A FOOD CORPORATION OF INDIA AND ORS.

v.

BHANU LODH AND ORS.

FEBRUARY 24, 2005

B [K.G. BALAKRISHNAN AND B.N. SRIKRISHNA, JJ.]

Food Corporation Act, 1964—Section 6(2)—Directives under—By Central Government—Regarding recruitment of staff—Competence of Central
C *Government to issue Directives—Courts below held that Central Government not competent to issue the Directives because the power under the provision in confined only to policy decision concerning business of the Corporation—On appeal, held: Central Government Competent to issue the Directives—Policy would include policy of recruitment and many other details which would have serious financial impact and in the long run would affect the*
D *interests of the consumers/producers—Filling up of a post or not being a policy decision, cannot be interfered with in judicial review unless infected with vice of arbitrariness—Constitution of India, 1950—Articles 14, 32 and 226.*

Service Law :

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Recruitment of Departmental candidates—Contrary to Recruitment Rules—Using power to relax the Rules—Validity of recruitment—Held: Recruitment not valid—Power of relaxation to be used in marginal cases where exceptionally qualified candidates are available.

F *Constitution of India, 1950—Article 14—Recruitment—Done in respect of one category of posts—Denied in respect of another category—Discrimination alleged—Held: Discrimination arises among similarly situated persons—Such act is valid as there is nothing in common between the category of posts.*

G **Appellant-Corporation issued an advertisement for direct recruitment to the posts of Joint Manager/Deputy Manager in the Corporation. After the select list of the candidates was finalized, Government of India issued a directive in exercise of its power u/s. 6(2) of Food Corporation Act, 1964 indicating therein the policy instruction**

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not to create/upgrade posts of any level except where completely unavoidable; not to fill up vacancies by fresh recruitment; and not to further revise conditions of service without prior approval of Central Government. While recruitment process for the post of Deputy Manager was being carried on, on receipt of complaints regarding manner of recruitment in excessive relaxation of the maximum age, Central Government issued a second directive imposing a complete ban on the recruitment process as being in violation of the recruitment Regulations. As a result of second directive, process for selection for the post of Deputy Manager was stopped, but the process was carried further for selection to the post of Joint Manager.

The officers/employees of the Corporation including the employees-respondent in the present case filed writ Petitions in different High Courts challenging the order of Central Government putting freeze on the appointment of departmental candidates as being beyond purview of Section 6 of the Act. The only question pressed before High Court was regarding competence of Central Government to interfere with internal administration of the Corporation particularly regarding appointment and service of its staff. Single Judge of High Court held that power of Central Government u/s 6(1) and (2) was confined to policy decision concerning business of the Corporation and was not in respect of internal management including appointment, promotion, transfer of the staff. In the Writ Appeals by Central Government and by respondent No. 1 - employee, Division Bench of High Court upholding the order of Single Judge held that Central Government had no power to issue the impugned directives; and that since 39 departmental candidates were above maximum age limit, they should be excluded from consideration and other qualified employees be appointed from the select list. Hence the present appeals by the Corporation and Special Leave Petition by the Employee. Special Leave Petition was only to canvass some of the points taken in the Writ Appeal, on the ground that they were not considered in the impugned judgment.

Allowing the appeals and dismissing the Special Leave Petition, the Court

HELD : 1. The directives issued by Central Government are well within the ambit of Sub-section (2) of Section 6 of Food Corporation Act, 1964. The words of Sub-section (2) of Section 6 of the Act direct that the Board of Directors in discharging its functions "shall act on business

A principles" having regard to the "interests of the producer and consumer" and shall be guided by "such instructions on questions of policy" as may be given to it by the Central Government. First, the expression "business principles" is one of widest import. There is no reason as to why the policy of recruitment of officers/staff, which would obviously have serious financial impact on the Corporation, is not subsumed under this B expression. Secondly, the Board of management is required to have regard to the interest of the 'producers and the consumers', and not merely of the officers and employees of the Food Corporation of India. Finally, the Board is required to discharge all its functions and be guided by the instructions on questions of policy, which may be given to it by the Central C Government. Questions of policy could be, not only with regard to the organization of the Corporation, its management and function, but also with regard to its employment policy, recruitment and many other details which would, in the long run, affect the interests of the consumers/ producers for whom alone the FCI is established under the Act.

[362-B-E]

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1.2. 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 E 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. [364-A-C]

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Shankarsan Dash v. *Union of India,* [1991] 3 SCC 47, followed.

Government of Orissa v. *Haraprasad Das and Ors.,* [1998] 1 SCC 487 and *State of Orissa and Ors.* v. *Bhikari Charan Khuntia and Ors.,* [2003] 10 SCC 144, relied on.

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1.3. The plea regarding discrimination does not appear to have been canvassed before the High Court, irrespective of whether it was raised in the pleadings or not. Secondly the discrimination, if any, can only arise as between the persons who are similarly, if not identically situated. It is not possible for the candidate for Deputy Manager's post to claim that he H had been discriminated because a Joint Manager had been appointed, for

there is nothing common between these two posts. It is perfectly valid for the employer to fill up one category of posts and decline to do so in respect of the other for various business reasons. [364-F; 365-B] A

Union of India and Ors. v. *Rajesh P.U., Puthuvalnikathu and Anr.*, [2003] 7 SCC 285; *Rakesh Ranjan Verma and Ors.* v. *State of Bihar and Ors.*, [1992] Supp. 2 SCC 343 and *Real Food Products Ltd. and Ors.* v. *A.P. State Electricity Board and Ors.*, [1995] 3 SCC 295, distinguished. B

2.1. The relaxation could not have been done for the benefit of persons who were over-aged by about 15 years. Even assuming that there is a power of relaxation under the Regulations, the power of relaxation cannot be exercised in such a manner that it completely distorts the Regulations. The power of relaxation is intended to be used in marginal cases where exceptionally qualified candidates are available. They are not intended as an 'open Sesame' for all and sundry. The wholesale go by given to the Regulations, and the manner in which the recruitment process was being done, was very much reviewable as a policy directive, in exercise of the power of the Central Government under Section 6(2) of the Act. [362-H; 363-B; 366-G] C D

2.2. Section 45 of the Act makes it clear that the power of the Corporation to frame Regulations under the Act is subject to the general restriction that the Regulations are not inconsistent with the Act and the Rules made thereunder. Section 6(2) is a provision of the Act itself which empowers the Central Government to issue directives and bind the Board of Directors of the Corporation to comply with such directives. Hence, it is not possible to read any Regulation framed under Section 45 as inconsistent with or overriding a directive or instruction validly given by the Central Government to the Corporation under Section 6(2) of the Act. It also cannot be said that the power of the Board of Directors to relax the prescribed age limit can be exercised in such an unreasonable manner as to distort the Regulation itself. [366-D-F] E F

3. On perusal of the judgment of Single Judge in the Writ Petition, the only question which was argued before the Single Judge was regarding competence of Government of India to interfere with internal administration of the Corporation. No other point was addressed to the Court. The judgment in the Writ Appeal also supports this view. In the face of this record it can not be accepted that any other arguments were addressed by the petitioner. The facts as obtaining from the judgment of G H

the High Court cannot be controverted by the averments made in present special leave petition, nor by the statement made across the Bar. **[361-F-H]**

State of Maharashtra **v.** *Ramdas Shrinivas Nayak and Anr.*, **[1982] 2 SCC 463, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1402-1404 of 2005.

From the Judgment and Order dated 23.2.2004 of the Gauhati High Court at Assam in W.A. Nos. 78, 79 and 102 of 2002.

WITH

S.L.P.(C) No. 11475 of 2004.

Mukul Rohtagi, Ajit Pudussery and K. Vijayan for the Appellants.

Sanjay Parikh for the Petitioner in S.L.P.(C) No. 11475/2004.

Sunil Gupta, Sanjay Parikh, Anil Hooda, Kaushal Yadav, Jamshed Bey, Parmanand Gaur, Ms. Manindu Acharya, Nikilesh Ramachandran and Harinder Mohan Singh for the Respondents.

Ajit Pudussery for the Respondent in S.L.P.(C) No. 11475/2004.

The Judgment of the Court was delivered by

SRIKRISHNA, J. Leave granted in Special Leave Petition (Civil) Nos. 9016-9018 of 2004. These appeals are directed against the common judgment of the Division Bench of the Gauhati High Court in Writ Appeals Nos. 78/2002, 79/2002 and 102/2002.

The material facts relevant for deciding the present appeals lie in a narrow compass. The appellants in the appeals arising out of Special Leave Petition (C) Nos. 9016-9018 of 2004 are the Food Corporation of India (hereinafter referred to as the 'FCI'), its officers and the Union of India. The respondents in these appeals are the employees of the FCI, who were candidates for direct recruitment to certain posts. The petitioner in Special Leave Petition (C) No. 11475 of 2004 is one more such candidate of the FCI, and the Union of India, FCI and its officers are the respondents in the said special leave petition.

Statutory Provisions : A

The FCI was established by the Food Corporation Act, 1964 (hereinafter referred to as 'the Act'), which was brought into force with effect from 17th December, 1964. As the preamble of the Act indicates, this is a Corporation established "for the purpose of trading in foodgrains and other foodstuffs and for matters connected therewith and incidental thereto". Section 13 of the Act B declares that "it shall be the primary duty of the Corporation to undertake the purchase, storage, movement, transport, distribution and sale of foodgrains and other foodstuffs". For the purpose of carrying on the business assigned to it under the Act, FCI had been invested with the power of management of the Corporation and the authority to employ such officers and employees as C may be required for the efficient carrying out of its statutory work. Section 6 of the Act deals with the management of the Corporation and provides as under :

> "*Management* —(1) The general superintendence, direction and management of the affairs and business of the Corporation shall vest D in a board of directors which may exercise all such powers and do all such acts and things as may be exercised or done by the Corporation under this Act.
>
> (2) The board of directors, in discharging its functions, shall act on business principles having regard to the interests of the producer and E consumer and shall be guided by such instructions on questions of policy as may be given to it by the Central Government.
>
> (3) If any doubt arises as to whether a question is or is not a question of policy, the decision of the Central Government thereon shall be final." F

Section 12 of the Act deals with the power of the Central Government to employ officers and other employees of Corporation and reads as under :

> "*Officers and other employees of Corporation*—(1) The Central Government shall, after consultation with the Corporation, appoint a G person to be the Secretary of the Corporation.
>
> (2) Subject to such rules as may be made by the Central Government in this behalf, the Corporation may appoint such other officers and employees as it considers necessary for the efficient performance of its functions. H

A (3) The methods of appointment, the conditions of service and the scales of pay of the officers and other employees of the Corporation shall---

(a) as respects the Secretary, be such as may be prescribed;

B (b) as respects the other officers and employees, be such as may be determined by regulations made by the Corporation under this Act."

Section 12A of the Act empowers the Central Government to transfer certain types of Government employees, serving in the Department of the Central C Government dealing with food or any of its subordinate or attached offices, to the FCI. Section 45 of the Act invests power in the FCI to make regulations "not inconsistent with this Act and the rules made thereunder, to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act." Under sub section (2)(a) of Section 45 such regulation may provide for "the methods of appointment, the D conditions of service and the scales of pay of the officers and employees of a Food Corporation." In exercise of its power under Section 45, the FCI has framed regulations styled as the "Food Corporation of India (Staff) Regulations, 1971."

E *Facts :*

During the period 6 to 12 November, 1993 the FCI issued an advertisement for direct recruitment to the posts of Joint Managers/Deputy Managers in the Corporation. During the period 26th August, 1994 to 19th July, 1995, the process of recruitment for the post of Joint Manager was F completed and the select list of the candidates was finalized with the approval of the Executive Committee of the Board of Management of the FCI. On 21st August, 1995 the Government of India, Ministry of Food, issued a directive, purportedly in exercise of its power under Section 6(2) of the Act. The said directive is of some importance and needs to be reproduced:

G "No. 12-6/95-FCI,

Government of India ....
Ministry of Food Procurement ....
And Distribution

H New Delhi dated the 21st August, 1995

ORDER

In exercise of the powers conferred by Section 6(2) of the Food Corporation Act, 1964, the Central Government is pleased to issue/reiterate the following policy instructions to the Food Corporation of India:-

(i) There shall not be any creation/upgradation of posts of any level except where completely unavoidable, New Divisions/offices or reorganization etc., shall not be not up/done unless absolutely essential: Even in such cases, matching saving should be provided by surrender of posts in the same group or of posts in the immediate lines of promotion. In such cases, specific prior approval of the Board of Directors and of the Government shall be taken.

(ii) The existing vacancies shall not be filled up by fresh recruitment. If, however, for specific operational reasons filling up of any vacant post is considered absolutely essential, prior approval of the Board and the Government shall be obtained.

(iii) FCI shall not arrive at any understanding with Staff Association in regard to restructuring of cadres, revision of pay scales, including introduction of new promotion policy and grant for new allowances, etc., unless approval for the same has been obtained from the Board of Directors and the Government.

(iv) FCI will not restructure cadre/revise pay scales, grant new/revise existing allowances or change other service conditions of its officers and staff without obtaining prior approval of the Board of Directors and the Central Government.

(v) FCI shall obtain prior approval of the Central Government in fresh construction proposals/fresh schemes which may have components of non-recurring financial expenditure of more than Rs. One Crore or recurring annual expenditure of more than Rs. Twenty five lakh.

Note Paras (i), (ii) and (iii) above are in continuation of Ministry instructions contained in D.O. Letter No. 18-11/90 FCI dated 5.9.90

Sd/
(Surendra Kumar)

A Joint Secretary (FP & D)

Shri Prabhat Kumar,
Chairman,
Food Corporation of India,
16-20, Barakhamba Lane,
B New Delhi - 110001."

While the recruitment process for direct recruitment to the post of Deputy Managers was still being carried on, a number of complaints were received by the Government of India with regard to the manner in which direct recruitment of departmental candidates was being done by excessive relaxation of the maximum age. Several reports by the Executive Director C (Vigilance) were made in this regard. Several complaints were also received with regard to irregularities/anomalies committed during recruitment exercise. It was found that, though the maximum age prescribed under the Recruitment Rules was 35-40, departmental candidates of age 52-53 years were proposed to be appointed for the posts. Considering all these factors, the Government D of India issued a second directive dated November 6, 1995 imposing a complete ban on the recruitment process, and declared the recruitment process to be treated as null and void for flagrant violation of the recruitment regulations for the said post. The said directive dated 6th November, 1995 reads as under :

E "Joint Secretary
Government of India
Ministry of Food Krishi Bhawan,
New Delhi-110001.

F D.O. No. 10-4/95-FCI November 6, 1995

Dear Shri Asthana,

The issue relating to direct recruitment to the post of Deputy Manager (Genl.), Joint Manager (Accounts), Joint Manager (Genl.), Deputy Manager (PF/& OP), Deputy Manager (CC) G Deputy Manager (Accounts) and Deputy Manager (Legal) in the Food Corporation of India on the basis of advertisement in November, 1993 was engaging the attention of the Ministry for quite some time. In this connection, letters received from Executive Director (Vigilance) bearing numbers Vig. 21(54)/95 dated 27th March, 1995, 5th May, 1995, 28th June, 1995 and H

from Manager (PE) No. 12-1/95-PP dated 12th June, 1995 and No. 1-6/95-RP.1 dated 25th July, 1995 are relevant. The intervention in the recruitment process was as a sequel to a number of complaints from various quarters, including from staff Body of the Corporation relating to irregularities/anomalies committed during the recruitment exercise.

2. Having regard to the views/facts furnished by the Corporation, established violation of Recruitment Rules and in the interest of fairness and equity and Government has decided that the whole direct recruitment process in respect of the aforesaid categories/ number of posts be treated as null and void because of flagrant violations of the Recruitment Regulations of the concerned posts, For example, departmental candidates of age 52-53 years were proposed to be appointed when the maximum age prescribed under Recruitment Rules is 35/40 years. It would be desirable to follow the Recruitment Regulations more objectively.

3. The FCI may separately approach the Ministry for clearance for making direct recruitment to specified number/category of posts as required under the Directives dated 21st August 1995, with full justification.

With regards,

Yours Sincerely,

Sd/-
(Surendra Kumar)

Shri Prabhat Kumar,
Chairman,
Food Corporation of India,
16-20, Barakhamba Lane,
New Delhi-110001."

Though, as a consequence of the said directive, the FCI did not further process for the selection for the posts of Deputy Managers, which had not yet been approved by the Executive Committee of the Board of FCI, the process was carried further in the case of selection to the posts of Joint Managers, these had already been approved, and the number of such posts was about seven. The freeze put on the appointment of departmental candidates resulted in a spate of litigation. The officers/employees in Andhra Pradesh region

A moved the High Court of Judicature, Andhra Pradesh by writ petition No. 18960 of 1994 challenging the action by the Central Government as beyond the purview of Section 6 of the Act. The learned Single Judge of the Andhra Pradesh High Court dismissed the writ petition by taking the view that the directives were very much within the ambit and scope of Section 6 of the Act. A Letters Patent appeal thereagainst was also summarily dismissed. A B similar view was also taken by the learned Single Judge of the Jammu & Kashmir High Court, though we are informed that a writ appeal filed there is pending disposal.

The present respondent-employee filed writ petition No. 414 of 1999 C before the Gauhati High Court impugning the directives issued by the Central Government. The only question which appears to have been pressed for decision before the learned Single Judge was :

> "Whether the Government of India has any lawful authority to interfere with the internal administration of FCI, particularly relating to the D matter regarding internal management viz appointment and service of its staff ?"

After considering the arguments addressed to him, the learned Single Judge came to the conclusion that the power of the Central Government under sub-sections (1) and (2) of Section 6 of the Act was confined to policy E decisions concerning the business of the Corporation. The learned Single Judge came to the finding :

> "On careful perusal of the afore quoted sub-section (1) and (2) of Section 6 of FC ACT, 1964 it appears that so far policy decision is concerned regarding the business of the Corporation which obviously F includes procurement storage, distribution, sale of the food grains/ food stuff, the Central Government has undoubtedly power to give policy directions but so far internal management of its staff is concerned which includes appointment, promotion, transfer of the staff and employees of the Corporation the Central Government has G nothing to say."

Three writ appeals, two by the Union of India and one by an employee-Bhanu Lodh, were carried against the judgment of the learned Single Judge. The Division Bench of the High Court agreed with the learned Single Judge with regard to the nature of the power of the Central Government under H Section 6(2) of the Act. The Division Bench also was of the view that service

matters of the employees of the Corporation did not fall within the ambit and scope of the expression, "business principles having regard to the interest of the producers and consumers" occurring in Section 6(2) of the Act. Hence, according to the Division Bench, "the Central Government had no power to issue the impugned directives". On facts, the Division Bench was satisfied that 39 departmental candidates, who were above the maximum age limit of 40 years, were included in the select list for the post of Deputy Manager (Genl. Admn.) contrary to the Recruitment Regulations. The Division Bench directed the FCI to exclude the 39 specified candidates from consideration, and consider the other employees who qualified for appointment to the 34 posts of Deputy Manager (Genl. Admn.) from the select list and in accordance with law.

Being aggrieved, the Food Corporation of India is in appeal before us in civil appeals arising out of Special Leave Petition Nos. 9016-9018 of 2004.

Special Leave Petition No. 11475 of 2004 appears to have been filed by Bhanu Lodh only to canvass some of the points taken in the writ appeal, on the ground that they were not considered in the judgment. The petitioner, in this case, was a person whose name appears at Sl. No. 53 of the select list and was hopeful of being appointed to one of the 34 vacancies, consequent upon the exclusion of 39 candidates from the select list.

Contentions :

We may first dispose of the contention raised by Mr. Sanjay Parikh, learned counsel for the petitioner in Special Leave Petition (Civil) No. 11475 of 2004. Having perused the judgment of the learned Single Judge in the writ petition, we find that the only question which was argued before the learned Single Judge was the one which we have extracted hereinbefore. No other point seems to have been addressed to the court. A perusal of the judgment in the writ appeal also supports this view. In the face of this record, it is not possible to accept the contention of the learned counsel for the petitioner that any other arguments were addressed. We must accept as correct the facts as obtaining from the judgment of the High Court, which cannot be controverted by the averments made in present special leave petition, nor by the statement made across the Bar. We are, therefore, not in a position to accept that any contention other than the contention placed before the High Court was urged before the High Court. (See the observations of this Court in Para 4 in the

A judgment of *State of Maharashtra* v. *Ramdas Shrinivas Nayak and Anr.*[1]). The only contention which appears to have been urged and examined by the High Court pertained to the power of the Central Government to issue direction under sub section (2) of Section 6 of the Act, which have the effect of putting an embargo on the direct recruitment of employees.

B In our view, the words of sub section (2) of Section 6 of the Act are very material and direct that the Board of Directors in discharging its functions "shall act on business principles" having regard to the "interests of the producer and consumer" and shall be guided by "such instructions on questions of policy" as may be given to it by the Central Government. First, the expression C "business principles" is one of widest import. We see no reason as to why the policy of recruitment of officers/staff, which would obviously have serious financial impact on the Corporation, is not subsumed under this expression. Secondly, the Board of management is required to have regard to the interest of the 'producers and the consumers', and not merely of the officers and employees of the FCI. Finally, the Board is required to discharge all its D functions and be guided by the instructions on questions of policy, which may be given to it by the Central Government. Questions of policy could be, not only with regard to the organization of the FCI, its management and function, but also with regard to its employment policy, recruitment and many other details which would, in the long run, affect the interests of the E consumers/producers for whom alone the FCI is established under the Act. Testing it on this anvil, we find no difficulty in holding that the directive dated 21st August, 1995 followed by the directive dated 6th November, 1995 are well within the ambit of sub section (2) of Section 6 of the Act. The directive dated 21st August, 1995 indicates that the policy was not to have any creation/upgradation of posts of any level except where completely F unavoidable. The policy was that "the existing vacancies shall not be filled up by fresh recruitment", and that there shall be no further revision in the conditions of service without the prior approval of the Central Government. The policy directive issued on 6th November, 1995 was a sequel and highlighted something being done contrary to the Regulations. While the maximum age prescribed under the Recruitment Rules is 35/40 years for the G concerned posts, departmental candidates in the age of 52-53 years were proposed to be appointed. Even assuming that there is a power of relaxation under the Regulations, we think that the power of relaxation cannot be exercised in such a manner that it completely distorts the Regulations. The

H 1. [1982] 2 SCC 463.

power of relaxation is intended to be used in marginal cases where exceptionally qualified candidates are available. We do not think that they are intended as an 'open Sesame' for all and sundry. The wholesale go by given to the Regulations, and the manner in which the recruitment process was being done, was very much reviewable as a policy directive, in exercise of the power of the Central Government under Section 6(2) of the Act. That is the reason why by Paragraph 3 of the communication dated 6th November 1995, the Central Government said "the FCI may separately approach the Ministry for clearance for making direct recruitment to specified number/ category of posts as required under the Directives dated 21st August, 1995, with full justification."

In our view, there is no manner of doubt that the two directives in question were clearly within the power of the Central Government under Section 6(2) of the Act. In *Shankarsan Dash* v. *Union of India*[2] a Constitution Bench of this Court laid down that there is no absolute right in favour of a candidate whose name is included in the selection list to be appointed. Said, the Constitution Bench, (vide para 7) :

> "It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. 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 Chander Marwaha*[3], *Neelima Shangla*

2. [1991] 3 SCC 47.

3 [1974) 3 SCC 220.

A v. *State of Haryana*[4], or *Jatendra Kumar* v. *State of Punjab*[5]."

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 B 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. C (See in this Connection: *Government of Orissa* v. *Haraprasad Das and Ors.*[6] and *State of Orissa and Ors.* v. *Bhikari Charan Khuntia and Ors.*[7]).

The learned counsel for the respondents, however, strenuously urged that even assuming the directives issued by the Central Government were well within the parameters of Section 6(2) of the Act, there was arbitrariness D writ large in the action of the Central Government and, therefore, there was justification for judicial interference. It is pointed out that the posts of Joint Manager (Accounts), and Joint Manager (Gen. Admn.) were filled, despite the two directives. This amounts to discrimination in the recruitment process, according to the learned counsel for the respondents, and, therefore, falls within the exception indicated by the Constitution Bench. Learned counsel E for the respondents also placed reliance on *Rakesh Ranjan Verma and Ors.* v. *State of Bihar and Ors.*[8] and *Real Food Products Ltd. and Ors.* v. *A.P. State Electricity Board and Ors.*[9], to contend that, in similar circumstances, under the provisions of the Electricity (Supply) Act, 1948, containing similar provisions, this Court had interdicted interference by the State Government.

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We may dispose of the contention based on discrimination first. In the first place, this question does not appear to have been canvassed before the

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4. [1986] 4 SCC 268.

G 5. [1985] 1 SCC 122.

6. [1998] 1 SCC 487.

7. [2003] 10 SCC 144.

8. [1992] Supp. 2 SCC 343.

H 9. [1995] 3 SCC 295.

High Court, irrespective of whether it was raised in the pleadings or not. Secondly, the contention is wholly misplaced. The discrimination, if any, can only arise as between the persons who are similarly, if not identically situated. It is not possible for the candidate for Deputy Manager's post to claim that he had been discriminated because a Joint Manager had been appointed, for there is nothing common between these two posts. It is perfectly valid for the employer to fill up one category of posts and decline to do so the other for various business reasons. The argument of discrimination is without basis or merit.

Learned counsel for the respondents relied on *Union of India and Ors.* v. *Rajesh P.U., Puthuvalnikathu and Anr.*[10] . That was a judgment in which the selection process was held vitiated on account of wide spread infirmities in the written examination. However, it was found that the infirmities did not affect 31 candidates who were declared successful for appointment. In the peculiar facts and circumstances, this Court held that the situation was not one of 'all or none', and the selection of 31 candidates need not have been set aside. We do not see how this judgment can be of any help in advancing the argument of the learned counsel.

Rakesh Ranjan Verma (supra) was a case with respect to exercise of the power under Section 78-A of the Electricity (Supply) Act, 1948, which was reproduced in Para 9 of the report. We notice that sub section (1) of Section 78-A merely states, "in the discharge of its function, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government". This is a far cry from the phraseology used in sub section (2) of Section 6 of the Act, which we have reproduced. On facts, therefore, the situation is quite distinguishable and this authority does not help in determining the ambit or scope of a directive under Section 6(2) of the Act.

Real Food Products Ltd. (supra) also arose in connection with Section 78-A of the Electricity (Supply) Act, 1948. In this context, it was held that where the direction of the State Government was to fix a concessional tariff for agricultural pump-sets at a flat rate per H.P., it does relate to a question of policy which the Board must follow. However, in indicating the specific rate in a given case, the action of the State Government was held to be in excess of the power of giving a direction on the question of policy, which the Board, if its conclusion be different, was not obliged to be bound by. We do

10. [2003] 7 SCC 285.

not think that any principle, as canvassed, can be founded on the ratio of this judgment.

Learned counsel for the respondent contended that the directives issued by the appellants and their action in putting a freeze on the process of direct recruitment of candidates to the Deputy Manager's post was in contravention of the Food Corporation of India (Staff) Regulations, 1971. The contention is that, although Regulation 7(2) requires all appointments to be made only if a person satisfies the qualifications and is within age limit prescribed, there is a power of relaxation vested in the Board, which may by order relax any of the provisions of the Recruitment Rules contained in Appendix I, if in their opinion it is necessary or expedient so to do. The learned counsel contend that the Board was therefore the only authority to arrive at the opinion that it was necessary and expedient to relax the maximum age limit, and in doing so the Board had absolute discretion and it was not open to the Central Government to interfere with such discretion by the so called exercise of its powers under section 6(2) of the Act. For this reason also counsel contends that the action of the appellants is liable to be faulted.

In our view, the contention is without merit. In the first place, section 45 of the Act makes it clear that the power of the Food Corporation of India to frame regulations under the Act is subject to the general restriction that the regulations are not inconsistent with the Act and the Rules made thereunder. Section 6(2) is a provision of the Act itself which empowers the Central Government to issue directives and bind the Board of Directors of Food Corporation to comply with such directives. Hence, it is not possible to read any regulation framed under section 45 as inconsistent with or overriding a directives or instruction validly given by the Central Government to FCI under section 6(2) of the Act. Apart therefrom, we are not able to appreciate the argument that the power of the Board of Directors to relax the prescribed age limit can be exercised in such an unreasonable manner as to distort the regulation itself. As we have noticed, the relaxation could not have been done for the benefit of persons who were over-aged by about 15 years. For both reasons, the contention fails.

Conclusion :

In the result, we allow the appeals arising out of special leave petition Nos. 9016-9018 of 2004. The impugned common judgment and Order dated 23rd February, 2004 of the High Court of Gauhati in Writ Appeal Nos. 78, 79 and 102 of 2002 is set aside and the corresponding writ petitions are

dismissed. A

Consequently, Special Leave Petition No. 11475 of 2004 and the impleadment applications are dismissed.

In the circumstances of the case, there shall be no order as to costs. B

K.K.T. C.A. Nos. 1402-04/05 allowed.
S.C.P. No. 11475/04 dismissed.