

Premanand Vs. Mohan Koikal

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Overruled by : [B. Premanand and Ors. vs. Mohan Koikal and Ors.](#)

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Court : Kerala

Decided On : May-24-2006

Reported in : 2006(3)KLT103; 2008(1)SLJ198(Kerala)

Judge : V.K. Bali, C.J.,; J.B. Koshy and; S. Siri Jagan, JJ.

Acts : Kerala State and Subordinate Services Rules, 1958 - Rules 17A and 27; Kerala State and Subordinate Services Act - Sections 17A; Kerala General Service (posts in the Development Department) Rules; [Constitution of India](#) - Article 226

Appeal No. : W.A. No. 1774 of 2003

Appellant : Premanand

Respondent : Mohan Koikal

Advocate for Pet/Ap. : K.R.B. Kaimal,; V.P.K Panicker,; George Varghese (Perump

Disposition : Appeal dismissed

Judgement :

V.K. Bali, C.J.

1. Rule 27(c) of the Kerala State and Subordinate Services Rules, 1958, hereinafter referred to as 'KS & SSR', dealing with seniority reads as follows:

(c) Notwithstanding anything contained in Clauses (a) and (b) above, the seniority of a person appointed to a class, category or grade in a service on the advice of 'the Commission shall, unless he has been reduced to a lower rank as punishment, be determined by the date of first effective advice made for his appointment to such class, category or grade and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advice list.

2. The appellants, who were respondents in the original lis, would endeavour to give literal meaning to the statute and in as much as the date of first effective advice in the matter of their appointment was prior in point of time from the petitioners in the original lis, now arrayed as respondents in this Writ Appeal, they would want us to declare them seniors. The petitioners, who succeeded in the matter of inter se seniority between them and the appellants in tune with the findings recorded by the learned Single Judge would want us to determine seniority by striking the balance to give effect to the general purpose of legislature not within the literal meaning of the statute. The learned Division Bench while hearing the appeal arising from the judgment recorded by the learned Single Judge determining seniority in consonance with equity, justice and good conscience doubted the correctness of the same and also the correctness of a Division Bench judgment in W.A.No. 156 of 2002(A) in the matter of decided on 27th May, 2002. It is for that precise reason that even though the matter was covered on all fours by a decision of the Division Bench in M. Seethi's case (supra, the matter has been referred for decision by a Full Bench.

3. Brief facts culminating into the reference made by the Division Bench dated 26th July, 2005 while doubting the decision of a co-ordinate Bench in M. Seethi 's case (supra) need a necessary mention. The petitioners who filed the Original Petition were holding the post of Block Development Officers,, hereinafter referred to as 'BDOs'. They came to be appointed by way of direct recruitment. They were advised by the Public Service Commission from the rank list of BDOs which came

into force with effect from 25.11.1997. The said rank list was prepared pursuant to the notification published in the Kerala Gazette dated 8.11.1983 inviting applications for appointment to the post of BDO. Even though their names came to be included in the rank list of 1987, they came to be appointed only in 1993. The reason for their appointment at such a belated stage was the letter issued by the Chief Secretary dated 30.11.1988 addressed to the Commissioner of Rural Developments, Thiruvananthapuram. The Chief Secretary, by the letter aforesaid, directed the Commissioner of Rural Developments to start applying the ratio in respect of cadre strength instead of the practice being followed. The Special Rules, namely, the Kerala General Service (posts in the Development Department) Rules, governing the appointments, provided that appointment to the cadre was to be made from three sources, namely, (i) by appointment by transfer from among Junior Lecturers in the Extension Training Centre, etc., (ii) by recruitment by transfer from among Senior Grade and Grade I Assistants in the Government Secretariat; and (iii) by direct recruitment. This was to be in the ratio of 1:1:1. This ratio was being applied with reference to the existing vacancies, but as mentioned above, the Chief Secretary directed that the ratio should apply as per cadre strength. Naturally, this direction resulted in upsetting the chances of direct recruits from being appointed. Apprehending that the rank list would expire thus leaving the petitioners, who were high in rank without any appointment, they filed O.P. 9161 of 1989. During the course of hearing of the aforesaid Original Petition, the petitioners prayed for an interim order and the Court by order dated 16.11.1990 directed to report 48 vacancies of BDOs to the Kerala Public Service Commission before 21.11.1990. This was accordingly done. The petitioners succeeded in setting aside the direction issued by the Chief Secretary so as to form the ratio as per cadre strength. A Division Bench of this Court held that the ratio was to be applied to the existing vacancies and not as per the cadre strength. The direction thus came to be issued to the Public Service Commission to advise 48 persons from the 1987 rank list for vacancies which had been reported as per the interim order. It is conceded position that the Special Leave Petition filed against the order of the Division Bench was dismissed by the Honourable Supreme Court. In the interregnum, i.e. between the filing of the Original Petition and the ultimate directions that were issued by the Division Bench, the

Government issued notification dated 5.12.1989 inviting applications from Scheduled Caste/Scheduled Tribe candidates for appointment as BDOs under special recruitment process as per the provisions contained in Rule 17A of KS & SSR dealing with special recruitment from among the Scheduled Castes and Scheduled Tribes. The rank list with regard to the said category of candidates came to be published on 20.6.1992 and the appellants came to be appointed from among the said rank list under special recruitment. The appellants thus, in the manner aforesaid, came to be appointed earlier in point of time than the petitioners. For the first time a tentative seniority list of BDOs came to be published on 4.6.1999. The appellants were shown as seniors to the petitioners, thus constraining them to file objections which were still pending when the petition giving rise to the present Writ Appeal was filed. The immediate cause of filing the Original Petition, even though objections against the tentative seniority list were pending, appears to be that the official respondents were contemplating promotion of the BDOs to the next higher rank without first deciding the objections raised by the petitioners.

4. The learned Single Judge before whom the matter came up for hearing framed the following question for determination:

The questions now emerging for decision are as to whether the assignment of a higher position to respondents 4 to 11 (appellants) is justified and whether the petitioners are entitled to accommodation for a position earlier than that is given to them.

5. The learned Single Judge by taking into consideration the provisions contained in Rule 27(c) of the KS & SSR, the fact that the appellants were appointed pursuant to special recruitment in terms of Section 17A of the KS & SSR and the decision of this Court in P.J. Grace v. State of Kerala and Anr. 1975 KLT 227, the decision in O.P. No. 15736 of 2000 and connected cases, upheld by the Division Bench of this Court and also the decision of Supreme Court of India in Dalalah Gojah v. State of Kerala 1998 (1) KLT 567 (SC), a Division Bench decision of this Court in Muraleedharan Nair v. K.S.R.T.C. 1998 (1) KLT 911, preferred to assign seniority to petitioners over and above the appellants on the basis of equity, justice

and good conscience and chose not to give literal interpretation to the language employed in Rule 27(c) of the Rules. Aggrieved, the appellants filed W.A.No. 1774 of 2003(c). A Division Bench of this Court before whom the matter came up for hearing was appraised of a decision recorded by a co-ordinate Bench in W.A. No. 1156 of 2002 arising from O.P. No. 15736 of 2000 dealing with exactly same controversy on identical facts. Learned Division Bench, however, by reproducing the observation made by a co-ordinate Bench in W.A. No. 1 156 of 2002, as reproduced below, observed that the learned Single Judge was persuaded by the said observation rather than the statutory rule, but when there is such a pronouncement by the Division Bench, it would not be proper for them to hold that the reliance placed on this passage is unjustified and, therefore, the matter would require more authoritative pronouncement:

If everything had been done in accordance with law the petitioners would have definitely got appointment earlier than the persons included in the subsequent rank list.

6. We have already reproduced provisions of Rule 27 (c) of the Rules. Surely, if one has to go by the literal meaning employed in the language of the said rule, there cannot be any doubt that the appellants would rank senior to the petitioners. But the questions that would arise would be, whether the Court is bound to give a literal meaning to a statute, whatever be the circumstances and whether the Court would interpret statute literally even pertaining to such circumstances which may not have been under contemplation of the legislature while enacting the concerned statute. Having heard the learned Counsel for the parties, this Court is of the firm view that if there is obvious anomaly in the application of law the Court shall have to shape the law to remove the anomaly. If the strict grammatical interpretation gives rise to absurdity or inconsistency, the Court should discard such interpretation and adopt an interpretation which will give effect to the purpose of the legislation. This could even be done if necessary by modification of the language used. Reference may in this connection be made to the decision of the Supreme Court in *Mahadeolal Kanodia v. Administrator General of West Bengal* : [1960]3SCR578 . While enacting statute, the legislature would obviously have in contemplation facts and circumstances as they may occur normally. The

legislature would have no clue with regard to unusual events which may some times occur. The legislature would also not contemplate making of law guessing for illegalities and/or irregularities. Unusual, out of place, irregular, illegitimate events and situations are thus normally not catered for in the statute at the time of enacting laws. Such situations are normally taken care of by the Courts. While interpreting the statute, the Court cannot be oblivious to such unusual events and thus where it may cause total injustice to a litigant, it would be perfectly justified in not giving literal meaning to the language employed in the statute.

7. We would have dwelled with the provisions of law enumerated above and would have gone into all possible aspects of the controversy in issue, but what we find is that on identical facts there is a decision of a Division Bench of this Court, correctness whereof has been doubted by the learned Division Bench making the present reference but the same has been upheld by the Honourable Supreme Court. In this scenario, all that needs to be mentioned is about the identical facts of the said case and further that the decision as aforesaid is based upon observations made by the Honourable Supreme Court in Dalalah Gojah's case (supra). The facts in M.Seethi's case (supra) would reveal that as per the method of appointment to the category of Assistant Engineers in the Kerala State Electricity Board, 40% of the vacancies were to be filled up by direct recruitment of Engineering graduates based on selection by the Kerala Public Service Commission. On 28.11.1989, Kerala Public Service Commission published a rank list of persons for appointment to the post of Assistant Engineer (Electrical) for the K.S.E. Board. The said rank list remained in force till 27th November, 1992. The petitioners in the Original Petitions, bearing Nos. 17257 of 2000 and 15736 of 2000 were among the persons included in the said rank list. When they found that all the vacancies available for direct recruitment were not reported to the Public Service Commission, they along with others filed O.P. 13471 of 1992. As per interim order passed on 24.11.1992 in O.P. 13471 of 1992, this Court directed the K.S.E. Board to report 67 vacancies of Assistant Engineers (Electrical) to the Public Service Commission. However, it was also directed that candidates need be advised only after getting further orders from the Court, In compliance with the order of this Court, the K.S.E. Board reported the vacancies to the Public Service Commission before the expiry of the rank list. O.P. No. 13471 of 1992 was finally

heard and dismissed by this Court on 1.8.1997. Against the dismissal of the Original Petition, the petitioners in the Original Petition filed W.A.No. 1876 of 1997. The Division Bench directed the Public Service Commission to advise candidates against the 67 vacancies within one month. Some persons who were not parties to the Writ Appeal filed a review petition, which was dismissed on 16.3.1998. The Special Leave Petitions filed against the judgment were dismissed by the Honourable Supreme Court on 17.12.1998. Petitioners in O.P.Nos. 17257 of 2000 and 15736 of 2000 were advised by the Public Service Commission on 16.3.1998 and they were appointed as Assistant Engineer (Electrical) by the K.S.E. Board on 11.3.1999. In the meanwhile, the Public Service Commission had issued a fresh notification inviting applications for the post of Assistant Engineer (Electrical) in the K.S.E. Board and a new rank list was published on 26.6.1997. The first advice from the said new rank list was made on 8.7.1997. Some 200 persons were appointed from the said rank list from 8.7.1997 to 16.3.1998. The earlier rank list was in force till 27.11.1992. The vacancies which arose upto 27.11.1992 were liable to be filled up by candidates included in the earlier rank list. The candidates included in the new rank list could be advised only against the vacancies which arose after 27.11.1992. However, in view of the failure of the K.S.E. Board to report the 67 vacancies which arose prior to 27.11.1992 and were available for direct recruitment, the petitioners had to file O.P. No. 13471 of 1992 and W.A.No. 1876 of 1997 to get the vacancies reported to the Public Service Commission and to get their names advised by the Public Service Commission. During the pendency of O.P. 13471 of 1992 and W.A. No. 1876 of 1997, candidates from the new rank list were advised for appointment by the Public Service Commission and were appointed by the K.S.E. Board. The petitioners made representations to the Public Service Commission claiming seniority over persons advised as Assistant Engineers (Electrical) from the new rank list. Their claim was rejected by the Public Service Commission holding that the petitioners are entitled to seniority only with effect from the date of their advice. Challenging the decision of the Public Service Commission, the petitioners filed O.P. Nos. 15736 of 2000 and 17257 of 2000. On the facts as mentioned above, the Division Bench of this Court held that:

The main contention of the appellants is that the decision of the learned Single Judge is contrary to Rule 27(c) of the Kerala State and Subordinate Services

Rules. As rightly pointed out by the learned Single Judge the provisions contained in Rule 27(c) cannot be strictly and mechanically applied to the facts of this case. Had the vacancies were reported to the Public Service Commission by the K.S.E. Board in accordance with the Rules the petitioners in the Original Petitions would have been advised by the Public Service Commission and they would have been appointed as Assistant Engineer (Electrical) in the K.S.E. Board before the appointment of the appellants. The petitioners had to seek the help of this Court to get the vacancies reported to the Public Service Commission and to get their names advised by the Public Service Commission against the vacancies so reported. The delay in the matter of reporting the vacancies and advising the petitioners for appointment occurred due to no fault of the petitioners but solely due to the fault of the K.S.E.Board. Hence such delay cannot result in injustice to the petitioners and this Court under Article 226 of the [Constitution of India](#) is competent to pass appropriate orders and give necessary directions to prevent such injustice to the petitioners. In the impugned judgment the learned Single Judge has rightly and justifiably exercised the power under Article 226 of the Constitution to prevent injustice to the petitioners on account of the failure of the K.S.E.Board to report the vacancies to the Public Service Commission in time and in accordance with the Rules. Hence the impugned judgment does not call for any interference by this Court.

8. During the course of arguments there was no dispute that the facts of the case in hand and the one culminating in order by Division Bench in M.Seethi 's case (supra) are absolutely identical. The observation made by the learned Single Judge that Special Leave Petition against this judgment was dismissed by Supreme Court is also not under challenge.

9. The Division Bench relied upon the observations made by the Honourable Supreme Court in Dalalah Gojah's case (supra) that if a right which had accrued to a person for appointment against a vacancy after he had been duly selected cannot be taken away merely because of the delay or inaction on the part of the Government in notifying his appointment. The facts of the case aforesaid reveal that the selection to the post of Legal Assistant had taken place and a select list was published on 23.6.1971. The name of the appellant, Dalalah Gojah, was

included therein. In view of the fact that there were some reservations which had been made for the OBCs and there was a likelihood that if the appellant had been appointed there would have been a disturbance of the 50% reservation which was permitted, the appointment of the appellant was not made and she was passed over. On 6.10.1972, two vacancies were reported and requisitions were made for the selection to those posts. Even though the appellant was entitled to be appointed against one of those posts, no appointment was made. Thereafter a fresh selection was made, which resulted in a new list being published on 22.3.1974. The respondents in both those appeals were included in the said list, but the name of the appellant was placed at serial No. 1 in as much as she had been passed over from the earlier list which had been prepared on 23.6.1971. The respondents filed writ petitions in this Court inter alia challenging the appointment of the appellant therein and her being placed at serial No. 1 in the select list. This Court did not disturb the appointment of the appellant, but observed that the writ petitioners would rank senior to the appellant. The appellant challenged the said order of this Court. While allowing the appeal, the Honourable Supreme Court observed that:

It appears to us that the appellant has been made to suffer for no fault of hers. From the facts enumerated hereinabove, it is quite clear that when two vacancies arose on 6th October 1972, the appellant had a right to be appointed against one of the said vacancies. At that point of time none of the respondents had even been selected for appointment to the said post, their selection having been notified only on the second list which was prepared on 22nd March, 1974. The right which had, therefore, accrued to the appellant for appointment against a vacancy after she had been duly selected could not have been taken away merely because of the delay or inaction on the part of the Government in notifying her appointment. The High Court, in our opinion, fell in error in observing that the appellant's name could not be placed at Serial No. 1 in the second select list. What was in fact done was that the appellant was being appointed against the vacancy which had arisen on 6th October, 1972 when admittedly, the select list was still alive. We see no reason, under these circumstances, when the appointment of the appellant has not been set aside, as to why she should be deprived of the seniority. She was selected earlier in point of time than the respondents and her selection should

have resulted, as it must now, with her filling the vacancy which had arisen on 6th October, 1972.

10. Counsel for the appellants has, however, placed reliance on a single Bench judgment of this Court in Mohanan v. State of Kerala 2000 (2) KLT 798. The facts of the case aforesaid would reveal that even though the 6th respondent therein later in point of time was given earlier rank than the petitioners, but meanwhile further promotions had already been effected. In all further promotional posts, the petitioners were seniors. It is in view of the promotions given to the petitioners who were higher in ranks, even though the mistake made in the case of the 6th respondent had been rectified later in point of time, it was held that:

Seniority in the above cadres is determined by the date of the order of promotion under Rule 27(a) of the KS & SSR. The 6th respondent therefore cannot claim any seniority over the petitioners in the above cadres. The earlier rank given to the 6th respondent over the petitioners in the cadre of Sub Inspector of Police cannot entitle the 6th respondent to get automatic promotion and seniority in preference to the petitioners who earned their regular promotion much earlier.

This judgment is distinguishable on facts. learned Counsel then relied on a Division Bench decision of this Court in K.V. John v. Kerala State Electricity Board, Kerala 1979 (2) SLR 641. The facts of the case aforesaid were that the appellants were appointed as 1st Grade Overseers in the Kerala State Electricity Board some time in 1968. By Exhibit PI proceedings of the Board dated 9.12.1970, it was notified after consideration of the question of reserving a certain percentage of vacancies of Junior Engineers for appointment by direct recruitment, that in making appointment to the said post, 40% of the vacancies will be from open market and 10% by direct recruitment, of Engineering Graduates in the service of the Board as Overseers, Clerks etc. On 2.2.1971, the Public Service Commission invited applications for recruitment to the post of Junior Engineers in the Electrical Department consistent with the terms of Exhibit PI proceedings. A clarificatory notification was issued on 22.3.1971. The appellants applied in pursuance of these notifications. They were interviewed by the Public Service Commission on 29.5.1971 and selected for the post of Junior Engineers. They were advised by the

Public Service Commission on 4.6.1971 and appointed by Exhibit P2 dated 17.6.1971. Exhibit P2 order expressly recited that the appointment was in pursuance of the advice dated 4.6.1971. Three open market candidates were advised on 7.7.1971, 11.10.1971 and 23.10.1971. Respondents 4 and 5 were included in the advice list dated 11.10.1971. The Commission thereafter prepared a combined seniority list. Exhibit P3, of departmental and open market candidates, in which the petitioners were placed below the respondents. The inter se seniority list was prepared by following 1:4 ratio between the departmental candidates and open market candidates. The Electricity Board had by its proceedings dated 25.9.1978 ordered that the existing ratio of Junior Engineer (Electrical) and 1st Grade Overseer (Electrical) under the Board between departmental and open market candidates was 1:4 and that accordingly the first candidate from the advice list of departmental candidates would be ranked first, thereafter four candidates will be ranked respectively from among those from the open market in the order of seniority in the advice list and then the next candidate from the departmental quota and the process will continue till the quota of the departmental candidates is exhausted. In Exhibit P3 the principle invoked at that time was followed. The appellants who were aggrieved by the seniority list had approached the Public Service Commission stating that the same was contrary to Rule 27(c) of the KS & SSR. The Division Bench after reproducing Rule 27(c) observed that:

The note to the Rule makes it clear that the date of effective advice in this Rule means the date of the letter of the Commission on the basis of which the candidate was appointed. It would, thus, be seen that it is the statutory right of the candidates concerned to have their seniority reckoned from the date of first effective advice by the Public Service Commission. By the very terms of Ext.P2 appointment order we have seen that the appellants were advised for appointment on 4.6.1971. Therefore it is not possible to subordinate or to understand how the seniority of the appellants happened to be fixed below that of the respondents who are advised on 7.7.1971, 11.10.1971 and 23.10.1971.

The contention of the Electricity Board was that having regard to the exigencies of administration and the difficult situation presented in filling up the vacancies from service candidates and from open market and co-relating the seniority of both, the

procedure adopted by the Commission for finalising the list of departmental candidates first and turning to the open market candidates next, was not illegal. This contention found favour with the learned Single Judge. The Division Bench while hearing the appeal, however, held that:

We are unable to sustain the same. To make ourselves absolutely sure about the position, we called for the two notifications, namely, the one dated 2.2.1971 and the other dated 22.3.1971, in order to see whether by the terms of these notifications, the Commission had reserved to itself the power of making a provisional advice to be finalised later after recruitment from the two sources was completed. Whether such provision could prevail against the statutory rule, is a different matter, on which we need not express ourselves. After taking time for production of the files, counsel for the Public Service Commission intimated to us that no such reservation was made in the notification issued by the Public Service Commission. That being so, we see no ground on which Rule 27(c) of the Kerala State and Subordinate Services Rules is to be denied its full force and effect. We are unable to agree with the learned Judge that exigencies of service or administration would warrant a departure from the rigour of Rule. It was stated in the counter affidavit of the Public Service Commission that it was clearly stated in the advice letter of the Commission dated 4.6.1971 that the advice of the candidates under the Departmental quota will be provisional, and that seniority will be finalised after recruitment from the open market. Ext.P2 memo of appointment issued to the 1st appellant does not bear out this statement. It contains no such reservation.

Once again we are of the view that the Division Bench judgment of this Court relied upon by the learned Counsel would provide no solace to the appellants. Surely, the provision of rule cannot be violated and the date of effective service as mentioned in the Note to Rule 27(c) had to be given effect. The only ground for making a departure from the rule was found to be factually incorrect.

11. The learned Counsel representing the appellants on the basis of the documents filed during the pendency of this appeal contends that appellants were recruited as BDOs on the basis of notification issued by the Public Service

Commission to fill up the vacancies reserved by the Government for special recruitment from candidates belonging to Scheduled Castes and Scheduled Tribes under Rule 17A of KS & SSR. The selection was for appointment against posts reserved by the Government for special recruitment under Rule 17A of KS & SSR. The Government in G.O. dated 30.11.1988 had reserved two posts of BDOs to be filled by special recruitment of SC/ST candidates. The Government by another notification dated 14.12.1988 had reserved another two posts of BDOs for special recruitment. The Government had reserved two more posts of BDOs for special recruitment as per G.O. dated 29.11.1989. Another two more posts of BDOs were reserved for special recruitment by the Government as per G.O. dated 24.5.1990. So, the above eight posts were to be filled up by recruitment of candidates as per Annexure-A notification dated 5.12.1989. The contention is that if the appellants have been recruited against the posts which accrued in 1988 or 1990, even though under Rule 17A dealing with special recruitment of Scheduled Caste/Scheduled Tribe candidates, the appellants should be deemed to have been appointed against the posts created for a special category in 1988 and 1990. If the petitioners can claim seniority on the basis of availability of posts in a particular year, even though advice in their case was given later, the appellants too can stake claim with regard to posts that were ordered to be filled in 1988 and 1990. Thus, having a right-to be appointed against the posts that accrued in 1988 and 1990, they shall be deemed to have been appointed against those posts and their appointments should have been from the date on which the Government had decided to create such posts.

12. We do not find any merit in this contention whatsoever. Creation of a post is entirely different than selection of a post pursuant to notification issued by the Government to fill up the vacancies. Creation of posts would, at the most, give a right to a particular category for appointment. No individual as such would be able to stake claim simply on creation of a post whereas, selection pursuant to issuance of a notification to fill up a post would give a right to an individual to claim the said post. That apart, the special recruitment envisaged under Rule 17A of KS & SSR can relate only to prospective vacancies and cannot affect candidates already advised for appointment. Still further, Rule 17A of KS & SSR, dealing with special recruitment from among Scheduled Castes and Scheduled Tribes, giving

the Government a right to reserve a specified number of posts in any service, class, category or grade to be filled by direct recruitment exclusively from among the members of Scheduled Castes and Scheduled Tribes is in the form of concession. The mere decision by the Government to reserve a specified number of posts in any service to be filled by direct recruitment would give no automatic right to any amongst those belonging to such category to claim the said post. To illustrate, if there be a backlog of Scheduled Caste/Scheduled Tribe candidates and the Government may decide to fill up the vacancies by special recruitment, even with regard to backlog pertaining to 10 years earlier, can it be said by any stretch of imagination that the person appointed against the vacancy in the backlog of 10 years earlier would be able to claim appointment from the date of the vacancy simply because posts could not be filled? In our view, the only answer to the question as posed above can be in the negative.

Finding no merit in this appeal, we dismiss the same leaving it, however, open to the parties to bear their costs.

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