

THE DIRECTOR OF INDIAN SYSTEM OF MEDICINE  
& ANR. ETC.

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v.

DR. SUSMI C.T. & ANR. ETC.

(Civil Appeal No. 7537-7544 of 2021)

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DECEMBER 08, 2021

**[UDAY UMESH LALIT, S. RAVINDRA BHAT AND  
BELA M. TRIVEDI, JJ.]**

*Service Law – Selection – Right of selected candidates – Extent and ambit of – Candidates complaining that some vacancies had been kept back and not reported – Held: Right of those who find a position in the ranked list is to be advised against vacancies which arise during the currency of the list, and which are reported – In the present case, it was as against vacancies that were reported to the State Public Service Commission, that the candidates had some semblance of a right – However, as far as those not reported are concerned, the candidates cannot claim a right per se – It is possible that in given situations, the State may be lethargic, or even may not wish to report vacancies – In such situations, undoubtedly the individuals awaiting appointment may have recourse to judicial remedies – In such proceedings, the government or the concerned agency can furnish a suitable explanation – If that is found to be arbitrary, appropriate directions may follow – However, the procedure in all such cases, would be to consider the State's response– Remedy – Judicial Review.*

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*Practice and Procedure – Judgment – Challenged by the State against only one party – Propriety – Held: The State or any public agency, cannot be precluded from challenging a judgment, on the ground that it approaches the court, filing an appeal against only one party – Even if in that case, the normative basis of the judgment under appeal is disturbed, and the issue concerns a matter having public ramifications, such as tax, or recruitment, the final judgment would bind all concerned – In the present case too, therefore, the High Court's reasoning that the state had not filed petitions against other persons, was flawed; that ipso facto should not have precluded an examination of the merits of the orders of the Tribunal.*

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- A *Shankersan Dash v. Union of India* [1991] 2 SCR 567 – followed.

B *Shenoy & Co v. Commercial Tax Officer* (1985) 2 SCC 512 : [1985] 3SCR 659 – relied on.

**Case Law Reference**

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|-------------------------|------------------|----------------|
| <b>[1985] 3SCR 659</b>  | <b>relied on</b> | <b>Para 23</b> |
| <b>[1991] 2 SCR 567</b> | <b>followed</b>  | <b>Para 25</b> |

C CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.7537-7544 of 2021.

D From the Judgment and Order dated 24.07.2019 of the High Court of Kerala at Ernakulam in R.P. Nos.657/2019 in O.P. (KAT) No.256/2019, R.P. No.659/2019 in O.P. (KAT) No.24/2019, R.P. No.660/2019 in O.P. (KAT) No.17/2019, Common Judgment dated 24.07.2019 in O.P. (KAT) Nos.286 and 287/2019 and Common Judgment dated 19.06.2019 in O.P. (KAT) Nos.17 and 24/2019.

E Pallav Sishodia, Sr. Adv., G. Prakash, Ms. Priyanka Prakash, Ms. Beena Prakash, Manan Sanghai, Vipin Nair, P. B. Suresh, Arindam Ghosh, Karthik Jayashankar, Prakash Baghel, Sanand Ramakrishnan, P. A. Noor Muhammed, Jishnu M. L., Prakash Ranjan Nayak, Roy Abraham, Adithya K. Roy, Himinder Lal, Advs. for the appearing parties.

F The Order of the Court was passed by

**S. RAVINDRA BHAT, J.**

G 1. Leave granted.

F 2. The appeals were heard finally with the consent of the counsel for the parties.

G 3. The appellant (hereafter referred to as the “Director”) is aggrieved by the impugned final judgment and order dated 24.07.2019<sup>1</sup>, as well as orders dated 02.07.2019<sup>2</sup> and 19.06.2019<sup>3</sup> passed by the High Court of Kerala at Ernakulam.

<sup>1</sup>R.P. No. 657/2019, R.P. No. 659/2019, R.P. No. 660/2019, OP(KAT) No.286/2019, OP (KAT) No.287/2019

<sup>2</sup>OP(KAT) No. 256/2019

<sup>3</sup>OP(KAT) No. 17/2019 and OP(KAT) NO. 24/2019

4. The Director had filed petitions challenging orders of the Kerala Administrative Tribunal (hereafter referred to as the “KAT”) which had required the reporting of 28 vacancies in the post of Medical Officer (Ayurveda), Assistant Insurance Officer in the Department of Indian System of Medicine (hereafter referred to as the “posts”).

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5. The Kerala Public Service Commission (hereafter referred to as the “KPSC”) issued a notification on 19.11.2014 eliciting applications from amongst eligible candidates for the posts. The first respondent along with several others applied for these posts. These candidates were included in the ranked list published on 19.11.2014. In accordance with the rules governing KPSC, the Department in question- i.e. Indian System of Medicine and Insurance Medical Service (hereafter referred to as the “department”) -had to report vacancies for the duration in which the list was operative. According to the procedure prescribed by those rules, vacancies had to be notified and candidates advised, after which they were to be appointed. On 14.11.2017 the first respondent, and others (hereafter referred to as the “applicants”) preferred proceedings under Section 19 of the Administrative Tribunal Act before the KAT<sup>4</sup>. The applicants sought the direction to the department to report 65 vacancies of the posts to KPSC before the list was to expire i.e. on or before 18.11.2017. An interim application seeking a direction to advise 28 vacancies remaining to be reported to the KPSC, was sought. The interim order was granted on 14.11.2017. Like the respondent in this case, other applicants also moved the KAT with different applications. These were considered and disposed of on 03.08.2018. The KAT took into consideration the pleadings and material before it, as well as the contentions urged. It was contended that about 33 anticipated vacancies were reported on 08.11.2017 and 28 provisional vacancies also needed to be reported which was taken care of by the interim order dated 14.11.2017. The KAT accepted an argument on behalf of the applicants that by a promotion order dated 20.06.2017, eligible Medical Officers (Ayurveda) were promoted as Senior Medical Officers, as a result of which 28 vacancies arose which had to be reported. In addition, the KAT also noted 15 other vacancies had to be treated as additional (over and above the 28 vacancies reported in terms of its interim order) and that the KPSC was bound to select candidates as against those vacancies.

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<sup>4</sup>O.A. 2816/2017

- A        6. The Department felt aggrieved and approached the Kerala High Court by filing O.P. (KAT) 256/2019. The High Court dismissed the Writ Petition on 02.07.2019, holding that it had been filed belatedly.
7. As far as the other petitions filed by the department were concerned, the High Court took note of the fact that in some cases Review Petitions were filed and after their dismissal Writ Petitions were preferred before it, and in some<sup>5</sup> the orders remained unchallenged. As a consequence, the High Court held that the finality of the Tribunal's order bound the department and consequently it could not maintain the Writ Petitions which were dismissed.
- B        Petitions were filed and after their dismissal Writ Petitions were preferred before it, and in some<sup>5</sup> the orders remained unchallenged. As a consequence, the High Court held that the finality of the Tribunal's order bound the department and consequently it could not maintain the Writ Petitions which were dismissed.
- C        8. It is firstly urged by Mr. Pallav Sisodia, senior counsel on behalf of the Director, that the High Court erred in rejecting the Department's petition on hyper-technicalities. It is pointed out that when the first Writ Petition O.P. 256/2019 came up for hearing the High Court rejected it on the ground of laches. A Review Petition (657/2019) was filed and rejected. It is pointed out that the Review Petition against the order in O.A. 2612/2017 was dismissed on 12.11.2018 after which O.P. 256/2019 was filed against main order dated 03.08.2018. Since only seven months was consumed and given that there was no question of limitation, the High Court was in error in rejecting the petition on the ground of delay. Furthermore, the order in O.A.34/2018 was connected to O.A.2212/2017 which was challenged by the Department by filing O.P. 221/2019.
- D        That petition was still pending before the High Court. The dismissal, therefore, on the ground of the delay, was clearly in error.
- E        9. It is urged by Mr. Sisodia that once the department sought review which was pending before the tribunal, the High Court could not have assumed that the matter had attained finality. On merits it is argued that the KAT fell into error by firstly directing the department to advise 28 vacancies on an assumption that they exist given that the rank list was to expire in terms of the rules on 18.11.2017. Furthermore, the High Court overlooked the important feature that the KAT completely ignored the department's counter affidavit which clearly disclosed that as against 163 vacancies which arose during the period of the currency of the ranked list - 158 candidates had been advised and 5 vacancies could not be filled since they were earmarked for persons with disabilities.
- F        10. It was further argued that initially when the applicants approached the KAT it was their claim that 125 candidates were advised,
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- H        <sup>5</sup>O.A. 2342/2017, 2212/2017, 2612/2017 and 2631/2017

as against the 163 vacancies advertised in 2011. The data presented to the tribunal on the other hand clearly showed that every vacancy that occurred as long as the rank list was inforce, was reported. In this context learned senior counsel appearing for the department relied upon a tabular chart to say that vacancies ranging between 17 and 1 were continuously reported for the period 05.05.2014 till 17.11.2017. It was further argued that the KAT fell into error in holding that several vacancies had arisen due to promotion of Senior Medical Officers.

11. Counsel relied upon the affidavit filed by the Director on 03.08.2018 which clearly stated that the order dated 20.06.2017 merely sanctioned higher grade and had promoted Medical Officers as per the ratio of 1:3 and the officials were allowed to continue under the same institutions. It was a categorical position of the Department that no vacancy arose in the entry cadre. The affidavit further stated that:

*"3. ...As per GO (Rt) No. 459/2017/Ayush dated 11.10.2017, 16 vacancies arose in Medical Officer (Ayurveda) post. Among this one vacancy was filled up by rejoining of a Medical Officer. Balance 15 vacancies were reported to Kerala Public Service Commission and appointment was given to candidates as per the advise list from the Kerala Public Service Commission.*

*4. It is submitted that Government have reported total number of 158 vacancies in the Medical Officer (Ayurveda) including the above 15 vacancies and as per the advise list from Kerala Public Service Commission, 158 candidates were appointed from the category No. 268/2011 rank list. 5 vacancies were set apart for Physically Handicapped candidates by Kerala Public Service Commission."*

12. It was argued that the KAT's directions have the effect of disturbing cadre strength of Medical Officers in the department. Besides the directions, results in the appointment of candidates were in numbers excess to what the rules would permit. In this context learned counsel relied upon Rules 13 and 14 of the Kerala Public Service Commission Rules of Procedure, 1976 (hereafter referred to as "rules").

13. Mr. P. B. Suresh, learned counsel appearing for the respondents i.e. those who were applicants before the KAT - argued that this Court should not interfere with the impugned orders. Learned counsel contended

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- A that although in terms of the rules, the life of the ranked list was two years, nevertheless it was extended by one more year. Counsel submitted that Rule 14 of the rules obliged the KPSC to advise candidates for all vacancies reported and pending before it, and vacancies which could be reported for the period during which the ranked list was alive.
  - B 14. It was therefore submitted that the department's omission to report 28 vacancies and other additional vacancies which arose on account of the promotions of incumbent Medical Officers (to the post of Senior Medical Officers) entitled the candidates awaiting appointments and whose names were reflected in the rank list (like the applicants) to seek judicial remedies. The KAT after thoroughly examining all the
  - C materials and considering the contentions made before it correctly held that there were adequate vacancies which had to be reported. The department did not disclose any sound *rationale* for not reporting such vacancies. In these circumstances the interim order dated 14.11.2017 was meant to and did complete justice to the parties.
  - D 15. Learned counsel particularly relied upon the reasoning of the KAT in its order dated 03.02.2018 (in O.A. 1900/2017). He submitted that the KAT took note of the Government order dated 20.06.2017 permitting 115 Medical Officers to the post of Senior Medical Officers which resulted in 115 vacancies during the currency of the ranked list.
  - E These in terms of Rule 14 had to be reported. The absence of any sound reason for not being reported, justified the KAT's final operative directions.
16. Mr. Noor Muhamad, learned counsel appearing for some of the applicant candidates, also relied upon Rule 14. He further contended that the department's position that the KAT's order with respect to vacancies arising after the promotion order dated 20.06.2017 is justified.
- F Those vacancies necessarily had to be reported to the KPSC for appointment and further process. He also submitted that the posts and promotions were governed by the Indian System of Medicines (Kerala Service Rules, 2005). It was submitted that the relevant category of posts i.e. Senior Medical Officers were to be filled only by promotion
  - G from the cadre of Medical Officers. The Departmental Promotion Committee convened for promotion of 140 Medical Officers to the post of Senior Medical Officers which resulted in 115 vacancies. This was consciously taken into account; the order was also considered by the KAT which issued directions. In these circumstances the High Court was justified in rejecting the Department's Writ Petition.
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***Reasoning and conclusions***

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17. Before proceeding with the discussion on merits, it is necessary to extract the relevant rules. Rules 13 and 14 are reproduced below:

*"13. The ranked lists published by the Commission shall remain in force for a period of one year from the date on which it was brought into force provided that the said list will continue to be in force till the publication of a new list after the expiry of the minimum period of one year or till the expiry of three years whichever is earlier:*

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*Provided that the above rule shall not apply in respect of ranked lists of candidates for admission to Training Course that leads to automatic appointment to Services or posts and that in such cases the Ranked Lists shall ...in force after one year from the date of finalisation of the Ranked Lists or after one month from the date of commencement of the course in respect of the last batch selected from the list within a period of one year from the date of finalisation of the ranked lists whichever is later.*

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*Provided further that the provisions of the proviso above mentioned shall not be applicable for the selection for admission to the Forest Rangers Course and also for admission to the Diploma Course in Forestry for which selections have to be made annually in accordance with the instructions of the Government of India issued from time to time. For these selections, the Ranked Lists will be in force only for a period of three months from the date of finalisation of the Ranked Lists or one month from the date of commencement of the course whichever is later.*

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*Provided further that the Commission may take steps for the preparation of a new ranked list wherever necessary even before the expiry of the period of one year of the ranked list, by inviting applications but that the ranked list prepared in pursuance of the said notification shall be brought into force only after the expiry of the period of one year of the existing ranked list.*

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- A *Provided further that a ranked list from which no candidate is advised during the period of one year from the date on which it was brought into force shall be kept in force till the expiry of three years from the said date and in a case where no candidate is advised from the ranked list till the expiry of the said period of three years, the duration of the ranked list shall be extended by the Commission for a further period of one year or till at least one candidate is advised from the list whichever is earlier.*
- B *Provided further that if the Commission is satisfied of the existence of a general ban not exceeding one and a half year in the aggregate duration declared by the Government on the reporting of vacancies, to the Public Service Commission, they shall have the power to keep alive the ranked lists which are normally due to expire during the period of the above said ban or within 7 days of the cessation of the ban, for a further period of 30 days from the date of cessation of ban. If the commission is satisfied of the ban and its consequences they shall issue a notification keeping alive the ranked list in the above manner and shall advise candidates to the vacancies which actually arose during the normal period of validity of the ranked list and certified to be as such by the Appointing Authorities reporting vacancies to the Commission.*
- C *14. The Commission shall advise candidates for all the vacancies reported and pending before them and the vacancies which may be reported to them for the period during which the ranked lists are kept alive in the order of priority, if any, and in the order of merit subject to the rules of reservation and rotation, wherever they are applicable.*
- D *Provided that the advice of candidates by the Commission from the ranked list kept alive under the 5th Proviso to .....be confined to the vacancies that actually arose during the normal period of validity of the ranked lists. Rule 13 and certified to be as such by the Appointing Authorities reporting vacancies to the Public Service Commission.*
- E *Note: The prolongation under the 5th proviso to Rule 13 shall not be deemed to be part of the normal period of validity of the ranked list under Rule 13.”*

18. It is evident, therefore, that candidates can expect that their claim vacancies which occur during the currency of a ranked list, upon their being advised by the KPSC, would be considered. This obligation, so to say, is because of the term in Rule 14 that the KPSC “*shall advise candidates for all the vacancies reported and pending before them and the vacancies which may be reported to them for the period during which the ranked lists are kept alive.*” If one keeps in mind, that the KPSC’s obligation arises *after* the vacancies are reported, it is apparent, that as a prerequisite for that obligation, the vacancies *should occur, and should be reported.*

19. In the present case, the department’s clear position in its affidavit, before the KAT was that *all* vacancies were reported, and that only 5 vacancies that had to be filled from amongst candidates with disabilities, were unfilled. This is quite apparent from the tabular chart, which disclosed the particulars of the vacancies that had arisen- during the currency of the ranked list, as well as those reported, and the final tally of vacancies which existed, as on the date when the ranked list expired, i.e 18.11.2017:

| S.<br>No. | File No. & Date                                                                                                                          | No. of vacancies<br>reported | No. of<br>candidates<br>advised from<br>KPSC | Remarks                      |
|-----------|------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|----------------------------------------------|------------------------------|
| 1.        | D3-6085/14, D3-16994/11;<br><br>D3-7668/12; D3-2908/12<br><br>D3-16994/11;D3-9887/11<br><br>(issued between 23/09/2011 to<br>05/05/2014) | 29+1+1+1+2+1<br><br>35       | 34                                           | 1Set apart for PH<br>(ortho) |
| 2.        | D3-6085/14 dated 11/03/15                                                                                                                | 4                            | 4                                            | NIL                          |
| 3.        | D3-6085/14 dated 06/06/15 (NJD)                                                                                                          | 1                            | 1                                            | NIL                          |
| 4.        | D3-10196/10<br><br>D3-15789/10<br><br>(issued between 29/10/10 to<br>02/11/10)                                                           | 2                            | 2                                            | NIL                          |
| 5.        | D3-10868/15 dated 30/07/15                                                                                                               | 5                            | 5                                            | NIL                          |
| 6.        | D3-10868/15 dated 12/01/16                                                                                                               | 2                            | 2                                            | NIL                          |

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|---|----------------------------------------------------------------------------------------------------------------------------------------|---------------------|-------------------|----------------------------------------|
| A | 7. D3-1740/16 dated 27/02/16<br>8. D3-10868/15 dated 11/04/16<br>9. D3-10868/15 dated 15/11/16 (NJD)<br>10. D3-16209/16 dated 08/12/16 | 30<br>7<br>1<br>3   | 29<br>7<br>1<br>3 | 1 (PH) Blind turn<br>NIL<br>NIL<br>NIL |
| B | 11. D3-84/17 dated 07/02/17<br>12. D3-84/17 dated 18/04/17<br>13. D3-84/17 dated 08/05/17                                              | 13<br>2<br>2        | 13<br>1<br>2      | NIL<br>DA-Ortho<br>NIL                 |
| C | 14. D3-84/17; D3-25517/17<br>D3-27139/17 (issued between 09/06/17 to 13/07/17)                                                         | <u>1+13+4</u><br>18 | 17                | DA-Ortho                               |
| D | 15. D3-27139/17 dated 02/09/17<br>16. D3-25517/17 dated 19/10/17<br>D3-33210/17 dated 04/11/17                                         | 1<br>21             | 1<br>20           | NIL<br>1 (DA-Ortho)                    |
| E | 17. D3-25517/17 dated 08/11/17 (NJD);<br>D3-32337/17 dated 16/11/17<br>D3-32337/17 dated 17/11/17                                      | 1+13<br>2           | 16                |                                        |
|   | TOTAL                                                                                                                                  | 163                 | 158               | 5                                      |

F 20. The basic premise for the KAT's direction – which was affirmed by the High Court - was that 28 vacancies were not reported and that 15 others arose. The KAT also formed the opinion that a large number of vacancies arose in the Medical Officers' cadre, on account of promotion orders dated 20.6.2017.

G F 21. This court notices that there was no dispute about the figures provided by the department, in the tabular chart. These reflected the government's ongoing engagement, and concern that the benefit of appointment of all those who could be given appointment during the currency of the ranked list, was provided. Even as late as on 17.11.2017, 37 vacancies were reported; between 19.10.2017 and 17.11.2017; 37 vacancies were advised. There is also no dispute that the advice led to further appointment of successful candidates. This being the position, the KAT, in this court's opinion, without any material, proceeded to direct the department to advise 28 vacancies on 14.11.2017. There is nothing on record to suggest that the government was tardy in reporting or

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advising, or was intentionally dragging its feet. This order was made at the first hearing, without providing the department with any opportunity to respond to the demand for an interim order. A

22. In the final order, the KAT virtually confirmed the interim order, and proceeded to entirely discount the department's stand that the promotion of some medical officers to the higher grade, did not automatically lead to existence of vacancies. The department had explained, in its affidavit, that the entire cadre of Medical Officers (714) with senior medical officers (237), was 951. The department's affidavit had stated that the promotions were not perceived as *ratio* promotions, as a result of which vacancies in the cadre of Medical Officers could not be inferred. Further, according to the department, as in June 2017, the strength of Medical Officers was 851, in excess of the sanctioned cadre strength. It was contended that for these reasons, no vacancies could be said to have arisen. However, the KAT rejected that submission; and the High Court confirmed its orders. B

23. This court is of the opinion that the approach of the High Court was to put it mildly, cavalier. When the department approached the High Court under Article 226 of the Constitution, its petition was rejected on the ground of laches, despite the fact that the main order of the KAT was given just a year before presentation of the petition; furthermore, the department had also filed a review petition. As far as the other writ petitions are concerned, the High Court gave them a short shrift saying that in one of the applications allowed by the KAT, the order had been allowed to become final. This approach was wrong, because the department had approached the KAT with a review, which was pending. Furthermore, even if that were so, the High Court should have considered the matter on merits, given that the issue involved, had large ramifications. *Shenoy & Co v. Commercial Tax Officer*<sup>6</sup> is an authority for the proposition that the state or any public agency, cannot be precluded from challenging a judgment, on the ground that it approaches this court, filing an appeal against only one party. Even if in that case, the normative basis of the judgment under appeal is disturbed, and the issue concerns a matter having public ramifications, such as tax, or—in this case, recruitment, the final judgment would bind all concerned. In the present case too, therefore, the High Court's reasoning that the state had not filed petitions against other persons, was flawed; that *ipso* C

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<sup>6</sup>(1985) 2 SCC 512 H

- A *facto* should not have precluded an examination of the merits of the KAT's orders.

24. As noticed earlier, the right of those who find a position in the ranked list, is to be advised against vacancies which arise during the currency of the list, and which are reported. In this case, the candidates B complained that some vacancies had been kept back *and not reported*.

25. The right of selected candidates (as those in a ranked list are) was explained by a five-judge bench of this court in *Shankersan Dash v. Union of India*<sup>7</sup> in the following manner:

- C “*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....*”

- F 26. It, is therefore, as against vacancies that are reported to the KPSC, that the candidates have some semblance of a right. However, as far as those not reported are concerned, the candidates cannot claim a right *per se*. It is possible that in given situations, the state may be lethargic, or even may not wish to report vacancies. In such situations, undoubtedly the individuals awaiting appointment may have recourse to G judicial remedies. In such proceedings, the government or the concerned agency can furnish a suitable explanation. If that is found to be arbitrary, appropriate directions may follow. However, the procedure in all such cases, would be to consider the state's response. In the present case, the KAT in this court's opinion, entirely misdirected itself in making an

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H <sup>7</sup> 1991 (2) SCR 567

inquiry whether vacancies had arisen in June 2017, with promotion of some Medical Officers. As the department explained, those promotions could not automatically result in vacancies, having regard to the fact that excess number of Medical Officers were on the rolls. Furthermore, the KAT in our opinion, should not have inquired into the matter, once it was reported that all vacancies that could be reported, had been reported- as is evident from the reply filed by the department, as well as the tabular chart in it.

27. For the above reasons, it is held that the impugned judgment and orders of the High Court cannot be sustained. The said judgment and order, as well as the orders of the KAT are, accordingly set aside. The appeals are allowed, but without order on costs.

Devika Gujral

Appeals allowed.