A JITENDRA KUMAR & ORS.

v.

STATE OF HARYANA & ANR.

DECEMBER 11, 2007

B **[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]**

Service Law – Appointment – By recruitment – Selected candidates recommended by Public Service Commission – Appointment letters not issued due to coming into operation of C *Model Code of Conduct in view of Assembly elections – Selection process alleged to be tainted by unsuccessful candidates –Vigilance inquiry in that regard directed – Successor Government reducing cadre strength – Selected candidates filing writ petition seeking appointment and challenging the notification whereby cadre* D *strength was reduced – High court dismissing the petition – On appeal, Held: Decision of the State is not* malafide *or arbitrary – Selectees do not have any legal right of appointment subject, inter alia, to* bona fide *action on the part of the State – In view of the allegation regarding selection process, decision of the State* E *justified – State is entitled to satisfy itself regarding propriety of the selection process – Direction for early disposal of inquiry – Haryana Civil Services (Executive Branch) and Allied Services and Other Services Common/Combined Examination Act, 2002 – s. 4 – Punjab Civil Service (Executive Branch) Rules, 1930 –* F *Administrative Law.*

Judicial Review – Of Policy decision – Interference with – Scope of – Held: Judicial review in such cases is though not prohibited, but should be exercised on the basis of known legal G *principles– Superior court in exercise of its judicial review would not ordinarily direct issuance of any writ in absence of any pleading and proof of* malafide *or arbitrariness– Pleadings.*

Doctrines/Principles – Doctrines of Legitimate expectation,

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Promissory Estoppel, Unreasonableness and Proportionality – Applicability of.

State of Haryana sent a requisition to the Public Service Commission for filling up 58 posts in HCS (Executive Branch) and 44 posts in Allied Services. After completion of all the stages of competitive examination for the same, the selected candidates were recommended by the Commission. Due to Assembly elections, Model Code of Conduct became effective and ban was imposed on issuance of appointment letters. Writ Petitions were filed leveling serious allegations against the then Chief Minister and the Chairman of the Commission in respect of the selection. Vigilance inquiry was also directed to be conducted. After completion of the election, new Government took over. As appointment letters were not issued, successful candidates-appellants filed writ petitions complaining about delay in issuance of appointment letters. The new Government by a notification reduced the cadre strength. Writ Petition was amended challenging the notification. High Court dismissed the writ petitions on the grounds *inter alia* that efficacy of the earlier selection was doubtful and vigilance enquiry was pending. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1.1. No case has been made out for interference with the impugned judgment of the High Court. It cannot be held that the decision of the State was either *malafide* or unreasonable or unfair or arbitrary. It has not been alleged that the State was acting for unauthorized purpose. [Paras 37 and 47] [127-F] [133 D-E]

1.2. In the fact situation obtaining in the instant case no case has been made out where the court shall delve deep into the question of reduction in cadre strength. The High Court, for good and sufficient reasons, was of the opinion that the State had acted *bonafide* in issuing the notification dated reviewing the cadre strength. [Paras 25 and 35] [120 D-E] [126 E-F]

A **1.3. An inflated cadre strength will have direct repercussions not only in the matter of good governance but also on the public exchequer. The State while exercising its power to review the cadre strength is entitled to take note of the entirety of the situation including the question as to whether** B **the quantum of work has gone up or the activities of the State have increased warranting upward revision in the cadre strength. When a review committee is constituted under a statute, it has to act strictly in terms thereof. It must act within its four-corners. Determination of cadre strength on the basis of the representa-** C **tion made by the Association or exercise of *suo motu* power by the Chief Minister without any material having been brought before him for the purpose of increase in the cadre strength must be deprecated in strongest terms. [Para 34] [126 C-E]**

D **1.4. Seven writ applications were filed by the unsuccessful candidates. Serious allegations were levelled therein against the then Chief Minister and the then Chairman of the Commission. Some selected candidates have also been impleaded as party-respondents therein. Purity of process of conducting of** E **examination as an issue was raised threin. Even allegations of favouritism and use of political influence in favour of nears and dears of the high-ups of the Government and the politicians were made. The matter indisputably is pending investigation by the Vigilance Bureau. The High Court, has also directed to carry** F **out an investigation. It may also be placed on record that the Commission was asked by the Vigilance Bureau to handover the records. [Para 26] [120 E-H] [121-A]**

1.5. There cannot be any doubt whatsoever that the State in absence of any other factor was obligated to make G **appointments keeping in view the reduced cadre strength. The Commission holds a constitutional duty to see that the entire selection process is carried out strictly in accordance with law fairly, impartially and independently. The selectors appointed by the Commission or its Chairman and members are forbidden to** H

take recourse to favouritism. Showing of any favour to any candidate on an irrelevant or extraneous consideration would be contrary to the constitutional norms of equality envisaged under Articles 14 and 16 of the Constitution of India. Fear or favour on the part of the Commission cannot but be condoned. [Para 35] [126 F-H] [127-A]

1.6. Enquiry of Vigilance Bureau should, be allowed to be continued unless the State in terms of the report made by the Vigilance Bureau and upon making an enquiry of its own satisfies itself that the selection process was not tainted. Its disinclination to make an appointment till then cannot be found fault with. [Para 36] [127 B-D]

1.7. It may be true that before the High Court the contention raised by the State was not in regard to the pendency of the Vigilance Enquiry but lack of vacancy, but it must also be noticed that the High Court itself despite perusing the records maintained by the State has clearly arrived at a finding that the enquiry by the State Vigilance Bureau had already been ordered, it cannot be ignored. The High Court in fact proposed to adjourn the matter *sine die* till the enquiry was completed, but the same was not acceptable to the appellants. [Para 43] [131 G-H] [132-A]

1.8. While embarking on a question of this nature, this Court must take an overview of the entire scenario. It need not keep itself confined to the stand of the State before the High Court alone. Even in a case where the process of selection gives rise to a doubt in regard to the fairness on the part of the selecting authorities, there need not be any categorical finding that the selection process is vitiated. Such a question may have to be posed and answered in an appropriate case. [Para 44] [132 A-C]

2.1. Section 4 of Haryana Civil Services (Executive Branch) and Allied Services and Other Services Common/Combined Examination Act, 2002 lays down that no appointment can be made beyond the number of posts advertised or against the

A **posts which were not advertised. In terms of the said provision, therefore, any vacancy which arose after the advertisement made in January, 2004 or after abolition of posts on 13.05.2005, which had not been advertised, cannot be offered to the appellants. The Government of Haryana also states that 10 posts are kept**
B **vacant for unforeseen demands. It was further stated that on 13.05.2005, 290 officers were holding posts against 230 sanctioned posts. Thus, any vacancy which arose by reason of retirement or death having regard to Section 4 of the 2002 Act can also not be offered to the appellants. Besides, the selectees**
C **do not have any legal right of appointment subject,** *inter alia*, **to** *bona fide* **action on the part of the State. The superior court in exercise of its judicial review would not ordinarily direct issuance of any writ in absence of any pleading and proof of** *malafide* **or arbitrariness on its part. Each case, therefore, must be considered**
D **on its own merit. [Paras 30, 31 and 45] [132 C-F] [125 C-D]**

Ashok Kumar and Ors. v. Chairman, Banking Service Recruitment Board and Ors. **(1996) 1 SCC 283;** *Shankarsan Dash v. Union of India* **(1991) 3 SCC 47;** *R.S. Mittal v. Union of India*
E **1995 Supp (2) SCC 230;** *Asha Kaul (Mrs.) and Anr v. State of Jammu and Kashmir* **(1993) 2 SCC 573;** *A.P. Aggarwal v. Govt. of NCT of Delhi and Anr.* **(2000) 1 SCC 600;** *Food Corpn. of India and Ors. v. Bhanu Lodh and Ors.* **(2005) 3 SCC 618 – relied on.**

3.1. If lack of *bonafide* **or arbitrariness on the part of the**
F **State is proved, whether the right is considered to be a vested or accrued right, or otherwise a negative right, the superior court may exercise its power of judicial review. The judicial intervention would, thus, be possible only when a finding of fact is arrived at in regard to acts of omissions and commission on**
G **the part of the State and not otherwise. [Para 32] [125 G-H] [126-A]**

3.2. What would be the need of the State and how an administration shall be run is within the exclusive domain of the
H **State. The power of judicial review in such matter is very limited.**

The superior judiciary ordinarily would not interfere in a matter involving policy decision. It does not mean that the policy decision of the State is beyond the realm of judicial review. However, power of judicial review can be exercised only on the basis of known legal principles. [Para 25] [120 B-D]

Cellular Operators Assn. of India and Ors. v. Union of India and Ors. **(2003) 3 SCC 186;** *Bombay Dyeing and Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group and Ors.* **(2006) 3 SCC 434;** *Sarbananda Sonowal v. Union of India* **(2007) 1 SCC 174– referred to**

4. There is no reason as to apply the doctrines of legitimate expectation and promissory estoppel in the instant case. A legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity, predictability and certainty with the Government's dealings with the public. The doctrine of legitimate expectation operates both in procedural and substantive matters. [Para 40] [129 A-C]

Chanchal Goyal (Dr.) v. State of Rajasthan **(2003) 3 SCC 485;** *Union of India v. Hindustan Development Corpn.* **(1993) 3 SCC 499;** *Kuldeep Singh v. Govt. of NCT of Delhi* **(2006) 5 SCC 702– relied on**

5.1. The decisions taken by one government in public interest itself cannot be a ground for review thereof at the hands of the successor government. It is not the government which is in the seat of the power, matters in this behalf, but what matters is the public interest. [Para 38] [127 G-H]

State of Karnataka and Anr. v. *All India Manufacturers Organisation and Ors.* **(2006) 4 SCC 683– relied on**

5.2. Whereas, on the one hand, an action on the part of the State to interfere with the good work done by the previous government solely on the basis of change in the regime must be

A **deprecated, there cannot however be any doubt whatsoever that the successor government cannot blink over the illegalities committed by the previous government. If illegalities have been committed, the same should be rectified. When there exists a reasonable apprehension in the mind of the State, having regard**
B **to the overall situation including the post haste manner in which actions had been taken, to cause an enquiry to be made and suspend the process of making appointments till the result of such enquiry is obtained, such a decision on its part per se cannot be said to be an act of arbitrariness or unreasonableness.**
C **[Para 39] [128 E-H]**

6. The fact that in some jurisdictions, doctrine of unreasonableness is giving way to doctrine of proportionality is beyond any dispute. But, the development of law in this field
D **could have been applied only if a case was made out. If the State is right in its contention that the selection process being in cloud, no appointment can be made, the court by invoking any doctrine cannot ask the State to do so unless it arrives at a positive and sdefinite finding that the State's stand is fraught**
E **with arbitrariness. In the instant case, there is no arbitrariness in the act of the State. [Para 42] [131 D-F]**

Teri Oat Estates (P) Ltd. v. U.T., Chandigarh and Ors. **(2004) 2 SCC 130;** *State of U.P. v. Sheo Shanker Lal Srivastava and Ors.* **(2006) 3 SCC 276;** *Bombay Dyeing and Mfg. Co. Ltd. (3) v.*
F *Bombay Environmental Action Group and Ors.* **(2006) 3 SCC 434;** *Indian Airlines Ltd. v. Prabha D. Kanan,* **(2006) 11 SCC 67;** *State of U.P. v. Sheo Shanker Lal Srivastava and Ors.* **(2006) 3 SCC 276– referred to**

G *Administrative Law, Ninth Edition*, **by Sir William Wade– referred to**

7. A constitutional authority like the Public Service Commission should neither withhold any document nor refuse to cooperate with the State Vigilance Bureau in the matter of conduct
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of an enquiry, as alleged. If the statements made by the Commission that the State has for all intent and purport made it defunct body although no case therefor has been made out are correct, they have nothing to hide. It would be in the interest of all concerned including the appellants herein to see that the enquiry should be completed at an early date. State Government is directed to take all steps in this behalf. The Commission is requested to render all cooperation to the authorities of the State Vigilance Bureau. [Para 46] [133-B] [132-F] [133 B-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5803 of 2007

From the Common final Judgment and Order dated 12.10.2006 of the High Court of Punjab and Haryana at Chandigarh in C.W.P. Nos. 5437 and 18572/2005 and amended C.W.P. No. 3768/2005.

WITH

C.A. NOs. 5810, 5801, 5802, 5800, 5804, 5805, 5807, 5806, and 5808 of 2007.

Manjit Singh Addl. A.G., Sanjiv Bansal Addl. A.G., P.P. Rao, Rakesh Dwivedi, Dr. Rajeev Dhavan, Dr. Abhishek Manu Singhvi, Raju Ramachandran, Mohan Lal Saggar, S.K. Dholakia, C.K.Sucharita, K.K. Lahiri Ejaz Maqbool, Keshav Mohan, Taruna Singh, Ashish Verma, Neeraj Bansal, M.K. Michael, Sanjeev K. Bhardwaj, Kul Bharat, Ranbir Singh Yadav, Dr. Ramesh K. Haritash, Dr. Kailash Chand Amit Kumar, Pawan Rai, Yash Pal Dhingra, Harikesh Singh, T.V. George, Balbir Singh Gupta and Meenakshi Arora, with them for the appearing parties and Respondent-in-Person.

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted in all the SLPs.

1. These appeals arise out of a common judgment and order dated 12.10.2006 passed by a Division Bench of the Punjab and Haryana High Court whereby and whereunder the writ petitions filed

A by the appellants praying inter alia for issuance of a writ of or in the nature of mandamus directing the respondents to issue letters of appointments to them on the premise that they had duly been selected in Harayana Civil Service (HCS) (Executive Branch) and/ or Allied Service pursuant to or in furtherance of the result declared by the B Haryana Public Service Commission (for short "the Commission") as also for quashing of notification dated 13.05.2005 whereby and whereunder the cadre strength of HCS (Executive Branch) has been reduced from 300 to 230, were dismissed.

C 2. State of Haryana sent a requisition to the Commission in or about December, 2003 for filling up 58 posts in HCS (Executive Branch) and 44 posts in Allied Services. Pursuant to or in furtherance of the said requisition received by the Commission, an advertisement was issued on or about 24.01.2004 notifying that:

D (i) the preliminary examination for the HCS Ex. Br. and the other Allied Services Examination, 2004 would be held in May/ June, 2004 at Chandigarh for 58 posts in the "HCS (Ex. Br.)" and 44 posts in the Allied Services; The number of posts given against each category is however liable to E variation to any extent either way.

(ii) The recruitment would be in accordance with the said '1930 Rules' and the Haryana Civil Services (Executive Branch) and Allied Services and other Services common/ F combined Examination Act, 2002 hereinafter refer as the '2002 Act' for the sake of brevity;

(iii) The examination will be conducted in accordance with the plan and syllabus given in the Brochure for 'H.C.S. (Ex. Br.)' and Allied Services examination.

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(iv) The combined competitive examination will comprise of two successive stages (a) preliminary examination and (b) main written examination and viva-voce/ personality test for selection to various services and posts.

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Pursuant to or in furtherance of the advertisement inviting applications, 14,237 candidates responded.

3. It is not in dispute that the matter relating to recruitment in the said posts is government by the Haryana Civil Services (Executive Branch) and Allied Services and Other Services Common/ Combined Examination Act, 2002 (Act No. 4 of 2002) (for short "the 2002 Act") and Punjab Civil Service (Executive Branch) Rules, 1930 (for short "the 1930 Rules") as amended in the year 2002.

The selection process was to take place in several stages, viz., holding of preliminary examination so as to prepare a short list of those who may be permitted to appear in the main examination followed by interview. 14,050 candidates including the appellants appeared in the preliminary examination, on 23.05.2004. 1541 candidates including the appellants were selected in the main examination. The written examination was conducted by the Commission in terms of Rule 9(1) of the 1930 Rules wherein 1,394 candidates appeared.

4. On or about 27.09.2004, the respondent – State of Haryana sent requisition to the Commission for filling up of 19 vacancies in HCS (Executive Branch) by promotion of the in-service candidates in accordance with the 1930 Rules. Out of the said vacancies, 8 were to be filled up from amongst the category of the District Revenue Officer/ Tehsildars/ Naib Tehsildar (Register A-I), 6 vacancies from members of Class III Services (Register A-II) and 5 vacancies from the category of Block Development and Panchayat Officer (Register C).

5. It is not in dispute that under Rule 17 of the 1930 Rules, 2/ 3rd of the total available vacancies were to be filled up by the direct recruitment and 1/3rd of the total available vacancies were to be filled up by promotion. It is also not in dispute that on or about 4.10.2004, pursuant to the recommendations made by the Commission, Respondent – State entered the names of 8 officers in Register A-I, 6 officers in Register A-II and 5 officers in Register C for promotion to the HCS (Executive Branch).

A 6. Results of the main written open competitive examination were announced on 7.12.2004 whereby 292 candidates were declared by the Commission to have qualified themselves to appear in the viva-voce test. Interviews of the successful candidates were held from 16.12.2004 to 18.12.2004.

B 7. General Elections of the Haryana Legislature were announced in on 17.12.2004. As the Model Code of Conduct became effective on and from 17.12.2004, the Election Commission in terms of a circular letter dated 27.12.2004 imposed a ban on issuance of appointment C letters to the candidates selected by the Commission without its permission till the completion of the election process. However, on 30.12.2004, a select list of 102 candidates was published by the Commission recommending their appointment to the HCS (Executive Branch) and the Allied Services on the basis of the result of the D examinations held by it. Admittedly, in view of the ban imposed by the Election Commission, no offer of appointment was issued. We may, however, notice that the Chief Secretary of the State of Haryana by a letter addressed to the Election Commission asked for its permission to issue the appointment letters. There is nothing on record to show E that the Election Commission responded thereto one way or the other.

8. Before proceeding further, we may notice that in terms of the 1930 Rules, Review Committee determined the cadre strength. In the year 1990, the cadre strength was revised from 200 to 240 posts. No cadre review was effected in the years 1993 and 1996. On or about F 20.10.1999, the cadre strength was fixed at 240. However, in the year 2002, due to deletion of 26 posts from the cadre, the total cadre strength was determined at 223.

A representation thereafter was made by the Haryana Civil G Service (Executive Branch) Officer's Association (Association) for increase in the cadre strength by increasing 48 posts which found favour with the Committee. The Committee submitted its report opining that the total strength of the cadre should be fixed at 271. According to the State, the cadre strength was inflated on the basis of the H representation made by the Association as there was no actual need

therefor.

9. In or about January, 2005, an advertisement was issued by the Commission intimating holding of combined/ common examination for appointment to 15 more posts in HCS (Executive Branch) and 42 posts in the Allied Services and inviting applications therefor from the eligible candidates.

10. Elections for the Haryana State Legislative Assembly were admittedly held on 3.02.2005.

On or about 13.02.2005, the State Government requested the Election Commission to reconsider its instructions in regard to the ban imposed on making regular appointment as the selection process had commenced much before the announcement of election schedule.

11. Some writ petitions were filed before the Punjab and Haryana High Court complaining undue delay on the part of the State in issuing the offers of appointment. The new Government took over on 5.03.2005.

12. By a notification dated 13.05.2005, the cadre strength was reduced to 230.

After issuance of the aforementioned notification dated 13.05.2005, writ petitions filed in the High Court were suitably amended.

The said writ petitions have been dismissed by reason of the impugned judgment.

13. Before we advert to the rival contentions raised by the parties, it may be placed on record that during pendency of these Special Leave Petitions, the State Government directed filling up of the 27 posts of Deputy Superintendent of Police by promotion including 8 vacancies for which the appellants were selected by an order dated 21.02.2007. Similar orders of promotion were passed to the post of Deputy Superintendent of Police on 12/13.03.2007 and 11 Excise and Taxation Officers on 3.04.2005.

A 14. Mr. P.P. Rao, Mr. Rakesh Dwivedi, Mr. L. Nageshwara Rao and Dr. Rajeev Dhavan, learned senior counsel appearing on behalf of the appellants, submitted as under:

(i) The Review Committee for determining the cadre strength having made recommendations, the impugned notification reducing the same could not have been issued.

(ii) The High Court failed to consider that even assuming that the State Government had the requisite power to reduce the cadre strength of HCS (Executive Branch) from 300 to 230, reliefs prayed for could be granted as:

(a) the cadre strength of the Allied Service to which 44 candidates were selected was not disturbed;

(b) the impugned reduction of the cadre strength from 300 to 230 cannot affect in any manner the selections made to 34 (out of 58 posts) in the HCS (Executive Branch);

(c) in addition even after the reduction in the cadre strength, 10 vacancies were available in the HCS (Executive Branch);

(iii) The post haste reduction in the cadre strength without following the due procedure was apparently colourable exercise of power by the government as it was determined not to appoint under any circumstance the candidates selected by the "Commission" as it was constituted by the previous government.

(iv) Even if the notification dated 13.05.2005 is valid as the selection process has not been held to be a tainted one and 34 posts in HCS (Executive Branch) and 44 posts in Allied Services being still vacant, there is absolutely no reason as to why the admitted vacancies should not be directed to be filled up.

(v) Promotion to the post of HCS (Executive Branch) and Allied Services having been given and as the Rules provided for quota and rota, the appointments in the direct recruitment should be made to fill the requirements of the Rules. A

(vi) The findings of the High Court that a vigilance enquiry is pending, by itself cannot take away the legal right of the appellants. B

(vii) Assuming that the appellants do not have any legal right to be appointed, the power of the State being coupled with duty and as the action of the respondents must be supported by reasons and/ or bona fide on their part; in respect whereof there being no proof, the impugned judgment cannot be sustained. C

(viii) For the purpose of filling up of the vacancies, the State should have proceeded to apply the doctrine of 'least invasion' in the instant case. D

(ix) The High Court committed a serious error insofar as it failed to take into consideration that the doctrine of 'legitimate expectation' of the selectees as also the doctrine of 'promissory estoppel' confer legal rights upon the appellants to be appointed. E

(x) The High Court committed a serious error insofar as it failed to take into consideration that a successor government cannot take recourse to regime revenge and undo all acts which are otherwise valid inasmuch as the decision taken by one government cannot be nullified only because there is a change in the government. F

15. Mr. Raju Ramachandran and Dr. Abhishek Manu Singhvi, learned senior counsel appearing on behalf of the State of Haryana, on the other hand, submitted as under: G

(i) Undue haste with which the cadre strength has been inflated by the previous regime was sufficient for the State to issue H

A the notification dated 13.05.2005.

(ii) The legal position being settled that the selected candidates does not have any legal right subject, of course, to non-arbitrary action on the part of the appointing authority the B High Court cannot be said to have committed any error in passing the impugned judgment..

(iii) The very fact that the entire selection process was under a cloud, the State could not have made any appointment unless the cloud itself was clear. As an enquiry in regard C to the selection process by the State Vigilance Bureau at the behest of the High Court in a writ petition filed by the unselected candidates is pending, the State without obtaining any report in this behalf did not cancel the selection process.

D (iv) As the selectees have no legal right, the doctrine of legitimate expectation or promissory estoppel cannot have any application as their non-appointments are supported by valid reasons and in any event the selectees did not alter their position pursuant to any promise made by the State E Government.

(v) The question of taking recourse to regime revenge by the State Government does not arise as any government is duty bound to correct the illegalities committed by the previous regime and in regard thereto it cannot turn blind. F It only suspended the appointments pending enquiry.

(vi) The State has furnished enough materials to satisfy the tests of judicial review. As the Review Committee was required to determine the cadre strength only upon taking G into consideration the need of the State, its recommendations pursuant to the representation of the Association as also the decision of the Chief Minister must be held to be wholly irrelevant.

(vii) The matter relating to recruitment of the officers being H

governed by Act No. 4 of 2002, as a combined examination was to be held, no appointment could be made either in the post of HCS (Executive Branch) or in the Allied Services. A

(viii) Upon consideration of the materials on record, the High Court has arrived at a finding that efficacy of earlier selection is doubted which should not be interfered with by this Court. B

(ix) Although promotion had been effected after delivery of the judgment of the High Court, but they have been made only against the vacancies which are within the promotion quota and any promotion which had been made on the basis of earlier inflated strength, notice to show cause had already been issued. No appointment has been made from the posts meant to be filled up by the direct recruits. C D

16. Mr. S.K. Dholakia, learned senior counsel appearing on behalf of the Commission, submitted that it is incorrect to contend that irregularity has been committed by the Chairman and Members of the Public Service Commission in making the recommendations for recruitment. According to the learned counsel, the Commission has complied with the requirements of the Rules scrupulously and all steps have been taken within the time schedule prescribed by the statute. E

17. The Legislature of the State of Haryana enacted the 2002 Act to provide for holding of common/ combined examination of direct recruitment to HCS (Executive Branch) and Allied Services and other services. F

Section 2(i) of the 2002 Act defines "Allied Services" to mean the services shown in Appendix A thereof. G

"Other Services" has been defined in Section 2(v) to mean "the service/ posts, recruitment to which is made by holding common/ combined examination, but does not include the service/ posts shown in Appendix A". H

"Direct Recruitment" has been defined in Section 2(vii) to mean recruitment by open competition but does not include (a) appointment by promotion; or (b) appointment by transfer of an officer already in the service of any State Government of the Government of India.

Section 4 of the 2002 Act provides that no appointment shall be made to any posts or service to which the 2002 Act applies beyond the number of post advertised. Sub-section (4) of Section 4 reads thus:

> "(4) The State Government may offer appointment to the candidates to Haryana Civil Service (Executive Branch) and Allied Services or Other Services, as the case may be, to the extent of number of advertised posts only. However, no candidate shall be offered appointment even to the extent of number of advertised posts, if his name is not recommended by the Commission or if he does not fulfill the eligibility condition laid down by the State Government for appointment to that service/ post by way of service rules, regulation of executive instruction, as the case may be."

18. Appendix A appended to the 2002 Act provides for the following categories in Allied Services:

> "1. Excise and Taxation Officer
>
> 2. District Food and Supplies Controller
>
> 3. 'A' Class Tehsildar
>
> 4. Assistant Registrar, Co-operative Societies
>
> 5. Assistant Excise and Taxation Officer
>
> 6. Block Development and Panchayat Officer
>
> 7. Traffic Manager
>
> 8. District Food and Supplies Officer
>
> 9. Assistant Employment Officer"

Pursuant to or in furtherance of the provisions of the 2002 Act, an advertisement was issued on 24.01.2004 showing 58 vacancies in the post of HCS (Executive Branch), 8 vacancies in the post of DSP, 21 vacancies in the post of F.T.O., 1 vacancy in the post of A Class Tehsildar, 1 vacancy in the post of Assistant Registrar Coop. Societies and 13 vacancies in the post of B.D.P.O.

19. In the brochure published for the said purpose, it was inter alia stated:

> "Those declared to have qualified the Preliminary Examination shall submit in their own hand a fresh application form for admission to the Main Examination which will be obtained separately after clearing/ passing the Preliminary Examination. While filling up the application form for Main Examination, candidate may apply for appointment to all or any of the service/ services/ posts as advertised by the Commission and he will be considered for the service/ post he applies for. It is made clear that in case no order of preference is given in the application meant for Main Examination, the appointment shall be made strictly in order of merit in the following warrant of precedence to the various departments..."

20. Indisputably, the matter relating to the recruitment is governed by the 1930 Rules. Rule 3 of the 1930 Rules provides for the strength and composition of the HCS (Executive Branch) cadre empowering the Government to determine the same from time to time. It enjoins a duty upon the government to make alterations, if it so feels, at the interval of every three years upon examining the strength and composition thereof.

Rule 5 of the 1930 Rules provides for appointment of the members of the service from time to time as required from amongst the accepted candidates whose names had been duly entered in accordance with the 1930 Rules in one or other of the registers of Accepted Candidates to be maintained thereunder.

Rule 6 provides for the registers which are of the following

description:

"(b) Register A-1 of "District Revenue Officer, Tahsildars and Naib Tahsildars accepted as candidates.

(c) Register A-II of members of Class III Service accepted as candidates.

(d) Register B of person accepted as candidates on the result of a competitive examination; and

(e) Register E of Block Development and Panchayat Officers."

Register B was to be maintained for the direct recruits.

Rules 7 and 8 of the 1930 Rules provide for selection of candidates for the purpose of entering their names in Register A-1 and Register A-II. Rule 9 provides for holding of competitive examination for selection of candidates for entering the names of successful candidates in Register B in the following terms:

"9. Competitive examination to be held yearly for selection of candidates for Register B – (1) A competitive examination hereinafter called "the examination for the post of Haryana Civil Service (Executive Branch) and other Allied Services" the Scheme of which is given below, shall be held at any place in Haryana each year as per Schedule given in Annexure – III for the purpose of selection by competition of as many candidates for the Service as the Governor of Haryana may determine..."

Rule 10 of the 1930 Rules provides for admission of candidates to the examination. Rule 11 provides for selection of candidates for Register B whereas Rule 12 provides for selection of candidates for Register C. Rule 17 provides for appointment of registered candidates to service in the following terms:

"From Register B	two candidates
From Register A-I	one candidate
From Register B	two candidates

From Register A-II	one candidate	A
From Register B	three candidates	
From Register A-I	one candidate	
From Register B	two candidates	
From Register A-II	one candidate	B
From Register C	one candidate	
From Register B	three candidates	
From Register A-I	one candidate	
From Register B	two candidates	C
From Register A-II	one candidate	
From Register B	two candidates	
From Register A-I	one candidate	
From Register B	three candidates	D
From Register C	one candidate	

and thereafter in the same rotation beginning again from Register B."

21. The basic fact of the matter in regard to issuance of advertisement, holding of examination and publication of results of the written examination as also holding of interviews is not in dispute. It has also not been disputed that the names of appellants herein find place in the select list.

The power of the State to determine the cadre strength is also not in dispute. The State before issuance of the notification dated 13.05.2005 has taken into consideration the relevant facts. The history of determination of the cadre strength from 1993 would clearly go to show that prior to issuance of impugned notification, the State has taken into consideration all the relevant facts. Although there does not exist any statutory rule in regard to the matter of determination of the cadre strength, there exists some guidelines. A formula has been laid down for determining the cadre strength which read as under:

"Permanent Cadre Strength:

(a) General Administration posts:

(b) Posts in other Departments:

(c) Subtract 10 posts of SDO (C) to be manned by Junior Scale IAS: i.e.

(d) Permanent Cadre Strength:

(e) Deputation Reserve @ 25%

(f) Leave Reserve @ 10%

(g) Training Reserve @ 10%

(h) Addl. for unforeseen demands.

Total of d, e, f, g and h is the Cadre Strength."

22. In the year 1990, the cadre strength was revised from 200 to 240 posts having regard to the following position:

"(a)	General Administration posts:		91
(b)	Posts in other Departments:		71
(c)	Subtract 10 posts of SDO (C) to be manned by Junior Scale IAS: i.e	(-)	10
(d)	Permanent Cadre Strength:		158
(e)	Deputation Reserve @ 25%	(+)	40
(f)	Leave Reserve @ 10%	(+)	16
(g)	Training Reserve @ 10%	(+)	16
(h)	Addl. for unforeseen demands.	(+)	10
Total			240"

23. Although a review was to be made after three years, as per Rule 3 of the 1930 Rules, no cadre review was effected in the years 1993 and 1996. On or about 20.10.1999, the cadre strength was fixed on the same line as was done in 1990.

24. Again the process began in 2002. Upon taking into

consideration the suggestions given by various authorities, recommendation for deletion of 26 posts was made by the Committee from the cadre, as a result whereof permanent strength came to be 140 posts and upon application of the formula, as noticed hereinbefore, the total cadre strength came to 223. A representation thereafter was made by the Association for increase in the cadre strength by 48 which allegedly found favour with the Committee. The Committee submitted its report opining that the total strength of the cadre should be at 271. According to the State, the cadre strength was inflated on the basis of the representation made by the Association and there was no actual need therefor. Concededly, again the Chief Minister passed an order on 20.10.2003 to add 20 more posts in the cadre strength note sheet the relevant part whereof is as under:

> "CM has seen and ordered that there is no need to subtract the posts of SDOs. Even if the posts are in HCS cadre the officers from junior scale of IAS can be posted in higher scale. He has further ordered that the senior HCS posts should include:
>
> | | | | |
> |---|---|---|---|
> | 1. | Executive Magistrate | - | 3 |
> | 2. | Joint Director Sports | - | 1 |
> | 3. | Joint Director Tech. Education | - | 1 |
> | 4. | Joint Controller Civil Defence | - | 1 |
>
> Ambala
>
> | | | | |
> |---|---|---|---|
> | 5. | FSO FC's Office | - | 1 |
> | 6. | Ad. O. Irrigation | - | 1 |
> | 7. | FSO Excise & Taxation | - | 1 |
>
> and further the LAOs posts may remain 11 as at present and, therefore, the total senior duty posts will be 200 on the basis of which total cadre strength should be worked out as per the formula keeping the additions for unforeseen demand at 10."

25. However, upon change in the political set up and upon an

A objective consideration of the entire matter vis-à-vis the need and interest of the State, the cadre strength was fixed at 230. No serious challenge has been made to this part of the judgment of the High Court.

B We also do not see any reason to interfere with the impugned notification dated 13.05.2005. What would be the need of the State and how an administration shall be run is within the exclusive domain of the State. The power of judicial review in such matter is very limited. The superior judiciary ordinarily would not interfere in a matter C involving policy decision. We do not mean to say that the policy decision of the State is beyond the realm of judicial review. However, power of judicial review can be exercised only on the basis of known legal principles. [See *Cellular Operators Assn. of India and Others* v. *Union of India and Others,* (2003) 3 SCC 186, *Bombay Dyeing* D *& Mfg. Co. Ltd. (3)* v. *Bombay Environmental Action Group and Others* (2006) 3 SCC 434 and *Sarbananda Sonowal* v. *Union of India* (2007) 1 SCC 174]

We, however, in the fact situation obtaining herein cannot opine that any case has been made out where the court shall delve deep into E the aforementioned question.

26. It would be relevant to place on record that seven writ applications were filed by the unsuccessful candidates. Serious allegations had been levelled therein against the then Chief Minister Shri Om F Prakash Chautala and the then Chairman of the Commission Shri K.C. Bangar. Some selected candidates have also been impleaded as party-respondents therein.

Purity of process of conducting of examination as an issue was raised threin. Even allegations of favouritism and use of political influence G in favour of nears and dears of the high-ups of the Government and the politicians were made. The matter indisputably is pending investigation by the Vigilance Bureau. The High Court, we are informed, has also directed to carry out an investigation. It may also be placed on record that the Commission was asked by the Vigilance Bureau to H

handover the records. Such an action on the part of the Vigilance Bureau was the subject matter of a writ petition filed by the Commission. The said writ petition has been disposed of by a judgment dated 12.08.2005, in which one of us (Bedi, J.) was a member. The said decision was reported in 2005 (3) PLR 486; Paragraphs 14 and 22 whereof read as under: A B

> "14...It is not in dispute that the enquiries now being conducted by the Vigilance Bureau pertain to certain past selections. From the communication received by the petitioner-Commission, it appears that the action of the past Secretary, the past Chairman and certain other Officers/Officials of the Commission, are being probed with regard to the serious charges. Under any circumstances, the aforesaid enquiries cannot be taken to mean any erosion of the authority of the Commission or its independence. Even an expert and constitutional body like the Commission is supposed to perform its duties, fearlessly and carry out selections on the basis of the best merit available. However, if the aforesaid selections are alleged to be tainted and based upon consideration other than merit, the Commission cannot, in such circumstances, claim any immunity No body has a vested right to perpetuate illegality or hide a scandal. All selections made by public servants are supposed to be based upon competence, merit and integrity. The allegations to be contrary would not only erode the public confidence in the Commission but would also result in merit being a casualty....
>
> 22. It is, thus, apparent that an effort has been made by the Commission to protect its Chairman and the members, who for undisclosed reasons have chosen not to directly approach this Court. The commission which is a constitutional body has unnecessarily filed the present petition to watch the interest of the Chairman and member, who have chosen to remain behind the curtain. The Commission cannot equate itself, nor under the Constitution of India can it be so equated, with its Chairman and its members. The Commission has a distinct and a constitutional

C D E F G H

A identity, independent of its Chairman and members. It is, thus apparent that the present petition has been filed at the instance of the Chairman and members, although in the name of the Commission. We cannot put any seal of approval to this act of the Commission."

B

27. We may furthermore notice that after the increase of the cadre strength from 240 to 300, 19 candidates from Registers A-1, A-II and C were nominated. Out of these 19 candidates, 3 are not in Haryana Civil Service (Executive Branch) cadre. Remaining 16 C candidates have been issued show cause notice as to why they should not be repatriated to their parent departments, which is again the subject matter of some writ petitions.

28. Although it is not necessary for us to go into the said question, we may in passing also place on record that the present State D Government had withdrawn work of selection process from Haryana Public Service Commission in view of its constitution and a reference under Article 317 of the Constitution of India is pending decision.

29. Appellants herein indisputably are the selected candidates. E The principal question which, however, arises for our consideration is as to whether they have, in the facts and circumstances of this case, have a legal right to be appointed.

Submission of the learned senior counsel appearing on behalf of the appellants is that the High Court did not consider the question as F to whether the posts being vacant, even if the reduced cadre strength is to be made operative, whether appointments could have been made to the 34 posts which are lying vacant in the share of direct recruits. The fact that 34 posts are lying vacant even if the cadre strength is taken to be 230 may not be in dispute but the question of filling up of G the vacancies would arise only if there exists a select list from which such vacancies can be filled up.

30. The legal principle obtaining herein is not in dispute that the selectees do not have any legal right of appointment subject, inter alia, H to bona fide action on the part of the State. We may notice some of

the precedents operating in the field. A

In *Shankarsan Dash* v. *Union of India* [(1991) 3 SCC 47], this Court held:

> "7 . It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are B 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 C 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 D are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash E Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab."

Yet again in *R.S. Mittal* v. *Union of India* [1995 Supp (2) SCC 230], this Court held: F

> *"...It is no doubt correct that a person on the select panel has no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority* G *cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for* H

A *appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government. No reason whatsoever, not to talk of a justifiable reason, was given as to why the appointments* B *were not offered to the candidates expeditiously and in accordance with law. The appointment should have been offered to Mr Murgad within a reasonable time of availability of the vacancy and thereafter to the next candidate. The Central Government's approach in this case was wholly* C *unjustified."*

(Emphasis supplied)

In *Asha Kaul (Mrs.) and Another* v. *State of Jammu and Kashmir* [(1993) 2 SCC 573], this Court held:

D "8. It is true that mere inclusion in the select list does not confer upon the candidates included therein an indefeasible right to appointment (State of Haryana v. Subhash Chander Marwaha; Mani Subrat Jain v. State of Haryana; State of Kerala v. A. Lakshmikutty) but that is only one aspect of the matter. The E other aspect is the obligation of the Government to act fairly. The whole exercise cannot be reduced to a farce. Having sent a requisition/request to the Commission to select a particular number of candidates for a particular category, — in pursuance of which the Commission issues a notification, holds a written F test, conducts interviews, prepares a select list and then communicates to the Government — the Government cannot quietly and without good and valid reasons nullify the whole exercise and tell the candidates when they complain that they have no legal right to appointment. We do not think that any G Government can adopt such a stand with any justification today..."

[See also *A.P. Aggarwal* v. *Govt. of NCT of Delhi and Another* (2000) 1 SCC 600]

In *Food Corpn. Of India and Others* v. *Bhanu Lodh and* H

Others [(2005) 3 SCC 618], this Court held:

> "14. Merely because vacancies are notified, the State is not obliged to fill up all the vacancies unless there is some provision to the contrary in the applicable rules. However, there is no doubt that the decision not to fill up the vacancies, has to be taken bona fide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution. Again, if the vacancies are proposed to be filled, then the State is obliged to fill them in accordance with merit from the list of the selected candidates. Whether to fill up or not to fill up a post, is a policy decision, and unless it is infected with the vice of arbitrariness, there is no scope for interference in judicial review."

31. It is, therefore, evident that whereas the selectee as such has no legal right, the superior court in exercise of its judicial review would not ordinarily direct issuance of any writ in absence of any pleading and proof of malafide or arbitrariness on its part. Each case, therefore, must be considered on its own merit.

32. Dr. Rajeev Dhawan would submit that the negative right contemplated by reason of the aforementioned decisions should be held to have conferred a positive right on the selectee so as to hold that if there was no bonafide on the part of the State or if the State had not assigned any sufficient or cogent reasons for not appointing the selected candidates, the same would give rise to a legal right in the selectees which is although not an unqualified one. It was further submitted that the right become stronger when the selection process is completed and the candidates are selected.

Whether we apply the negative test or the positive test, the decision making process should veer round the question in regard to the lack of bona fide or an act of arbitrariness on the part of the State. If lack of bonafide or arbitrariness on the part of the State is proved, whether the right is considered to be a vested or accrued right, or otherwise a negative right, the superior court may exercise its power of judicial review. The judicial intervention would, thus, be possible

A only when a finding of fact is arrived at in regard to the aforementioned acts of omissions and commission on the part of the State and not otherwise.

33. The question which, therefore, is required to be posed is : can in the exigencies of the situation obtaining herein the State be said to have acted bonafide in not making any appointment?

34. The State has serious reservations about the efficacy of the selection process. It has also reservation in regard to the mode and manner in which a decision was taken to increase the cadre strength. /An inflated cadre strength will have direct repercussions not only in the matter of good governance but also the public exchequer. The State while exercising its power to review the cadre strength is entitled to take note of the entirety of the situation including the question as to whether the quantum of work has gone up or the activities of the State have increased warranting upward revision in the cadre strength. When a review committee is constituted under a statute, it has to act strictly in terms thereof. It must act within its four-corners. Determination of cadre strength on the basis of the representation made by the Association or exercise of suo motu power by the Chief Minister without any material having been brought before him for the purpose of increase in the cadre strength must be deprecated in strongest terms.

35. The High Court, for good and sufficient reasons, was of the opinion that the State had acted bonafide in issuing the said notification dated 13.05.2005. There cannot be any doubt whatsoever that the State in absence of any other factor was obligated to make appointments keeping in view the reduced cadre strength. Selection process has several stages. The Commission holds a constitutional duty to see that the entire selection process is carried out strictly in accordance with law fairly, impartially and independently. The selectors appointed by the Commission or its Chairman and members are forbidden to take recourse to favouritism. Showing of any favour to any candidate on an irrelevant or extraneous consideration would be contrary to the constitutional norms of equality envisaged under Articles 14 and 16 of

the Constitution of India. Fear or favour on the part of the Commission cannot but be condoned. A

36. In this batch of appeals, we are not concerned with the questions which have been raised by the State of Haryana in its counter-affidavit in regard to the acts of omission and commission on the part of the Commission but there cannot be any doubt whatsoever that there existed a cloud which is required to be cleared. Unsuccessful candidates have levelled serious allegations against the members of the Commission. They may or may not be correct. The Vigilance Bureau has initiated an enquiry into the whole matter. Such an enquiry should, in our considered opinion, be allowed to be continued unless the State in terms of the report made by the Vigilance Bureau and upon making an enquiry of its own satisfies itself that the selection process was not tainted. Its disinclination to make an appointment till then cannot be found fault with. It is not a case where in view of the provisions of Act No. 4 of 2002 as also the 1930 Rules, any piecemeal appointment can be made. The examination is a combined examination. It is an integrated process. Selection of candidates whether in the civil service or allied service would depend upon the performance of the candidates. Preference in the posts is required to be adjusted on the basis of such performance. All appointments, therefore, are inter-linked. Furthermore, no appointment can be made beyond the posts advertised for. [See *Ashok Kumar and Others* v. *Chairman, Banking Service Recruitment Board and Others* (1996) 1 SCC 283] B C D E

37. It is, therefore, difficult for us to hold that the decision of the State was either mala fide or unreasonable or unfair or arbitrary. It has not been alleged that the State was acting for unauthorized purpose. F

38. We are not oblivious of the constitutional scheme that the decisions taken by one government in public interest itself cannot be a ground for review thereof at the hands of the successor government. It is not the government which is in the seat of the power, matters in this behalf, but what matters is the public interest. G

39. Mr. Dwivedi has drawn our attention to a decision of this H

A Court in *State of Karnataka and Another* v. *All India Manufacturers Organisation and Others* [(2006) 4 SCC 683] wherein it was held:

> "66. Taking an overall view of the matter, it appears that there could hardly be a dispute that the Project is a mega project which is in the larger public interest of the State of Karnataka and merely because there was a change in the Government, there was no necessity for reviewing all decisions taken by the previous Government, which is what appears to have happened. That such an action cannot be taken every time there is a change of Government has been clearly laid down in State of U.P. v. Johri Mal and in State of Haryana v. State of Punjab where this Court observed thus:
>
> "[I]n the matter of governance of a State or in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding Government must be held duty-bound to continue and carry on the unfinished job rather than putting a stop to the same."

B C D

E There cannot be any doubt in regard to the aforementioned proposition of law but the question herein is whether public interest would be subserved by asking the State to proceed to make appointments. Whereas, on the one hand, an action on the part of the State to interfere with the good work done by the previous government F solely on the basis of change in the regime must be deprecated, there cannot however be any doubt whatsoever that the successor government cannot blink over the illegalities committed by the previous government. If illegalities have been committed, the same should be rectified. When there exists a reasonable apprehension in the mind of G the State, having regard to the overall situation including the post haste manner in which actions had been taken, to cause an enquiry to be made and suspend the process of making appointments till the result of such enquiry is obtained, such a decision on its part per se cannot be said to be an act of arbitrariness or unreasonableness.

H

40. Application of doctrine of legitimate expectation or promissory estoppel must also be considered from the aforementioned view-point. A legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. [See *Chanchal Goyal (Dr.)* v. *State of Rajasthan* (2003) 3 SCC 485 and *Union of India* v. *Hindustan Development Corpn.* (1993) 3 SCC 499] It is grounded in the rule of law as requiring regularity, predictability and certainty with the Government's dealings with the public. We have no doubt that the doctrine of legitimate expectation operates both in procedural and substantive matters.

In *Kuldeep Singh* v. *Govt. of NCT of Delhi* [(2006) 5 SCC 702], this Court held:

> "25. It is, however, difficult for us to accept the contention of the learned Senior Counsel Mr Soli J. Sorabjee that the doctrine of "legitimate expectation" is attracted in the instant case. Indisputably, the said doctrine is a source of procedural or substantive right. (See R. v. North and East Devon Health Authority, ex p Coughlan) But, however, the relevance of application of the said doctrine is as to whether the expectation was legitimate. Such legitimate expectation was also required to be determined keeping in view the larger public interest. Claimants' perceptions would not be relevant therefor. The State actions indisputably must be fair and reasonable. Non-arbitrariness on its part is a significant facet in the field of good governance. The discretion conferred upon the State yet again cannot be exercised whimsically or capriciously. But where a change in the policy decision is valid in law, any action taken pursuant thereto or in furtherance thereof, cannot be invalidated."

We also fail to see any reason as to why the doctrine of promissory estoppel will apply in the instant case.

41. Dr. Dhawan has laid strong emphasis on the doctrine of proportionality and reasonableness, drawing sustenance from the dicta of this Court laid down in *Teri Oat Estates (P) Ltd.* v. *U.T.,*

Chandigarh and Others [(2004) 2 SCC 130], *State of U.P.* v. *Sheo Shanker Lal Srivastava and Others* [(2006) 3 SCC 276] and *Bombay Dyeing & Mfg. Co. Ltd. (3)* (supra)]

Our attention has also been drawn to the following passage of Sir William Wade's Administrative Law, Ninth Edition, pages 371-372:

"Goodbye to Wednesbury?

The Wednesbury doctrine is now in terminal decline, but the coup de grace has not yet fallen, despite calls for it from very high authorities. Lord Slynn said in the Alconbury case, with reference to proportionality:

I consider that even without reference to the Human Rights Act 1998 the time has come to recognize that this principle is part of English administrative law not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing.

and in the Daly case Lord Cooke said:

I think that the day will come when it will be more widely recognized that Associated Provincial Picture Houses Ltd v. Wednesbury Corpn was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.

Although quoting and sympathizing with these weighty opinions, and acknowledging that 'the Wednesbury test is moving closer to proportionality', the Court of Appeal has held that 'it is not for this Court to perform the burial rites'. That task must be left to the House of Lords, and meanwhile the law as laid down by the House in the Brind case, in which proportionality was rejected

as part of English law, must linger on.

> Lord Irvine LC has suggested, in a human rights context, that 'there is a pro-found difference between the Convention margin of appreciation and the common law test of rationality', and has raised the question, 'how long the courts will restrict their review to a narrow Wednesbury approach in non-Convention cases, if used to inquiring more deeply in Convention cases?' The difference that he observes is in substance the same as that detected by the House of Lords, and his question is whether it will be eliminated by 'spill-over effect' from human rights and EU law. This is exactly the kind of convergence which European influences are likely to bring about. It is evident already in the numerous references to proportionality which judges are making freely, and which are paving the way for its general acceptance."

We, with greatest respect, do not have any such problem. This Court not only has noticed the development of law in this field but applied the same also.

42. The fact that in some jurisdictions, doctrine of unreasonableness is giving way to doctrine of proportionality is beyond any dispute. [See *Indian Airlines Ltd.* v. *Prabha D. Kanan,* (2006) 11 SCC 67 and *State of U.P.* v. *Sheo Shanker Lal Srivastava and Others* (2006) 3 SCC 276] But, the development of law in this field could have been applied only if a case was made out. If the State is right in its contention that the selection process being in cloud, no appointment can be made, the court by invoking any doctrine cannot ask the State to do so unless it arrives at a positive and definite finding that the State's stand is fraught with arbitrariness. We do not find any arbitrariness in its act.

43. It may be true that before the High Court the contention raised by the State was not in regard to the pendency of the Vigilance Enquiry but lack of vacancy, but it must also be noticed that the High Court itself despite perusing the records maintained by the State has clearly arrived at a finding that the enquiry by the State Vigilance Bureau had already been ordered, it cannot be ignored. The High

A Court in fact proposed to adjourn the matter sine die till the enquiry was completed, but the same was not acceptable to the appellants.

44. Moreover, while embarking on a question of this nature, this Court must take an overview of the entire scenario. It need not keep B itself confined to the stand of the State before the High Court alone. Even in a case where the process of selection gives rise to a doubt in regard to the fairness on the part of the selecting authorities, there need not be any categorical finding that the selection process is vitiated. Such a question may have to be posed and answered in an appropriate C case.

45. There is another compelling reason why we think not to issue any direction upon the state to order appointment of the appellants in the vacant posts. Section 4 of the 2002 Act lays down that no appointment can be made beyond the number of posts advertised or D against the posts which were not advertised. In terms of the aforementioned provision, therefore, any vacancy which had arisen after the advertisement made in January, 2004 or after abolition of posts on 13.05.2005, which had not been advertised, cannot be offered to the appellants herein. The Government of Haryana also states that E 10 posts are kept vacant for unforeseen demands. It was further stated that on 13.05.2005, 290 officers were holding posts against 230 sanctioned posts. Thus, any vacancy which had arisen by reason of retirement or death having regard to Section 4 of the 2002 Act is also not capable of being offered to the appellants herein.

F

46. We must before parting, notice a disturbing feature in this case. Whereas according to the Commission, the State has for all intent and purport made it a defunct body although no case therefor has been made out, the contention of the State, on the other hand, is G that although in all the maters allegations made by the complainant have been found to be true but the enquiry cannot proceed as the Commission is not cooperating with the State Vigilance Bureau. Indisputably and as has been indicated hereinbefore, seven separate writ petitions were filed by unsuccessful candidates. Various complaints H had also been received by the State. Four separate enquiries had been

directed to be conducted by the State Vigilance Bureau.Allegations have also, rightly or wrongly, been made that the Commission had acted in undue haste. We although as at present advised do not intend to make any observations in regard to the allegations and counter-allegations made by the Commission and State against each other, we only hope and trust that a constitutional authority like the Commission should neither withhold any document nor refuse to cooperate with the State Vigilance Bureau in the matter of conduct of an enquiry.

If the statements made by the Commission are correct, they have nothing to hide. It would be in the interest of all concerned including the appellants herein to see that the enquiry should be completed at an early date.

We direct the State Government to take all steps in this behalf. We would also request the Commission to render all cooperation to the authorities of the State Vigilance Bureau.

47. For the reasons aforementioned, we are of the opinion that no case has been made out for interference with the impugned judgment of the High Court. The appeals are dismissed accordingly. However, in the facts and circumstances of this case, there shall be no order as to costs.

K.K.T. Appeals dismissed.