violative of the fundamental rights granted under Articles 14 and 16 of the Constitution. It was observed as follows in paragraph Nos. 13 to 15 of the judgment.

13. Filling up of vacancies over and above the number of vacancies advertised would be violative of the fundamental rights granted under Articles 14 and 16 of the Constitution. (See *Union of India v. Ishwar Singh Khatri* [1992 Supp (3) SCC 84]; *Gujarat State Dy. Executive Engineers' Assn. v. State of Gujarat* [1994 Supp (2) SCC 591]; *State of Bihar v. Secretariat Asstt. Successful Examinees Union, 1986* [(1994) 1 SCC 126]; *Prem Singh v. Haryana SEB* [(1996) 4 SCC 319]; *Surinder Singh v. State of Punjab* [(1997) 8 SCC 488] and *Kamlesh Kumar Sharma v. Yogesh Kumar Gupta* [(1998) 3 SCC 45]).

⁸ [(2006) 3 SCC 330]



14. Selectees cannot claim the appointment as a matter of right. Mere inclusion of candidate's name in the list does not confer any right to be selected, even if some of the vacancies remained unfilled and the candidates concerned cannot claim that they have been given a hostile discrimination. (See *Shankarsan Dash v. Union of India* [(1991) 3 SCC 47]; *Asha Kaul v. State of J&K* [(1993) 2 SCC 573]; *Union of India v. S.S. Uppal* [(1996) 2 SCC 168]; *Hanuman Prasad v. Union of India* [(1996) 10 SCC 742]; *Bihar Public Service Commission v. State of Bihar* [(1997) 3 SCC 198]; *Syndicate Bank v. Shankar Paul* [(1997) 6 SCC 584]; *Vice-Chancellor, University of Allahabad v. Dr. Anand Prakash Mishra* [(1997) 10 SCC 264]; *Punjab SEB v. Seema* [1999 SCC (L&S) 629]; *All India SC & ST Employees' Assn. v. A. Arthur Jeen* [(2001) 6 SCC 380]; *Vinodan T. v. University of Calicut* [(2002) 4 SCC 726]; *S. Renuka v. State of A.P.* [(2002) 5 SCC 195] and *Batiarani Gramiya Bank v. Pallab Kumar* [(2004) 9 SCC 100]).

15. Even if in some cases appointments have been made by mistake or wrongly that does not confer any right on another person. Article 14 of the Constitution does not envisage negative equality, and if the State committed the mistake it cannot be forced to perpetuate the same mistake. (See *Sneh Prabha v. State of U.P.* [(1996) 7 SCC 426]; *Secy., Jaipur Development Authority v. Daulat Mal Jain* [(1997) 1 SCC 35]; *State of Haryana v. Ram Kumar Mann* [(1997) 3 SCC 321]; *Faridabad C.T. Scan Centre v. D.G., Health Services* [(1997) 7 SCC 752]; *Jalandhar Improvement Trust v. Sampuran Singh* [(1999) 3 SCC 494]; *State of Punjab v. Dr. Rajeev Sarwal* [(1999) 9 SCC 240]; *Yogesh Kumar v. Govt. of NCT, Delhi* [(2003) 3 SCC 548]; *Union of India v. International Trading Co.* [(2003) 5 SCC 437] and *Kastha*



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Niwarak Grihnirman Sahakari Sanstha Maryadit v. President,
Indore Development Authority [(2006) 2 SCC 604].

13. In essence, what has been held by the Apex Court is that filling vacancies beyond the number advertised violates the fundamental rights guaranteed under Articles 14 and 16 of the Constitution. Candidates included in a select list have no inherent right to be appointed, even if some vacancies remain unfilled. The mere inclusion of a name in the list does not guarantee selection, and candidates cannot claim discrimination if not appointed. Moreover, even if appointments were mistakenly or wrongly made in some cases, this does not entitle others to the same. Article 14 does not support "negative equality," meaning the State cannot be compelled to repeat its errors.
14. The next question is the necessary fallout of the answer to the first issue. A necessary consequence of the wrong exercise of filling vacancies beyond the post advertised would unfairly cause a disadvantage to the individuals who became eligible after the application deadline but were unable to apply because the vacancies were not advertised for them. This issue was considered in **Hoshiar Singh v. State of Haryana**⁹, wherein in paragraph 10 of the judgment, it was

⁹ [1993 Supp (4) SCC 377]



observed as under:

10.....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.

15. The Apex Court held that appointing candidates to additional posts based on an earlier selection and recommendation would unfairly disadvantage those who were not eligible by the original application deadline but became eligible later. These individuals would be deprived of the opportunity to be considered for these additional posts. If these posts were advertised later, those who became eligible in the interim would have the right to apply, ensuring a fair chance for all qualified candidates.



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16. Now the question is whether a candidate in the waiting list has a right to appointment against vacancies that were not notified or available when the select list was initially prepared. It also needs to be considered whether the waiting list can be treated as a reservoir to fill vacancies that arise after the issuance of a notification/advertisement, allowing candidates from the list to be drawn as and when necessary. The final question is whether and under what circumstances can the rule against recruiting candidates in excess of the notified vacancies be relaxed.
17. In **Gujarat State Dy. Executive Engineers' Assn. v. State of Gujarat**¹⁰, the question that arose for consideration revolved around the interpretation of a circular issued by the State Government to the effect that waiting lists prepared from competitive examination results would remain valid until the results of subsequent examinations are declared. The key question was whether such a waiting list could remain active for up to 10 years and continue to serve as a recruitment source. The following observations made by the Apex Court are of general application. It was observed as under in paragraphs Nos 8 and 9 of the judgment

“8. How a waiting list should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or

¹⁰ [1994 Supp (2) SCC 591]



examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. Therefore, once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it.

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



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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.

As has been held by the Apex Court, a waiting list prepared from an examination is not intended to serve as a continuous source of recruitment. It is only applicable in specific circumstances, such as when a selected candidate does not join, allowing the next person on the list to fill the vacancy, or in cases of extreme urgency where the government may decide, as a policy matter, to appoint individuals from the waiting list based on merit. If a waiting list were allowed to serve as an indefinite source for appointments, there is a danger that the authorities concerned might avoid holding new examinations for years and instead continually draw from the waiting list. Such a practice would undermine constitutional discipline and could create a vested interest, effectively sidelining a new pool of candidates.

18. In **State of Punjab v. Ragbir Chand Sharma**¹¹, the Apex 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

¹¹ [(2002) 1 SCC 113]



the post but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under in para 4 of the judgment.

“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.

19. In **Mukul Saikia v. State of Assam**¹², the Apex Court while dealing with an identical issue 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 the course is impermissible in law.

¹² [(2009) 1 SCC 386]



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20. In **Madan Lal v. State of J&K**¹³, a recruitment process was initiated by the Jammu and Kashmir Government to fill 11 clear and existing vacancies for the position of Munsiff. It was contended by the petitioners that the requisition did not include or anticipate any future vacancies, as the letter only requested the preparation of a select list of 20 candidates to ensure a sufficient pool if any of the first 11 candidates failed to join. According to them the contention that the requisition was for both clear and anticipated vacancies cannot therefore be sustained. While explaining the position, it was observed as under by the Apex Court:

24.....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

¹³ [(1995) 3 SCC 486]



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 gets 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.....

.....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.



The Court has held that the merit and waiting lists are only valid during its period of validity. The scope of recruitment has to be confined to the specific number of vacancies outlined in the requisition, and any extended merit list prepared by the Commission (e.g., selecting 20 candidates for 11 vacancies) is only applicable within the one-year validity period or until those vacancies are filled. Once the specified vacancies are filled or the one-year period expires, the list is exhausted, and it cannot be used to fill new vacancies that arise thereafter. Consequently, any remaining or new vacancies can only be filled through a fresh recruitment process, ensuring that all eligible candidates have the opportunity to compete.

21. In **Rakhi Ray v. High Court of Delhi**¹⁴, the facts were that an advertisement issued by the Delhi High Court on May 19, 2007, to fill 20 District Judge vacancies, with 13 for the general category, 3 for Scheduled Castes, and 4 for Scheduled Tribes. The appellants, belonging to the general category, participated in the selection process, and the results were declared on January 3, 2008. Although the appellants were included in the merit list, they ranked below the top 13, and all 13 general category vacancies were filled. However, the reserved vacancies for Scheduled Castes and Scheduled Tribes remained unfilled due to a

¹⁴ [(2010) 2 SCC 637]



lack of suitable candidates. Subsequently, unsuccessful candidates filed writ petitions in the Delhi High Court, arguing that 13 additional vacancies arose during the selection process which should have been filled from the existing select list based on a precedent set in **Malik Mazhar Sultan v. U.P. Public Service Commission**¹⁵. The High Court after considering the contentions came to the conclusion that only three vacancies arose after the advertisement and directed that two of these be offered to general category candidates and one to a Scheduled Caste candidate. The appellants, who were left out approached the Apex Court seeking appointment. While deciding the issue, the Apex Court after referring to the previous precedents observed as under in paragraph 7 of the judgment.

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.

¹⁵ [(2008) 17 SCC 703]



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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.

After observing as above, it was held as under in paragraph 12 of the judgment:

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.

22. In **High Court of Kerala v Reshma and others**¹⁶, after referring to the past precedents, it was held as under:

55. The constitutional principle which finds recognition in the precedents of this Court is that the process of selection in making appointments to public posts is subject to the guarantees of equality under Article 14 and of equality in matters of public employment under Article 16. The process of selection must comport with the principles of

¹⁶ [(2021) 3 SCC 755]



reasonableness. Where the authority which makes a selection advertises a specific number of posts, the process of selection cannot ordinarily exceed the number of posts which have been advertised. While notifying a process for appointment, the authority may take into consideration the actual and anticipated vacancies but not future vacancies. Anticipated vacancies are the vacancies which can be reasonably contemplated to arise due to the normal exigencies of service such as promotion, resignation or death. Hence, in notifying a given number of posts for appointment, the public authority may legitimately take into account the number of vacancies which exist on the date of the notification and vacancies which can reasonably be expected to arise in the exigencies of the service. While the exact number of posts which may fall vacant due to circumstances such as promotion, resignation or death may be difficult to precisely determine the authority may make a reasonable assessment of the expected number of vacancies on these grounds. However, future vacancies conceptually fall in a distinct class or category. Future vacancies which arise during a subsequent recruitment year cannot be treated as anticipated vacancies of a previous selection year. Vacancies which would arise outside the fold of the recruitment year would not fall within the ambit of anticipated vacancies. For it is only the vacancies, actual and anticipated which would fall within the course of the selection or recruitment year that can be notified when the selection process is initiated. These are constitutional principles to which statutory edicts are subordinate.

The constitutional principle, as upheld by the Apex Court,



mandates that the selection process for public appointments must adhere to the guarantees of equality under Articles 14 and 16 of the Constitution. The selection process must be reasonable and align with the advertised number of posts. While authorities may consider actual and anticipated vacancies (those likely to arise due to promotions, resignations, or deaths), they cannot account for future vacancies in a different recruitment year. Only vacancies within the current selection or recruitment year, whether actual or reasonably anticipated, can be included in the notification. These constitutional principles would override any statutory provisions to the contrary.

23. Now what remains is the question as to the circumstances under which vacancies over the notified vacancies could be filled up. The Apex Court in **Rakhi Ray** (supra) had after holding that such filling up is neither permissible nor desirable, went on to state that such an exercise can be carried out only in a rare and exceptional circumstance and in emergent situations that too after adopting a policy decision based on some rationale. The same view was taken in **Prem Singh** (supra) as well. It would be relevant to note that though such an observation was made in **Rakhi Ray** (supra), while deciding the issue it was held that appointment made beyond the number of vacancies advertised is without jurisdiction and is violative of Articles 14 and 16(1) of the



Constitution of India, and is a nullity and cannot be enforceable under law. The Division Bench in the reference order has spelled out certain circumstances under which such deviations can be allowed. We are of the view that deviation from the rule that vacancies cannot be filled beyond the number advertised is only permissible under rare and exceptional circumstances or in emergent situations. Such deviations are allowed only when a policy decision is taken based on a sound rationale.

24. As held in **Prem Singh** (supra), when the filling up of more posts than advertised is challenged, the Courts are bound to consider whether the mandate in **Rakhi Ray** and **Prem Singh** (supra) has been followed and then mould the relief in the facts and circumstances of each case.
25. Now what remains is the nature of the order that is to be passed by us. Section 7 of the High Court Act (Kerala) says that when a question of law is referred to a Full Bench, the Full Bench may finally decide the case or return it with an expression of its opinion upon the question referred for final adjudication by the Bench which referred the question. As we have dealt with the entire issue, we thought it fit to decide the case rather than return it to the Division Bench with our opinion.
26. The learned Single Judge, on the basis of the materials available, has rightly noted that the notification was issued for filling up two vacancies



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of UPSC and the ranked list was prepared pursuant to the notification for filling up the notified vacancies alone. The fact that a decision had already been taken on 31.12.2019 to the effect that the ranked list would be operated only for the purpose of filling up the notified vacancy was also rightly noticed. As the advertisement was for a specific number of posts, the Devaswom could not have appointed more candidates than advertised, even if a larger select list had been prepared. Furthermore, in the case on hand, no policy decision had been taken with due and careful consideration of the facts and circumstances. The Managing Committee's decision, as reflected in Ext.P4, to extend the life of Ext. P2 select list was made without taking note of the vital facts and circumstances. The Devaswom, in its counter affidavit, admits that this resolution was based on the mistaken belief that Ext.R2(a) was a genuine and bona fide request from the Headmistress. Furthermore, Devaswom asserts that Ext.P4 is tainted by fraud, rendering the resolution invalid. Such a resolution fails to meet the criteria established by the Apex Court in **Rakhi Ray** (supra). Even otherwise, the request of the Headmistress to keep the select list active to fill future vacancies and avoid class disruptions due to a lack of teachers does not constitute a rare and exceptional circumstance or an emergent situation, fulfilling the mandate of law. We are unable to accept the declaration of law made by



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the Division Bench in the judgment dated 7.7.2021 in W.A. No. 488 of 2021 (Reema R V Guruvayoor Devaswom and Others).

In view of the discussions above, we find no merit in this Writ Appeal, and the same is dismissed.

Sd/-

**RAJA VIJAYARAGHAVAN V,
JUDGE**

Sd/-

**C. JAYACHANDRAN,
JUDGE**

Sd/-

**C. PRATHEEP KUMAR,
JUDGE**

@S/05/09/24