Tridip Kumar Dingal And Ors vs State Of West Bengal And Ors on 4 November, 2008

Equivalent citations: AIR 2008 SC (SUPP) 824, 2009 (1) SCC 768, (2008) 15 SCALE 232, (2009) 2 SERVLJ 196, (2009) 2 JCR 62 (SC), (2009) 2 CALLT 13, (2009) 1 SCT 440, (2009) 2 CAL HN 152, (2009) 3 SERVLR 1

Author: C.K. Thakker

Bench: D.K. Jain, C.K. Thakker

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVL APPELLATE JURISDICTION

CIVIL APPEAL NOs. OF 2008
ARISING OUT OF
SPECIAL LEAVE PETITION (CIVIL) NOs. 14820-14825 OF 2005

TRIDIP KUMAR DINGAL & ORS. ... APPELLANTS

VERSUS

STATE OF WEST BENGAL & ORS. ... RESPONDENTS

WITH

CIVIL APPEAL NOs. OF 2008
ARISING OUT OF
SPECIAL LEAVE PETITION (CIVIL) NOs. 10507-10509 OF 2005

UJJAL MAITY & ANR. ... APPELLANTS

VERSUS

KALYAN BAGCHI & ORS. ... RESPONDENTS

WITH
CIVIL APPEAL NOs. OF 2008
ARISING OUT OF
SPECIAL LEAVE PETITION (CIVIL) NOs. 9531-9532 OF 2005

MUKSUDUR RAHMAN & ORS. ... APPELLANTS

VERSUS

KALYAN BAGCHI & ORS. ... RESPONDENTS

J U D G M E N T

C.K. THAKKER, J.

1. Leave granted.

2. The present appeals have been instituted by the appellants being aggrieved and dissatisfied with the judgment and order passed by the High Court of Calcutta on August 11, 2003 in WPSR No. 630 of 2002 and companion matters and an order, dated January 06, 2005 in CAP No. 1006 of 2004 and cognate petitions.

3. The case has a checkered history. In early nineties of the last century, the Department of Health & Family Welfare, State of West Bengal suffered acute shortage and non- availability of adequate member of Medical Technologists. In their absence, laboratory and investigation work in Government Hospitals, Laboratories, Medical Colleges, Primary Health Centres, Blood Banks, etc. could not be performed satisfactorily. The Government was worrying as to distress and agony of patients visiting hospitals and dispensaries. It, therefore, took an initiative to fill up requisite number of vacancies of Medical Technologists by taking up the matter with the Employment Exchange. On October 5, 1993, the Assistant Director of Health Services (Administration) issued a Memo to the Director of Employment Exchange for sponsoring names of candidates for the post of Medical Technologist (Laboratory) having requisite qualification of Madhyamik (Secondary)/Higher Secondary with Science along with a certificate of Laboratory Technology from a recognized University or Institution. The post was in the basic pay of Rs.1040-1920 with other admissible allowances. It was stated that the candidates were required to work in any District of West Bengal.

4. Pursuant to the above Memo and receipt of names from Employment Exchange, a written examination was held on August 20, 1995. A list of 1070 candidates was published who had cleared the examination. On August 1, 1996, oral interview of the candidates who had cleared written examination was taken and provisional select list was prepared which was published on December 18, 1998. The empanelment was made on the basis of marks obtained by the candidates at oral interview.

5. The candidates who could not get entry in the select list prepared by the authorities on the basis of marks obtained at oral interview, approached West Bengal Administrative Tribunal, Calcutta by instituting Original Application No. 1023 of 1999. It was contended by them that the authorities had committed an error of law in totally ignoring the marks obtained by candidates at written examination and panel was prepared only on the basis of marks obtained by the candidates at oral interview which was illegal and contrary to law. Preparation of panel, therefore, was arbitrary, unreasonable and was liable to be set aside. Interim order was passed by the Tribunal on April 9, 1999 granting liberty to the authorities to make appointment of candidates selected and empanelled subject to the result in Original Application. Liberty was also granted to the parties to move the Tribunal for variation, vacation or modification of the order.

6. Being aggrieved by the interim order dated April 9, 1999 granting liberty to the authorities to make appointment subject to final outcome of the proceedings, the appellants approached the High Court of Calcutta by filing WPST No. 199 of 1999 contending that they had been treated with discrimination and different interim orders were passed in different matters. The petition was disposed of by the High Court by issuing certain directions. The Tribunal was requested to dispose of the main matter expeditiously preferably before January 15, 2000.

7. By judgment and order dated June 30, 2000, main matter was disposed of by the Tribunal. Merit list which was prepared on the basis of marks obtained by candidates at oral interview was set aside and a direction was issued by the Tribunal to prepare fresh merit list of candidates by adding the marks obtained by them in both (i) written examination, and

(ii) oral interview, excluding those who were already in service. It was observed that in the oral test 40% was fixed by the Committee as pass marks. The said standard should be applied on the total marks as pass marks. Appointment should be given from the fresh panel so prepared in order of merit subject to reservation and to fill up vacant posts. Since substantial period had gone in the meanwhile, a direction was also issued that age bar will not come in the way of the candidates in getting appointment. The persons who were selected, appointed and were in employment were protected. It was also observed that every appointment would be subject to medical examination and police verification. A direction was also issued that all appointments should be given within a period of four months from July 1, 2000. The case was thus finally disposed of.

8. The decision of the Tribunal was challenged in writ petitions in the High Court and the High Court, by judgment and order dated November 27, 2000, disposed of the petitions. It observed that the question of retaining those candidates who had been appointed, must be considered afresh by the Tribunal since Tribunal had not assigned any reason as to why they should be permitted to be continued in service. According to the High Court, if the Tribunal was of the view that the selection process was vitiated, no such sympathy could have been shown to the candidates selected in the said selection process. It was also observed that the question as to whether 40% marks could have been allotted to the oral test also ought to have been considered by the Tribunal keeping in view various decisions of the Apex Court. Taking note of the grievance of some of the petitioners, the High Court observed that the Tribunal would consider whether 100% roster had been maintained. Request was made to the Tribunal to dispose of the matter at an early date preferably within a period of two months from the communication of the order. That is how the first round of litigation came to an end.

9. The Tribunal again considered the matter. The main grievance of the applicants before the Tribunal, who were unsuccessful in written examination or oral interview was that the marks obtained by them in both written examination and oral interview ought to have been combined by the respondent authorities in preparation of the merit list and panel ought to have been prepared on that basis which was not done. Since the selection was made only on the basis of oral interview, the whole selection process was vitiated in law. The authorities ought to have considered marks of both, written examination and oral interview and ought to have prepared merit list and in that case, most of the applicants would have been empanelled by finding place in the merit list. It was also

contended that the respondent authorities had followed a `pick and choose' policy by including names of their `kiths and kins'. It was alleged that certain applicants had cleared both written test as well as viva voce and yet their names were not included in the panel prepared for the selection. Other grievances were also made.

10. The case of the respondent authorities, on the other hand, was that those who had become successful in both written test and oral interview were selected and they were appointed in due course. They were discharging their duties as Medical Technologists faithfully since three years and had acquired right to continue as such and they could not be deprived of their livelihood for no fault on their part at the belated stage. It was also contended that once those candidates who participated in the process and could not get themselves selected, had no right to raise objection against such process which had been undertaken in accordance with law. They were estopped by the doctrine of estoppel by turning round and challenging it being illegal or unlawful.

11. It was also contended by the counsel for the State that since posts which were to be filled in were very limited (80) and large number of candidates applied (approximately 4000 candidates), the State authorities had no alternative but to screen candidates by holding written examination. Such a `screening test' was perfectly legal, valid and it could not have been objected. In other words, according to the State, written examination was in the nature of `elimination test'. So far as oral interview was concerned, it was submitted that the Selection Committee was consisting of high ranking officials who acted impartially, objectively and without malice. The allegation that the members of Selection Committee were instrumental in the matter of selection of their close relations was totally baseless. Aggrieved candidates could not give any name of alleged close relatives of the members of the Selection Committee. It was, therefore, submitted that the action of the State was wholly legal and valid.

12. The Tribunal considered the rival contentions of the parties and observed that as against recruitment of 80 Medical Technologists, about 4000 candidates offered their respective candidature for appointment. It was unprecedented and perplexing situation. In absence of Recruitment Rules, an administrative decision was taken by the Government for screening unsuccessful candidates by holding written test which was legal and proper. About 2500 candidates appeared at the written test out of 4000 applicants and a list was prepared eliminating those candidates who had obtained less than qualifying marks (40%) at the written examination. Since the object of the test was only to oust huge number of unsuccessful candidates, there was no illegality in undertaking the said exercise. A final list of eligible and qualified candidates was prepared, who were called for oral interview. According to the Tribunal, the purpose of written test was only to eliminate huge number of unsuccessful candidates and it was not a case of selection based on written examination and oral interview. There was no question of `pick and choose' or showing discrimination as alleged.

13. The Tribunal also noted that about 190 candidates had already joined service as Medical Technologists and they were working since more than three years. Since the entire selection process had been found legal and lawful, there was no question of cancellation of appointments of the candidates who had already joined service.

14. Moreover, unsuccessful candidates having participated in the selection process without any objection or protest, could not be allowed to turn around and challenge the selection as illegal or null and void. Following a decision of this Court in Swaran Lata v. Union of India, (1979) 3 SCC 165, the Tribunal held that the applicants could not `approbate and reprobate at the same time'.

15. Taking overall view of the matter, the Tribunal found that the selection process was bona fide and in accordance with law and it was, therefore, required to be approved. Appointments which had already been made by the authorities of 190 candidates who had gained experience of more than three years in the work of investigation entrusted to them also could not be disturbed. Accordingly, a direction was issued to the State authorities to offer appointments to successful candidates in the waiting list subject to availability of vacancies following medical examination and police verification.

16. The above judgment and order was again challenged by the unsuccessful candidates in the High Court and by the impugned order, the High Court allowed the petitions. It observed that the Tribunal had committed an error of law in not directing the authorities to prepare merit list on the basis of marks obtained in the written test as well as viva voce. It was urged that if the marks obtained at the written test had been kept out of consideration, proper selection could not be said to have been made and the entire panel would be invalid. Referring to Raj Kumar & Ors. v. Shakti Raj & Ors., (1997) 9 SCC 527 and Praveen Singh v. State of Punjab & Ors., (2000) 8 SCC 633, the High Court issued the following directions;

> "We hold that a fresh panel of Medical Technologies has to be prepared by the State Government on the basis of qualifying marks both in the written test as well as in oral test. We, therefore, dispose of all these writ applications by giving the following directions:
>
> i. The State Government must prepare within a period of six weeks from the date of service of this order upon them a fresh panel of Medical Technologies on the basis of qualifying marks in the already held written and oral test for appointment to the post of Medical Technologists;
>
> ii. 40% of such marks including the marks obtained in written and oral test should be the qualifying marks and persons who have not obtained 40% marks need not be empanelled;
>
> iii. After preparation of such panel, appointment is to be made on the basis of such panel;
>
> iv. While preparing the panel the rule relating to reservation must be taken care of;
>
> v. In the matter of preparation of panel no candidate who otherwise qualifies in the panel on the basis of the test made above should be disqualified solely on the ground of age;

> We are giving these directions since controversy is pending for all these years and for which the petitioner or candidates are not to be blamed".

17. It was also made clear that if those candidates who had already been appointed did not find place in the panel, consequential orders could be made by the State Government but those who were in the panel could be accommodated if by reason of existing vacancies, they could be accommodated.

18. It appears that certain candidates approached this Court by filing Special Leave Petition (Civil) No. (CC) 3728 of 2004 challenging the judgment and order dated August 11, 2003. A two Judge Bench of this Court dismissed the Special Leave Petition as withdrawn on April 29, 2004.

19. Nothing was done by the appellant herein immediately against the order passed by the High Court on August 11, 2003. It further appears that implementation of the order passed by the High Court was sought and a contempt petition was filed by petitioners inter alia, alleging that the authorities had not implemented the directions issued by the High Court. A prayer was, therefore, made to call upon the respondents/ contemnors to show cause why they should not be committed to prison or otherwise dealt with for having violated the judgment and order dated August 11, 2003 passed by the High Court and why they should not be directed to prepare fresh panel in accordance with those directions.

20. An affidavit was filed by the State asserting that they had followed the directions of the Court. It was stated that there was some delay on the part of the authorities because of procedural difficulties and practical problems but it was unintentional. They were always ready and willing to carry out the directions of the Court. An unconditional apology was also tendered by the respondents.

21. The High Court passed an interim order on December 21, 2004. Reading of the order made it clear that the Court was not inclined to issue any direction for removal/termination of services of 66 persons who were working since 3-4 years. The Court directed the State to make inquiries and to report to the Court on January 06, 2005 as to the exact number of vacancies which were available for the appointment of the panel to be prepared. It also directed the State to inform the Court whether nine vacancies which had become defunct, could be revived.

22. On January 06, 2005, again the matter was placed before the Court as per the order dated December 21, 2004. The High Court heard learned counsel for the parties and noted that a panel of 586 candidates had been prepared on the basis of 40% marks obtained both in the written test as well as oral interview. It also observed that sixty-six persons who were appointed should be allowed to be accommodated by granting liberty to the State Government in the manner it thought best without disturbing their seniority or continuity of their service. It directed that the remaining vacancies should be filled up on the basis of seniority position from the panel of 586 candidates. Contempt petition was accordingly disposed of.

23. The appellants being aggrieved by the directions of the High Court have approached this Court.

24. There was long delay of 559 days in approaching this Court by the appellants so far as the order passed in the Writ Petition. On July 15, 2005, notice was issued by this Court on Special Leave Petition as well as on application for condonation of delay. No stay of appointment, however, was granted pursuant to the impugned order of the High court and liberty was granted to the State to make appointments. It was, however, clarified that the appointments if any shall be subject to further orders that may be passed in the Special Leave Petition. The matter was thereafter adjourned from time to time. Affidavits and further affidavits were filed. Considering the nature of litigation and administrative problems of the State Government on one hand and future of several candidates on the other hand, it was thought fit to dispose of the matter finally and accordingly the Registry was directed to place the matter for final disposal on a non-miscellaneous day. That is how the matter has been placed before us.

25. We have heard learned counsel for the parties.

26. The learned counsel for the appellants contended that the orders passed by the High Court were not in consonance with law. Moreover, even those orders had not been complied with by the authorities. The orders are, therefore, liable to be set aside. It was stated that the action of the authorities of allocation of more than 15% marks for oral interview was illegal and contrary to the law laid down by this Court. Preparation of merit list and panel of selected candidates was arbitrary and unreasonable. The action of the authorities and of the Tribunal as well as of the High Court of protecting 66 selected and appointed candidates was unlawful and no such direction could have been issued. It was submitted that since the action of the respondent authorities was illegal and the Tribunal as well as the High Court were wrong in protecting illegally selected candidates, the doctrine of estoppel, waiver or acquiescence does not apply. The entire process of selection got vitiated and directions are required to be issued by this Court to respondent authorities to act in accordance with law.

27. It was stated that several vacancies are still there in the cadre of Medical Technologists and almost all the appellants can be accommodated by the State authorities. It was, therefore, submitted that the appeals deserve to be allowed by issuing consequential directions.

28. The respondent authorities, on the other hand, supported the orders passed by the Tribunal and confirmed by the High Court. It was stated that there is gross and unexplained delay and laches on the part of the appellants in approaching this Court.

29. So far as the order dated August 11, 2003 is concerned, it was submitted that certain directions were issued which were complied with by the authorities. The appellants herein did not challenge those directions at that time. In fact, their grievance was that the authorities had not complied with the orders passed in August, 2003 and hence contempt petition was filed after about ten months. The prayer was to implement the order passed by the High Court. Necessary directions were, therefore, issued by the High Court in January, 2005 ordering the authorities to act in accordance with the directions of the Court.

30. It was also contended that several candidates did not challenge the orders of the High Court. It was urged that having accepted the judgment and filed contempt petition, the appellants were estopped under the doctrine of estoppel, waiver or acquiescence and they cannot challenge the order of 2003 by approaching this Court after about two years. It was urged that present case is one of `approbate and reprobate', `hot and cold', or `fast and loose'. This Court, in exercise of discretionary jurisdiction under Article 136 of the Constitution may not entertain such prayer and dismiss all the matters.

31. It was further urged that in the order passed in contempt petition, the High Court observed that if any person is aggrieved by any action taken by the authorities in pursuance of the order, he is at liberty to take appropriate proceedings in accordance with law. Therefore, even on that ground, the present appeals are not maintainable.

32. The learned counsel for the State stated that 66 persons have been retained who were selected and appointed. Initially, they were not made parties and were continued in service. By now they have completed about ten years. He fairly stated that in the circumstances, this Court may direct the authorities that those candidates who are similarly situated to 66 persons who are protected and who are in the merit list above those 66 candidates may be ordered to be appointed inasmuch as there are several vacancies. He, however, submitted that the said benefit may be extended only to those candidates who have approached the Court by filing Original Applications, Writ Petitions and by making grievance before this Court. The candidates who had not approached the Tribunal, High Court and this Court have no right to make any grievance. Hence, the applicants who have sought impleadment in the present proceedings for the first time cannot claim the benefit which the appellants herein have claimed. It was, therefore, submitted that an appropriate direction may be issued so that no prejudice will be caused to those employees who were vigilant of their rights and who are otherwise qualified and eligible on the basis of protection granted to 66 employees.

33. The learned counsel appearing for 66 employees who were appointed, protected by the Tribunal and by the High Court and who are still in service, submitted that the High Court was wholly right in protecting his clients. It was stated that their names were sponsored by the Employment Exchange, they cleared written examination as well as oral interview; they were declared successful and were appointed. In the Original Application, they were not made parties before the Tribunal. They were, therefore, protected by the Tribunal and there was no illegality therein. The High Court, no doubt, directed the Tribunal to consider the cases of those candidates but it is equally true that they were in service and therefore they were protected even in the second round. The High Court in the second round, expressly stated that since the employees were in service, they needed protection and accordingly direction was issued to that effect. Even during the course of proceedings, it was stated on behalf of the petitioners before the High Court that the protection granted in favour of selected candidates could be continued. It was, however, submitted that similar benefit ought to be extended to them. The High Court expressly protected them by directing the authorities to consider the cases of eligible petitioners and to extend similar benefit to them. Even thereafter, in the contempt proceedings, the selected candidates were not disturbed. By now, they have completed about ten years of service. It was, therefore, submitted that this Court, in exercise of power under Article 136 of the Constitution, may not interfere with the direction issued by the High Court.

34. Having heard learned counsel for the parties, in our opinion, the appeals deserve to be partly allowed. The contention on behalf of the State Government that written examination was for short-listing the candidates and was in the nature of `elimination test' has no doubt substance in it in view of the fact that the records disclose that there were about 80 posts of Medical Technologies and a huge number of candidates, approximately 4,000 applied for appointment. The State authorities had, therefore, no other option but to `screen' candidates by holding written examination. It was observed that no Recruitment Rules were framed in exercise of the power under the proviso to Article 309 of the Constitution and hence no such action could be taken. In our opinion, however, even in absence of statutory provision, such an action can always be taken on the basis of administrative instructions - for the purpose of `elimination' and `short listing' of huge number of candidates provided the action is otherwise bona fide and reasonable. It has also come on record that the administrative decision had been taken by the State to take `elimination test' to `short list' huge number of candidates. It is further clear that the plea to that effect was raised by the State in the first round of litigation before the first authority, viz. the Tribunal itself. But, in view of the fact that in that round of litigation, the Tribunal held the action of the State authorities to be wrong and the High Court upheld it and the State did not challenge the order in this Court, in our opinion, the High Court in the second round, did not commit any error of law in directing the authorities to prepare merit list on the basis of marks obtained by the candidates in written examination as also in oral interview. It was not open to the State authorities to reiterate and re-agitate in the second round, the same ground, that written examination was in the nature of `elimination test' and it was limited to `short listing' of candidates and marks obtained by candidates at the written examination could not be considered for preparation of merit list. The said stage had already gone and the decision in the first round had attained finality so far as the nature of written examination was concerned. The Tribunal and the High Court were, therefore, right in holding in the second round that the merit list was required to be prepared on the basis of composite marks obtained by candidates at the written examination and oral interview both and not only on the basis of marks at the oral interview.

35. The contention on behalf of the appellants that as per the law laid down by this Court in Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors., (1981) 1 SCC 722 and other cases that there cannot be more than 15% marks at the oral interview also cannot be accepted at this stage. As already indicated earlier, such a direction was issued as early as in 2000. The appellants, who were applicants before the Tribunal and petitioners before the High Court accepted the said decision and did not challenge the legality thereof by approaching this Court. Even in the second round, the same view was taken both by the Tribunal and by the High Court. The decision of the High Court was not challenged immediately. On the contrary, by filing a Contempt Petition, implementation of the direction of the High Court was sought by the appellant. The said direction was, therefore, binding on all the parties including the appellants.

36. Regarding protection granted to 66 candidates, from the record it is clear that their names were sponsored by the Employment Exchange, they were selected and appointed in 1998-99. The candidates who were unable to get themselves selected who raised a grievance and made a complaint before the Tribunal by filing applications ought to have joined them (selected candidates) as respondents in the Original Application, which was not done. In any case, some of them ought to

have been arrayed as respondents in a `representative capacity'. That was also not done. The Tribunal was, therefore, wholly right in holding that in absence of selected and appointed candidates and without affording opportunity of hearing to them, their selection could not be set aside.

37. The Tribunal stated;

> "In the case before us, the marks obtained in the written test were excluded from consideration which preparing the final list not in accordance with any policy which decision of the Government. Moreover, the weight of the decision of the Apex Court is on the side of consideration of the totality of the performance of the candidates in both oral and written test, when rules do not provide against it and appointment should be given from the merit list thus prepared in accordance with the rules including reservation rules. In our views same course should be followed in the cases before us. In this connection, it should be mentioned that this finding will not affect the appointments given to medical technologists (Laboratory) already the appointments given as those person are not parties to the proceedings before this Tribunal. It would be most improper for us to pass any judgment against to them without giving them an opportunity of being heard. So those appointments will remain unaffected by this Judgment".

(emphasis supplied)

38. The learned counsel for the respondents, in this connection rightly placed reliance on a decision of this Court in Prabodh Verma and Ors. v. State of Uttar Pradesh & Ors., (1984) 4 SCC 251.

39. True it is that the High Court, in the first round, directed the Tribunal to reconsider the matter of 66 candidates who were selected and appointed observing that the Tribunal had not assigned any reason for granting protection. With respect, it was not factually correct. The Tribunal had recorded reasons, namely, that they had been selected and appointed, they were working since the date of their appointment; they were not joined as respondents and no opportunity of hearing was afforded to them and in their absence and without observing principles of natural justice and fair play, their appointment could not be set aside.

40. Be that as it may, in the second round also, the Tribunal as well as the High Court protected them.

41. Dealing with the selected candidates, the Tribunal stated;

> "Taking an over-all view of the matter as disclosed from material on record, we find that the selection process opted by the Respondent authorities was bonafide and in accordance with the law. Therefore, we approve the action taken by them in the matter. We hold that the entire selection process was not vitiated in law and hence there was no question of quashing the selection process and other action adopted by the respondents in the matter. There was again no question of cancellation of the

appointments given by the State Respondent authorities to 190 candidates. They have served for about 3 years and have hence gained sufficient experience in the work of investigation entrusted to them. Again any other setting aside their appointments was bound to affect adversely the working of various medical Technologists in different Medical Units throughout the State of West Bengal. We also hold that fixation of qualifying marks in both written and oral test as 40% is quite lawful and valid in the facts and circumstances of the case.

In the aforesaid background and scenario, we direct that the appointees (in-service candidates)

will continue to do work as Medical Technologists. We also hold that the panel of 240 candidates was quite lawful and valid. Accordingly, we direct the State respondent authorities to offer appointments to the successful candidates, who are not now waiting in the Panel (Namely from Sl. No. 202-240) subject to availability of vacancies and also subject to medical examination and police verification. We also issue directions to the Respondents concerned, to relax the age illegible of the empanelled successful candidates (namely from Sl. No. 202-

240), if so required."

42. The High Court, in the writ petition also stated;

"It is further made clear that if those candidates who are already appointed do not find a place in the panel in that case consequential orders may be made by the State Government. But those who were in the panel if they can be accommodated by reason of existing vacancies in such cases persons who have already been appointed should not be disturbed. If is further made clear that appointments must be made on the basis of the panel as directed above."

43. Even in contempt proceedings, similar orders were passed.

44. On December 21, 2004, the Court passed the following orders;

"After considering the facts and circumstances of the case and also the affidavits filed by the State, it appears that in the panel which has been prepared, there are sixty-six persons who do not qualify on the basis of the norms fixed by this Court's order dated 11th August, 2003 and on the basis of which the panel has been prepared. But the fact remains that those sixty-six persons are now working. There were none vacancies which could not be filled up. It also appears from the affidavit of the State that those vacancies have become defunct. The Court is also not inclined to pass any order for removal/termination of services of those sixty-six persons who have been working for

> last three to four years and have become confirmed".

(emphasis supplied)

45. Then while finally disposing of Contempt Petition, the Court said;

> "We, therefore, give liberty to accommodate those sixty six persons in the manner it thinks best and without disturbing their seniority or continuity of service."

46. In fact, it was stated at the Bar that on behalf of the appellants a statement was made before the High Court that appointment of 66 employees may not be disturbed but similar relief could be granted and benefit should be extended to the candidates who had approached the Court. The Court, to that extent, accepted the submission and directed the authorities to consider the cases of those candidates who had obtained requisite 40% marks at written examination and oral test and who could be placed in the merit list along with or above 66 candidates. By taking such view, no illegality can be said to have been committed by the High Court and we see no infirmity in such a direction.

47. In Munindra Kumar & Ors. v. Rajiv Govil & Ors., (1991) 3 SCC 368, the selection comprised of written test, group discussion and oral interview. The relevant rule fixed 40 per cent of total marks for group discussion and oral interview (20 per cent each). Though this Court held fixation of marks as arbitrary being on higher side, it refused to set aside selection made on that basis since selection had already been made, persons were selected, appointed and were in service.

48. In Gujarat State Deputy Executive Engineers' Association v. State of Gujarat & Ors., 1994 Supp (2) SCC 591, this Court recorded a finding that appointments given under the `wait list' was not in accordance with law. It, however, refused to set aside such appointments in view of length of service (five years and more).

49. In Buddhi Nath Cahudhary & Ors. v. Akhil Kumar & Ors., (2001) 3 SCC 328, appointments were held to be improper. But this Court did not disturb the appointments on the ground that the incumbents had worked for several years and had gained good experience.

> "We have extended equitable considerations to such selected candidates who have worked on the posts for a long period", said the Court.

50. In M.S. Mudhol (Dr.) & Anr. V. S.D. Halegkar & Ors., (1993) 3 SCC 591, the petitioner sought a writ of quo warranto and prayed for removal of a principal of a school on the ground that he did not possess the requisite qualification and was wrongly selected by the Selection Committee. Keeping in view the fact, however, that the incumbent was occupying the office of Principal since more than ten years, this Court refused to disturb him at that stage.

51. In our considered opinion, the law laid down by this Court in aforesaid and other cases applies to the present situation also. We are of the considered view that it would be inequitable if we set aside appointments of candidates selected, appointed and are working since 1998-99. We, therefore, hold

that the Tribunal and the High Court were right in not setting aside their appointments.

52. It is undisputed that by the time we are called upon to decide the matter, the selected and appointed candidates have completed ten years. They are thus having rich experience in the field. There are several vacancies. The stand of the State Government is equally fair and reasonable. It was stated that those candidates who had grievance against the selection and had not waived their right to get similar treatment and had approached the Tribunal, High Court and this Court, may be granted similar relief. We are also of the view that such relief can be granted in favour of appellants who were agitated and had raised voice against the selection of candidates before the Tribunal, before the High Court and before us.

53. Those candidates who had not approached the Tribunal, High Court or this Court have now filed Interim Applications in this Court. The learned counsel appearing for those applicants submitted that they may also be granted similar benefits. It was urged that equals must be treated equally which is the fundamental right enshrined in Articles 14 and 16 of the Constitution. It was vehemently argued that it is settled law that fundamental rights cannot be waived. Hence, even if the applicants had not approached this Court earlier, they can come to this Court claiming similar relief by invoking Part III of the Constitution.

54. We are unable to uphold the contention. It is no doubt true that there can be no waiver of fundamental right. But while exercising discretionary jurisdiction under Articles 32, 226, 227 or 136 of the Constitution, this Court takes into account certain factors and one of such considerations is delay and laches on the part of the applicant in approaching a writ-Court. It is well settled that power to issue a writ is discretionary. One of the grounds for refusing reliefs under Article 32 or 226 of the Constitution is that the petitioner is guilty of delay and laches.

55. If the petitioner wants to invoke jurisdiction of a writ-Court, he should come to the Court at the earliest reasonably possible opportunity. Inordinate delay in making the motion for a writ will indeed be a good ground for refusing to exercise such discretionary jurisdiction. The underlying object of this principle is not to encourage agitation of stale claims and exhume matters which have already been disposed of or settled or where the rights of third parties have accrued in the meantime [vide State of M.P. & Anr. V. Bhailal Bhai, (1964) 6 SCR 261; Moon Mills v. Industrial Court, Bombay, AIR 1967 SC 1450; Bhoop Singh v. Union of India & Ors., (1992) 2 SCR 969].

56. This principle applies even in case of an infringement of fundamental right [vide Trilokchand Motichand v. H.B. Munshi, (1969) 1 SCC 110; Durga Prasad v. Chief Controller, (1969) 1 SCC 185; Rabindranath Bose v. Union of India, (1970) 1 SCC 84].

57. There is no upper limit and there is no lower limit as to when a person can approach a Court. The question is one of discretion and has to be decided on the basis of facts before the Court depending on and vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose.

58. We are in respectful agreement with the following observations of this Court in P.S. Sadasivaswamy v. State of T.N., (1975) 1 SCC 152;

> "It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extra-ordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters"

(emphasis supplied)

59. From the facts, it is clear that written examination for the selection of Medical Technologists was taken as early as in August, 1995 and list of more than 1,000 candidates was published in June, 1996. By now more than a decade has passed. The applicants who had never challenged the selection before the Tribunal, before the High Court and before us and have applied for the first time in the present proceedings which were instituted in 2005 by filing impleadment applications have thus accepted the position as prevailed in 1996. Qua them, therefore, the matter can be said to have been `settled'. Initiation of proceedings at the instance of those candidates now will `unsettle the settled position'.

60. In our opinion, the learned counsel for the State is right in contending that even if this Court holds that the appellants who have approached this Court are entitled to some relief, such relief could be granted to those candidates who had grievance against the selection and who had challenged the action of the respondent authorities but it could not be extended to the applicants who have approached this Court in the present proceedings.

61. Though there is considerable force in the argument of the learned counsel for the State and contesting respondents that there is substantial delay on the part of the appellants in approaching this Court, in the light of factual scenario and the direction which we are inclined to issue, we have thought it fit not to dismiss Special Leave Petitions on the ground of delay but considering merits of the case, we are issuing necessary directions granting relief to the appellants who were vigilant about their rights.

62. Similarly, there is also substance in the contention of the learned counsel for the respondents that the appellants, by appearing in the written examination and oral interview had taken a chance and having failed have approached the Tribunal. Again, a Special Leave Petition filed by some candidates has already been dismissed by this Court. But in the larger interest and keeping in view vacancies in the cadre, we have granted equitable relief in favour of eligible and qualified applicants.

63. In the result, the appeals are partly allowed. Service of 66 candidates who were selected and appointed in 1998-99, whose appointments were initially not challenged and thereafter who were protected by the Tribunal and by the High Court have not been disturbed. The appellants who are

similarly situated to 66 respondents who are protected in the present proceedings will be treated at par with those respondents. And if on the basis of merit list prepared as per the order of the High Court, they are found eligible and qualified, the State Government will consider their cases, i.e. the cases of the appellants and will appoint them in accordance with law. Age bar, if any, will not come in the way of those candidates. The said benefit, however, is limited to those candidates who have challenged the selection by approaching the Tribunal, the High Court and this Court. Our directions will not apply to those candidates who have approached this Court for the first time by filing Interim Applications. Their applications, therefore, stand dismissed.

64. On the facts and in the circumstances of the case, there shall be no order as to costs.

.....J. (C.K. THAKKER) NEW DELHI,
.....J. November 04, 2008. (D.K. JAIN)