

CENTRAL ADMINISTRATIVE TRIBUNAL  
KOLKATA BENCH, KOLKATA



Date of order: 20.08.2019

Present : Hon'ble Ms. Bidisha Banerjee, Judicial Member  
Hon'ble Dr. Nandita Chatterjee, Administrative Member

- No. O.A. 351/912/AN/2017 (1) Anjan Sarkar,  
M.A. 351/00525/AN/2017 Son of Sri Sukumar Sarkar,  
O.A. 351/1517/AN/2018 Aged about 33 years,  
M.A. 351/00747/AN/2018 Residing at  
Village - Subhasgram,  
Post Office - Diglipur,  
Police Station - Diglipur,  
District - North & Middle  
Andaman,  
Pin - 744 202.
- (2) Rama Devi,  
Daughter of Sri Jagdish Singh,  
Aged about 29 years,  
Residing at  
Village - Brindaban Ferrarjranj,  
South Andaman,  
Ferrarjganj,  
Pin - 744 206.

... Applicant

- V E R S U S -

- (1) The Andaman & Nicobar Administration,  
Service through the Chief Secretary,  
Having office at  
Secretariat Building,  
Port Blair.
- (2) Lieutenant Governor,  
Service through the Secretary,  
Having office at Raj Niwas,  
Port Blair,  
Pin - 744 101.
- (3) Principal Secretary,  
Health,  
Having office at Secretariat Building,  
Port Blair,  
Police Station - Averdeau,  
Pin - 744 101.

(4) The Director of Health,  
Having its office at  
Director of Health Service Building,  
Port Blair,  
Pin - 744 101.

... Respondents

For the Applicant : Mr. H.D. Banerjee, Counsel

For the Respondents : Mr. R. Halder, Counsel

**ORDER**

**Per Dr. Nandita Chatterjee, Administrative Member:**

The applicant has approached the Tribunal under Section 19 of the Administrative Tribunals Act, 1985 praying for the following relief:-

"(i) The e-recruitment notice dated 14.9.2018 for absorbing the post of a staff nurse be quashed considering the facts and circumstances of the present case.

(ii) To pass any other or such other or further order or orders as to your Lordships may deem fit and proper and your applicants as in duty bound shall ever pray.

(iii) Leave may be granted to move this application jointly in self same application under Rule 4(5)(a) of CAT (Procedure) Rule, 1987."

2. Heard both Ld. Counsel, examined pleadings, documents on record. Ld. Counsel for the applicant has cited judicial pronouncements in

(I) ***N.T. Devin Katti & others. V. Kanataka Public Service Commission and others (1990) 3 SCC 157,***

(II) ***High Court of Judicature of Rajasthan v. Veena Verma and another, (2009) 14 SCC 734,***

(III) ***Ashok Kumar Sharma and others v. Chander Sekhar and another (1997) 4 SCC 18*** and

(IV) ***First Appeal No. 5 of 1979 Sm. Sarashibala Roy & ors. v. Sm. Monorama Roy & ors. under West Bengal Premises Tenancy Act, 1986*** in support of his claim.

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Written notes of arguments have been filed by Ld. Counsel for the applicants citing following judgments:-

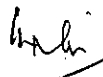
- (i) ***State of UP v. Ram Swarup Saroj, AIR 2000 SC 1097;***
- (ii) ***Nirupama (Roy) Barman & ors. v. State of West Bengal & ors. with Daya Sarkar (Das) v. State of West Bengal & ors., 2013 (@ CLJ (Cal); and***
- (iii) ***Prabir Sinha Roy & ors. v. The Hon'ble The Chief Justice, High Court, Calcutta & ors., Writ Petition Matter No. 2980 of 1994, 1996 (II) CHN 497.***

Written notes of arguments have also been filed by Ld. Counsel to respondents in which the judgment in ***State of Orissa & another v. Rajkishore Nanda & others (2010) 6 SCC 777*** has been cited in support.

3. An M.A. bearing No. 525/AN/2017 arising out of O.A. No. 912/AN/2017 has been filed by the applicants on the ground of commonality of interest and common cause of action. Upon being satisfied that there is indeed common cause of action and common interest, we allow the M.A. and dispose it of accordingly.

4. The submissions of the applicants, as made through their Ld. Counsel is that, the applicants are aspirants for recruitment to the post of Staff Nurse with the respondent authorities and had accordingly responded to a vacancy notice dated 12.8.2013.

That, although written examination for the said recruitment was postponed on a number of occasions, finally, on 17.8.2014, the applicants participated in the written examination and a merit list was published, which also inter alia, contained an extended merit list (on the same date for recruitment) to the post of Staff Nurse in the OBC category. According to the applicants, even after recruitment of



candidates against 25 notified vacancies, it has come to the notice of the applicants through information sought through RTI that 24 more vacancies including 9 OBC vacancies are available which should be filled up by the applicants as they had appeared in the extended merit list.

As the respondents, however, have failed to respond to the representations made in this regard, the applicants have approached the Tribunal for a direction on the respondent authorities to engage the applicants from the extended merit list for the additional vacancies in the OBC category. The applicants have furnished the following grounds in support of their claim:

- (a) That, even when additional vacancies for the post of Staff Nurse were available, the respondent authorities failed to engage the applicants therein.
- (b) That, the illegal action of the respondent authorities is contrary to Article 14 of the Constitution of India.

5. The respondents have controverted the claim of the applicants in their written statement, and also during hearing by arguing as follows:-

That, the respondent authorities had notified 18 vacancies for the post of Staff Nurse in August, 2013. The said selection process was, however, kept on hold and, that, thereafter, vide vacancy notice dated May, 2015, the department once again advertised 25 vacancies for the post of Staff Nurse and the additional vacancies from 18-25 arose on account of retirement in the interim period.

That, the claim of the applicants cannot be accepted as because the department has not notified any further vacancies and, also, in case the additional vacancies are filled up from the extended merit list without notifying the same in public domain, the action would be discriminatory, inequitable and prejudicial to other aspiring candidates, who would not

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be privy to the fact that there were additional vacancies to be filled up in the category of Staff Nurse. The respondents have further contended that the mere inclusion of name in the select list does not bestow any legal right for appointment and that the right of the applicants would only accrue if any of the 25 candidates finally selected as per merit have resigned or quit, with resultant vacancies thereof.

6. The primary issue to be resolved for adjudication of the instant matter is whether the applicants have a right to be engaged in such vacancies which were not notified by the respondent authorities.

7.1. At the outset, we refer to the vacancy notice dated 12.8.2013 (Annexure A-1 to the O.A.), wherein a total of 18 vacancies were notified including 7 in OBC category. Thereafter, as admitted by the respondent authorities, the said recruitment was placed on hold and a further vacancy notice was issued on 10.5.2015 (Annexure A-8 to the O.A.) where the number of posts notified were increased to 25, including 10 from the OBC category. The respondents have clarified the enhancement of vacancies on the ground that, in the interim period, there had been certain retirements which the respondent authorities took into account by notifying an enhanced number of vacancies.

Ld. Counsel for the applicants would place reliance on a further annotation in the recruitment notice as follows:-

"The number of vacancies shown at Sl. No. 03 above against each category or total vacancies are subject to variation/revision."

According to the Ld. Counsel for the applicants, the fact that the total number of vacancies and also category-wise vacancies have been annotated as subject to variation/revision, the respondent authorities were well within their rights to enhance the vacancies automatically in case further vacancies arose before closure of the recruitment process.

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Ld. Counsel for the applicant would rely on an order passed in a litigation under West Bengal Premises Tenancy Act as First Appeal No. 5 of 1979 (**Sm. Sarashibala Roy & ors. v. Smt. Monorama Roy & ors.**) to explain the implications of the phrase "subject to". The Court, while interpreting Section 18(A), observed that Section 13(1)(f) of the **West Bengal Premises Tenancy Act, 1956** had held that the interpretation subject to "affording reasonable facilities to the tenants to be restored back and to utilize the tenancy for which the same was used." must be inspired with the object to giving protection to the function and if two interpretations are possible, the one which is protective to or prove to be protective of the tenant must be preferred to those protective or to be granted protection to the interest of the landlords. According to the Ld. Counsel for the applicants, a similar interpretation of "subject to" as noted in the notification dated 12.8.2013 should be protective of the interest of the applicants included in the extended merit list. This contention of the applicants, however, fails to merit consideration in terms of the ratio held in **State of Haryana v. Subhas Chander Marwaha, (1974) 3 SCC 220**, wherein the Hon'ble Supreme Court pointed out that whether a particular vacancy or what number of vacancies will be filled is a managerial function depending upon administrative necessity.

7.2. The applicants have obtained through RTI, the details of those Staff Nurse who have retired / promoted/ voluntary retired / expired / terminated from service along with details of action taken by respondents to fill up the consequent vacancies (Annexure A-13 to the O.A.).

The applicants have also furnished the list of provisionally shortlisted candidates for recruitment to the post of Staff Nurse in OBC category (Annexure A-11 to the O.A.) and we find that 10 incumbents



have been selected therein. In the same annexure, the extended merit list of staff nurse in OBC category showing a total list of 58 incumbents have been enclosed and, according to the applicants, they figure in this extended merit list.

It is axiomatic that without the existence of posts or existence of such posts, the question of recruitment does not arise as ruled in **Himachal Road Transport Corpn. V. Parveen Kumari, (1996) 4 SCC 560.**

Further, in **Official Liquidator v. Dayanand, (2008) 10 SCC 1** the Hon'ble Apex Court ruled that Court cannot direct an employer to create posts to be filled by particular mode of recruitment and that Judicial Review can be exercised only if the action of the employer runs contrary to the Constitution, to statutory provisions or is patently arbitrary or illegal.

In **Union of India v. Parul Debnath, (2009) 14 SCC 173** the Hon'ble Apex Court has held that creation of posts is the prerogative of the executive and the courts have no role in creation of posts.

This was reiterated in **Divl. Manager Aravali Golf Club v. Chander Hass. (2008) 1 SCC 683.**

It is well settled that generally the employer is not bound to fill up any post or posts and in **Rakesh Ranjan Verma v. State of Bihar, AIR 1992 SC 1348** it was ruled that it might "happen that the Government for financial or other administrative reason might not fill up any vacancy." The Hon'ble Apex Court reiterated that mere existence of vacancy alone is not sufficient until the employer considers it necessary as to how many posts were required to be filled in any year in order to carry out its functions and duties.

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In the land mark judgment in **J & K Public Service Commission v. Dr. Narinder Mohan, AIR 1994 SC 1808** it was ruled that it is settled law that the Government need not immediately notify vacancies as soon as they arise.

It is also a well settled principle in service jurisprudence that, even if there is a vacancy, the State is not bound to fill up such vacancy nor is there any corresponding right vested in an eligible employee to demand that such vacancies be filled up. This is because the decision to fill up a vacancy or not vests with the employer who for good reasons, whether administrative, economical <sup>or</sup> or policy, can decide not to fill up such post(s).

In particular, the Hon'ble Apex Court has discouraged a chain system of recruitment by inviting each year's vacancy and recruitment of the candidates found eligible in the respective years as that would deprive all eligible persons from being considered for recruitment when he has satisfied the prescribed qualifications as on the date of inviting applications for recruitment. This also has been the founding logic of the respondents, who would argue that in case the additional vacancies, not notified are filled up from the extended merit list, it would deprive other eligible persons, who would not have a fair chance of participating in a recruitment process related to unnotified vacancies.

In **Subash Chander Marwaha (supra)** the Apex Court has further ruled that existence of vacancies does not give a legal right to a candidate to be selected. Para 7 of the said judgment reads as under:

" The mere entry in the list of the name of a candidate does not give him the right to be appointed. The advertisement that there are 15 vacancies to be filled does not also give him a right to be appointed. It may happen that the Government for financial or other administrative reasons may not fill up any vacancies. In such a case the candidates, even the first in the list, will not have a right to be appointed. The list is merely to help the State Governments in making the appointments showing which candidates have the minimum qualification under the Rules. The stage for selection for appointment comes thereafter, and it is not disputed that under the Constitution it is the State Government alone which can make the appointments. The High Court does not



come into the picture for recommending any particular candidate. The High Court plays no part except to suggest to the Government who in accordance with the select list to be appointed in a particular vacancy."

In **LT. CDR. M. Ramesh v. Union of India & others, (2019) 1**

**Supreme Court Cases (L&S) 213**, the Hon'ble Court held that there is no vested right of appointment. Even selectee has no indefeasible right to appointment, nor is State under duty to fill up vacancies but decision not to fill vacancies pursuant to selection process must be taken bona fide and for justifiable and appropriate reasons.

Ld. Counsel for the applicants in his support has referred to **N.T. Devin Katti (supra)** to establish that a person applying for admission, if other qualified, acquires a vested right for selection in accordance with that rules or order. This judgment, however, goes against the claim of the applicants with the Hon'ble Court's directions as follows:-

"Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right to being considered for selection in accordance with the rules as they existed on the date of advertisement."

The above decision as cited by Ld. Counsel for applicants establishes to the contrary that the applicants have no vested right of selection but only ~~for~~ consideration for selection.

Ld. Counsel for the applicants would also rely on **Ashok Kumar Sharma (supra)** to establish that claim on the date of eligibility wherein the Hon'ble Apex Court had held that when applications are called for prescribing a particular date as the last date for filling the applications, eligibility of the candidates shall have to be judged with reference to that date and date alone. In this matter, the applicants have been found eligible on the date of closure of receipt of applications and have participated in the recruitment process. Accordingly, their eligibility to participation not being the bone of contention, we do not find the applicability of this ratio as relevant in the instant matter.

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Ld. Counsel for the applicants has also relied on **High Court of Judicature for Rajasthan (supra)** to vindicate the implications of a negative approach. Herein, the Hon'ble Court has held that the Court cannot issue a mandate for increasing the posts, which is also supported by judicial ratio in **Dayanand (supra)**. In fact, the fact that the Hon'ble Supreme Court dismissed the case of the respondents and remanded the matter back to the Hon'ble High Court for adjudication on merit was on the ground that temporary or permanent posts created outside the cadre cannot be taken into consideration for determining the strength of the cadre and, accordingly, this ratio too does not come to the aid of the applicants.

In his written notes, Ld. Counsel for applicant has, cited **Ram Swarup Saroj (supra)**, **Nirupama Roy (Barman) & ors. (supra)** and **Prabir Sinha Roy & ors. (supra)** to highlight the ratio that candidates do not lose their right to be considered from the panel even if the validity of the panel expires during pendency of the legal proceeding and also that a plea of expiry of a panel not having been raised during litigation, cannot be raised in a later stage before a higher forum.

The respondents have controverted this reference by citing **Rajkishore Nanda (supra)** wherein the Hon'ble Apex Court had held as follows:-

"24. The aforesaid view taken by the High Court cannot be held to be in consonance with law. More so, if the State has committed an error in preparing the merit list containing the names of the candidates double the number of vacancies determined, that would not mean that the select list has become immortal and all those persons whose names appeared in the list would be offered appointment even after the expiry of the life of select list."

The respondents have clarified that the applicants concerned could only have been selected if any of the 25 candidates, appointed consequent to the notification dated May, 2015 had resigned or quit their



post causing a resultant vacancy which could then be filled up from the extended merit list.

As no more vacancies beyond 25 have been notified by the respondents, the validity of the extended panel is no longer germane to the dispute.

8. It is a fact, as reiterated by the respondents, that the respondents have not notified any vacancies for Staff Nurse beyond 25 (including 10 for OBC category) and, even if further vacancies have accrued, as ascertained by the applicants through RTI, it is for the respondents to take a policy decision based on their financial circumstances and administrative reasons whether more posts are to be filled up in future. The Court or this Tribunal under no circumstances can mandate the respondents to fill up any more vacancies than notified in the advertisement.

8. Accordingly, O.A. 912 of 2017 fails on merit and is dismissed accordingly. There will be no orders on costs.

9. During hearing of O.A. No. 1517 of 2018 read with M.A. 747 of 2018, Ld. Counsel for the applicants admitted that although he had challenged a notification for recruitment of Staff Nurse dated 14.9.2014 in the said O.A., it has come to their knowledge that the said notification has been cancelled and that a fresh notification has been issued in 2019 by the respondent authorities for filling up the vacancies of Staff Nurse. Accordingly, as the very notification under challenge has been cancelled, the O.A. 1517 of 2018 and M.A. 747 of 2018 are rendered infructuous and are disposed of accordingly with liberty to agitate afresh, if so advised.

**(Dr. Nandita Chatterjee)**  
Administrative Member  
SP

**(Bidisha Banerjee)**  
Judicial Member