

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE MOHAMMED NIAS C.P.

TUESDAY, THE 16TH DAY OF AUGUST 2022/25TH SRAVANA, 1944

O.P(KAT).NO.92 OF 2017

AGAINST THE ORDER DATED 10.3.2017 IN O.A.(EKM).NO.171/2016 OF
KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM

PETITIONER/3RD APPLICANT IN OA:

SANTHOSH KUMAR
AGED 39 YEARS
AGED 39 YEARS, S/O.KALLYANI AMMA, CIVIL EXCISE OFFICER,
KANNUR 670 631, RESIDING AT KANIYERI HOUSE, MALAPPURAM
PO, SREEKANDAPURAM VIA, KANNUR 670 631.

BY ADV.SRI.K.JAJU BABU (SR.)
BY ADV.SRI.BRIJESH MOHAN
BY ADV.SMT.M.U.VIJAYALAKSHMI

RESPONDENTS/RESPONDENTS:

- 1 STATE OF KERALA
REP. BY THE SECRETARY TO GOVERNMENT, TAXES DEPARTMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM 695 001.
- 2 THE COMMISSIONER OF EXCISE
COMMISSIONER OF EXCISE, THIRUVANANTHAPURAM -33.
- 3 KERALA PUBLIC SERVICE COMMISSION
PATTON, THIRUVANANTHAPURAM 695 004,
REP. BY ITS SECRETARY.
- 4 SRI.RAMESAN.M
PRAVEEN MANDIRAM, PAZHAVAR MULLARAVILA,
NEYYATTINKARA, THIRUVANANTHAPURAM 695 126
(THE NAME OF THE 4TH RESPONDENT IS CORRECTED AS
PRASANTH M INSTEAD OF REMESAN.M VIDE ORDER DATED
23.3.2016 IN MA 893/2016)
- 5 SRI.KIRAN K.NAIR
AGED 39 YEARS, S/O.DIVAKARAN NAIR, CIVIL EXCISE
OFFICER, EXICISE RANGE OFFICE, KOTTAYAM 686 001.
- 6 SRI.ANEESH K.A
AGED 39 YEARS, S/O.ALLESH, CIVIL EXCISE OFFICER,

EXCISE CIRCLE OFFICE, IRINJALAKUDA,
THRISSUR DISTRICT 680 121.

- 7 SRI ANEESH T.C
AGED 25 YEARS, S/O.CHANDRAN T.K.,
CIVIL EXCISE OFFICER, EXCISE CIRCLE OFFICE,
THRISSUR 680 121.
- 8 SRI ANTONY XAVIER.A.P
AGED 30 YEARS, S/O.A.A.PAILY, CIVIL EXCISE OFFICER,
CASHIER, KERALA STATE ELECTRICITY BOARD LTD, H.M.T.
ROAD, KALAMASSERY 683 503.
- 9 SRI.RAJESH .R
AGED 24 YEARS, S/O.RAMACHANDRAN, THOTTIPADAM,
VATTEKKAD POST, PALAKKAD 678 506.

ADDL.10 RAFI KALAMULLAVALAPPIL
EXCISE PREVENTIVE OFFICER, EXCISE CIRCLE OFFICE,
KUTHUPARAMBA, KANNUR DISTRICT, RESIDING AT RAFI
MANZIL, P.O.IRIVERI, PANERICHAL CHAPPA, KANNUR DISTRICT,
PIN - 670 613.

ADDL. 10TH RESPONDENT IS IMPEADED AS PER ORDER DATED
16.8.2022 IN I.A.NO.2/2021.

BY SRI.UNNIKRISHNA KAIMAL, SR. GOVT. PLEADER
BY SRI.P.C.SASIDHARAN, SC
BY ADV.SRI.K.H.ASIF
BY ADV.SRI.S.P.ARAVINDAKSHAN PILLAY
BY ADV.SMT.MOLTY MAJEED
BY ADV.SRI.P.B.UNNIKRISHNAN NAIR
BY ADV.SRI.RUBEN GEORGE ROCK
BY ADV.SMT.N.SANTHA
BY ADV.SRI.V.VARGHESE
BY ADV.SRI.PETER JOSE CHRISTO
BY ADV.SRI.S.A.ANAND
BY ADV.SMT.K.N.REMYA
BY ADV.SMT.L.ANNAPOORNA
BY ADV.SRI.VISHNU V.K.
BY ADV.SMT.ABHIRAMI K. UDAY
BY ADV.SRI.KURUVILLA SABU CHRISTY

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING COME UP
FOR ADMISSION ON 03.08.2022, THE COURT ON 16.08.2022 DELIVERED
THE FOLLOWING:

J U D G M E N T

A.K. Jayasankaran Nambiar, J.

The petitioner in this O.P.(KAT) was the 3rd applicant in O.A. (EKM) No.171 of 2016 before the Kerala Administrative Tribunal, and impugns the order dated 10.3.2017 of the Tribunal in the said O.A. The brief facts necessary for disposal of this O.P.(KAT) are as follows:

The petitioner is a Civil Excise Officer in the Excise and Prohibition Subordinate Service. The Public Service Commission [PSC], as per its Notification dated 28.3.2007, invited applications for selection to the post of Preventive Officer. Pursuant to the said selection, a rank list was published with effect from 19.3.2010. In the meanwhile, with effect from 4.6.2008, the Special Rules were amended taking away the source of direct recruitment to the post of Preventive Officer. Inasmuch as the amendment to Special Rules had taken place after the commencement of the selection process, the PSC went ahead with the selection process that had already

been initiated and issued advice memo to 158 candidates from the rank list, all of whom were also issued with appointment orders. It would appear that out of the 158 candidates, only 116 actually joined service, and therefore, on 1.3.2011, another 42 NJD vacancies were reported to the PSC. Apparently, four vacancies against the 42 NJD vacancies reported were filled from the existing rank list but no further NJD vacancy could be filled from the said rank list since it stood exhausted with effect from 11.5.2011. Consequently, a fresh notification dated 29.9.2012 was issued by the PSC, pursuant to which, a shortlist dated 30.7.2015 and rank list dated 26.7.2017 was published by the PSC. The said notification dated 29.9.2012 and the consequent selection process were impugned before the Tribunal in O.A.No.171 of 2016 by in-service candidates *inter alia* on the contention that inasmuch as the 38 NJD vacancies subsisted after the expiry of the original rank list, there could not have been a fresh notification issued by the PSC for the purposes of filling up the said vacancies since those vacancies had to be filled in terms of the amended Special Rules which had taken away the source of direct recruitment as a method of filling up the vacancies in the post of Preventive Officer.

2. The Tribunal, on a consideration of the O.A., found that the

substantial vacancy that was initially notified by the Notification dated 28.7.2007 could be seen as extinguished only on a person being advised against the same, issued with an appointment order, and actually having joined duty and discharged the duties attached to the post. Reliance was placed on Rule 2(1) of Part I of the Kerala State & Subordinate Services Rules to hold that the term “appointed to a service” meant that the incumbent had to discharge for the first time the duties of a post borne on the cadre of such service or when he commenced the probation, instruction or training prescribed for members thereof. The Tribunal essentially held that the substantial vacancy, which was relatable to a period prior to the introduction of the Special Rules, was not extinguished and continued to remain in existence till such time as a candidate had been appointed to the vacancy and commenced the discharge of his duties in the post in question. It was found that inasmuch as the NJD vacancies were vacancies that were traceable to a period prior to the amendment of the Special Rules with effect from 4.6.2008, there was no illegality in the PSC issuing the notification dated 29.9.2012 and continuing with the selection process for the purposes of filling up the NJD vacancies with direct recruits. The O.A. was therefore dismissed for the said reasons.

3. Before us, it is the contention of the Sri.Jaju Babu, the learned senior counsel, assisted by Adv.Sri.Brijesh Mohan appearing for the petitioner that it is now well-settled that there is no mandatory Rule which envisages that vacancies have to be filled in accordance with the law prevailing as on the date of arising of the vacancy. It is his contention that when there is a change in the Rules governing recruitment, the vacancies that arise subsequent to the amendment of the Rules have to be filled in accordance with the amended Rules and not in accordance with the erstwhile Rules. He places reliance on the decision of the Supreme Court in ***State of Himachal Pradesh and Others v. Raj Kumar & Others - [JT 2022 (5) SC 516]*** for the said proposition. He also places reliance on the judgment of the Supreme Court in ***Indian Bank v. R. Jayashree - [2001 SCC Online SC 23]***, where the Supreme Court, while reversing a Division Bench judgment of this Court, observed that when a vacancy arises in a post as a result of a non-joining of a candidate, the resulting vacancy has to be seen as a fresh vacancy to which a fresh appointment has to be made. It is his submission that in view of the admitted fact that the vacancies in question were NJD vacancies, the mere fact that the vacancies could be traced to a period prior to the amendment of the Special Rules could not be a reason to hold that the vacancies had to be filled in accordance with

the erstwhile Rules.

4. Per contra, it is the submission of Sri.Elvin Peter, the learned counsel appearing for the contesting respondents that the NJD vacancies had to be seen as vacancies that arose on dates prior to the amendment of the Special Rules, and hence, they could have been filled only in accordance with the erstwhile Rules and not in accordance with the Special Rules. It is also his submission that at any rate, the decision of the employer to report the vacancies to the PSC had to be seen as indicative of the policy of the employer to fill up those vacancies in terms of the earlier Rules and not in accordance with the amended Rules.

5. On a consideration of the rival submissions, we find that for the reasons that are to follow, this O.P.(KAT) must succeed. It cannot be in dispute that a vacancy that arises consequent to an advised candidate not reporting for duty pursuant to the advice, has to be treated as a fresh vacancy. The decision in ***Indian Bank (supra)*** clearly states so. Even otherwise, we are of the view that once the PSC advises a candidate to a vacancy, the said candidate acquires a right to that vacancy to the exclusion of all others. If the candidate then chooses not to join the post in question, then the resultant

vacancy has necessarily to be seen as a fresh one to be filled in accordance with the Rules in vogue. In other words, on the facts in the instant case, the NJD vacancies had to be seen as fresh vacancies arising on the date on which they were notified, namely 29.9.2012, and in that event, it was the amended Special Rules that had to govern the filling up of the said vacancies. As a matter of fact, we find that there was no justification whatsoever for the employer to have reported the NJD vacancies to the PSC at all, since the amended Special Rules had taken away the source of direct recruitment as a method of recruitment to the post in question. We therefore cannot accept the finding of the Tribunal in the impugned order that notwithstanding the non-joining of the advised candidates, the vacancies subsisted as those that had arisen on a date prior to the amendment of the Special Rules. The said finding militates against the view expressed above based on the judgment of the Supreme Court. We also accept the contention of the learned senior counsel based on the judgment in ***State of Himachal Pradesh and Others v. Raj Kumar & Others - [JT 2022 (5) SC 516]*** that the law that vacancies should be filled in accordance with the Rules existing at the time of arising of the vacancy is not one of universal application and would depend on the facts and circumstances of each case and the decision taken by the employer in such cases.

In the result, we set aside the impugned order of the Tribunal,
and allow the O.P.(KAT) with consequential reliefs to the petitioner.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/
MOHAMMED NIAS C.P.
JUDGE

prp/

APPENDIX OF O.P (KAT) .NO.92/2017

PETITIONER EXHIBITS :

- EXHIBIT P1 TRUE COPY OF THE OA(EKM) NO.171/2016 FILED ALONG WITH ANNEXURE A1 TO A5 BEFORE THE KERALA ADMINISTRATIVE TRIBUNAL THIRUVANANTHAPURAM
- EXHIBIT P2 TRUE COPY OF THE REPLY STATEMENT FILED BY THE 1ST RESPONDENT IN OA(EKM) NO. 171/2016 BEFORE THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM
- EXHIBIT P3 TRUE COPY OF THE REPLY STATEMENT FILED BY THE 3RD RESPONDENT IN OA(EKM) NO. 171/2016 BEFORE THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM
- EXHIBIT P4 TRUE COPY OF THE IMPEADING APPLICATION IN M.A.NO. 2669/2016 ALONG WITH ANNEXURES . MA1 TO 3 IN OA (EKM) NO. 171/2016 BEFORE THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM
- EXHIBIT P5 TRUE COPY OF THE IMPEADING APPLICATION IN M.A.NO. 3070/16 IN OA(EKM) NO. 171/2016 BEFORE THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM
- EXHIBIT P6 TRUE COPY OF THE REPLY STATEMENT FILED BY THE ADDITIONAL RESPONDENTS 5 TO 8 ALONG WITH ANNEXURE -R5(A) IN OA (EKM) NO. 171/2016 BEFORE THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM
- EXHIBIT P7 TRUE COPY OF THE REPLY STATEMENT FILED BY ADDITIONAL RESPONDENT OA(EKM) NO. 171/2016 BEFORE THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM
- EXHIBIT P8 TRUE COPY OF THE ORDER DATED 10.3.2017 OA

(EKM) NO. 171/2016 OF THE KERALA
ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM

EXHIBIT P9 TRUE COPY OF THE ORDER DATED 22/11/2001 OF
THE HONOURABLE SUPREME COURT IN CIVIL APPEAL
NO. 4054/199 AND 4055/1999

RESPONDENT EXHIBITS:

EXHIBIT R5 TRUE COPY OF THE RANK LIST PUBLISHED WITH
EFFECT FROM 26/07/2017 FOR THE POST OF
EXCISE PREVENTIVE OFFICERS

EXHIBIT R5 TRUE COPY OF THE TEMPORARY PROMOTION ORDERS
DATED 19/12/2019 WITH RESPECT TO THE
CORRESPONDING 13 NJD VACANCIES AT KANNUR

EXHIBIT R5 C TRUE COPY OF THE ORDER N O XD3-136956/2019
DATED 10-08-2020`

//TRUE COPY//

P.S. TO JUDGE