

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **WRIT PETITION (CIVIL) NO. 9046 OF 2007**

% **Date of Decision :** 3rd July , 2008.

N.G. DESAI Petitioner.

Through Mr. Amit S. Chadha, Sr. Advocate with
Mr. Kunal Sinha, Advocate.

VERSUS

GOVT. OF NCT OF DELHI & ORS. Respondents.

Through Mr. S.D. Singh & Mr. Rahul Kumar
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be
allowed to see the judgment?

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported YES
in the Digest ?

SANJIV KHANNA, J:

1. The petitioner, Dr. N.G. Desai, has challenged by way of the present writ petition appointment of Dr. D.C. Jain, the respondent No. 4 as the Director of the Institute of Human Behaviour and Allied Sciences, the respondent No. 3. The post of Director of the

respondent No. 3 had fallen vacant on 15th September, 2007, when the tenure of the last Director came to an end.

2. Respondent No. 3 is a society registered under the Societies Registration Act, 1861 and is governed by its Memorandum of Association. The main object of the respondent No. 3 is to promote growth and development of mental health, Neuro Sciences- Somato- Behavioural and Allied Sciences, to develop and to provide state of art facilities for diagnosis, investigation and treatment in the field of mental health, Neuro Sciences etc. The respondent No. 3 association has a general body and an Executive Council. The Lieutenant Governor of Delhi is the President of the general body and the Chief Secretary, Vice-Chancellor and Additional Secretary, Ministry of Health and Family Welfare are the Vice-Presidents. Other persons who are members of the general body are specified in Rule 1.1 of the Rules and Regulations of the respondent No. 3. Rule 2 stipulates that the respondent No. 3 will have an Executive Council which shall have powers and functions as specified in Rule 5. These powers and functions are subject to general control and directions of the general body. The Executive Council is responsible for the management and administration of the affairs of the institute and has power to create post, recruit and appoint staff.

3. Under Rule 5.2, the Executive Council has the authority to appoint Director of the respondent No. 3 institute with the approval of the President of the general body and on such terms and for such period as may be decided by the Executive Council. Under Rule 5.3 the Executive Council can by a resolution appoint one or more committees or sub-committees for such purpose and with such powers as may be specified.

4. The Executive Council of respondent No. 3 in its 45th meeting held on 22nd June, 2007 had examined the question of appointment of a new Director including eligibility criteria. The petitioner had participated in the said meeting as one of the Executive Members. After discussion, the recruitment rules and the eligibility criteria/parameters for appointment to the post of Director, were decided to be fixed as under:-

“(I) A teaching, research and/or practical experience of not less than 21 years after Post Graduation.

(II) 7 years experience as Professor in comparable institutions like AIIMS, NIMHANS, etc. or as Director-Professor either in Central Government or GNCTD's Medical Institutions or equivalent.

(III) Those candidates who have served as Director/Head of any Institute of comparable eminence may also apply, regardless of (II) above.”

5. The Executive Council in this meeting examined appointment of a new Director and the selection procedure, which was to be followed. It was noticed that earlier for screening of applications, two stage procedure had been followed with a Pre-Screening Committee and a Screening Committee. To curtail the process, it was decided to dispense with Pre-Screening Committee. The Screening Committee which had on earlier occasion screened the applications, consisting of Professor S.D. Sharma, former Director, respondent No. 2 and Professor P.N. Tandon, former HOD (Neuro Surgery), AIIMS, was again constituted, with Professor P.K. Dave, former Director, AIIMS as a standby. Composition of the Selection Committee was also considered and five persons were nominated with stipulation that three experts would be decided in the next Executive Council meeting to be held shortly.

6. The next meeting of the Executive Council was held on 16th July, 2007. This meeting was also attended by the petitioner as one of the Members of the Executive Council. The resolution passed earlier with regard to recruitment rules/eligibility criteria for appointment to the post of Director was discussed. On the question of age, it was noticed that the prescribed age in the draft Recruitment Rules was 50 years and it was decided that no such restriction was required to be imposed in case of recruitment by transfer on deputation. It was also decided that the existing

arrangement i.e. "direct recruitment/transfer on deputation" should be continued to give flexibility in the mode of recruitment. Another issue discussed was enhancement of the retirement age of the Director to 62 years from 60 years.

7. The petitioner has himself enclosed the amended Recruitment Rules for the Director. The post has been described as a selection post and the method of recruitment as by deputation or by direct selection for a maximum tenure of five years or upto the age of 60 years, whichever is earlier. The age limit specified is below 50 years, relaxable for Government servants or specially qualified candidates. The experience requirements are the same as were approved in the meeting of the Executive Council held on 22nd June, 2007 quoted above. The selection was to be done in two stages with the Screening Committee and the Selection Committee.

8. I have deliberately quoted above in detail the deliberations of the Executive Council of which the petitioner was also a Member. I may note here that in the writ petition, the petitioner has alleged mala fides in the amendment of the eligibility requirements and qualifications. It is stated that the relaxation or amendment in the eligibility criteria especially with regard to 21 years practical experience, instead of 21 years of teaching and research experience was made with ulterior motives and mala fide intention.

Similar allegations have been made with regard to other amendments made in the eligibility requirements. The petitioner during the course of arguments did not press this contention. The petitioner had participated in the meetings of the Executive Council and thereafter made an application for appointment to the said post on the basis of amended recruitment rules/eligibility criteria. He was a party to the resolutions by which amendments were made. Possibly he cannot now after being unsuccessful challenge the same. Reference in this regard can be made to judgments of the Supreme Court in ***Madan Lal and Others versus State of J&K and Others***, reported in (1995) 3 SCC 486 and ***Dr. G. Sarana versus University of Lucknow and Others***, reported in (1976) 3 SCC 585, wherein it has been held that if a candidate takes a calculated chance and participates in selection process, he cannot turn around and subsequently contend that the process was unfair or the Selection Committee was not properly constituted. A candidate who has taken his chance cannot subsequently on being unsuccessful challenge constitution of the selection board and the principle of estoppel applies.

9. The petitioner during the course of arguments had restricted his challenge to appointment of the respondent No. 4 on two grounds. Firstly, the Screening Committee had only recommended the petitioner and had held that all other applicants

were not eligible. It was submitted that the Selection Committee could not have gone beyond the recommendations of the Screening Committee and appointed respondent No. 4. Learned counsel for the petitioner had also drawn my attention to the counter affidavit filed by respondent Nos. 1, 2 and 3 i.e. the Government of Delhi, Chief Secretary, Government of Delhi and the respondent No. 3 institute in which it has been stated as under:-

“That the applications and papers submitted by all the candidates were also got scrutinized by the Institute independently by the experienced persons of the institute and the in house committee had made out a chart with respect to each and every candidate as per the recruitment rules. Annexed herewith and marked as Annexure R-2 is the copy of the report of in house committee.”

10. It was submitted that contrary to the resolution passed by the Executive Council, the respondent No. 3 institute had constituted an in house Screening Committee and which had made separate recommendations. It was submitted that the respondent No. 3 institute in view of the Memorandum of Association and Rules and Regulations of the respondent No. 3 should not have constituted an in house committee.

11. Constitution of in house committee was not correct. The Executive Council had accepted two stage process for selection of a Director. There was to be a screening committee and a

selection committee. Members of the screening committee and the selection committee, were also finalized by the Executive Council. The resolutions passed by the Executive Council did not permit constitution of an in house committee by the respondent No. 3 institute or their officers. However, this alone does not entitle the petitioner to succeed. The Selection Committee constituted by the Executive Council have independently applied their minds and have made the selection. The Selection Committee had called four candidates for personal talk and after interacting with the said candidates, verifying their qualification and experience had made their recommendation. This is clear from the proceedings recorded by the Selection Committee. The Selection Committee consisted of three medical experts viz. Dr. A.K. Aggarwal, former HOD Psychiatry, K.G.M.C., Lucknow, Dr. A.K. Mahapatra, Director, S.G.P.G.I., Lucknow, Dr. P.P.S. Mathur, Vice-Chancellor, Rajasthan Medical University, Jaipur, Dr. D. Nagaraja, Director, NIMHANS, Bangalore and nominee of the Government of India, Mr. Vivek Rae, Principal Secretary, Ministry of Health and Family Welfare, Government of Delhi and Mr. R. Narayanaswamy, Chief Secretary, Government of Delhi.

12. The purpose and object of the Screening Committee as is clear from the nomenclature itself is to screen the applications received and scrutinize them. This is apparent from the minutes of

the meeting of the Executive Council dated 22nd June, 2007, wherein it was observed as under:-

“For smooth transition, the process of recruitment of new Director is required to be initiated with advertisement in daily newspapers/circulars to universities and medical institutions followed by constituting a screening committee to scrutinize the applications received as done earlier.”

13. The object and purpose of the Screening Committee is to screen and scrutinize the applications so as to make it convenient for the Selection Committee. Perhaps it was thought that a large number of applications would be received from candidates all over India and the Selection Committee consisting of experts and senior officers may not have adequate time. In the present case, however, only five applications were received and out of five applicants, four were called for personal meeting before the Selection Committee. The Screening Committee did not call any of the candidates for interview. It is, therefore, not possible to accept the argument of the learned counsel for the petitioner that the Screening Committee was to act as a Selection Committee and only recommendations made by the Screening Committee could have been examined and considered by the Selection Committee. The role of the Screening Committee was to screen and scrutinize the applications and put them before the Selection Committee. The selection was to be made by the Selection

Committee and not by the Screening Committee. The Screening Committee's role was specified in the minutes of the Executive Council dated 22nd June, 2007. It was not to act as the Selection Committee. Learned counsel for the petitioner in support of his contention had relied upon judgment of this Court in ***Professor (Dr.) Jagdish Dytta Baruah versus Indian Council of Medical Research and Others***, reported in 1999 (48) DRJ 363. The said case is distinguishable. The petitioner therein was called for personal discussion by the Selection Committee on 27th December, 1995 but the Selection Committee on the said date itself had decided to call for more applications. The second Selection Committee held interviews again on 27th July, 1996 on which date the petitioner therein was out of India. The Selection Committee which had undertaken interviews on 27th July, 1996 was constituted of different members, than the Selection Committee which had interviewed the petitioner on 27th December, 1995. The second Selection Committee, therefore, did not have any occasion to interview the petitioner therein. In this context, a learned Single Judge of this Court had observed that the institute in question could not have substituted members of the Selection Committee, who had interviewed candidates on 27th December, 1995. It was also observed that the Executive Council of the institute in question had not authorized substitution of the

members of the Selection Committee. There was change in method, manner as well as deviation from the terms and conditions of the advertisement without authorization of the Executive Council of the concerned institute. It was held that the Director General of the institute in question could not have constituted a second Selection Committee and it was not within his domain to change the members of the Selection Committee, which could be nominated by the Executive Council. In the present case, the members of the Selection Committee were nominated by the Executive Council. The said members as nominated by the Executive Council have examined the candidates who had applied and thereafter made the selection. Screening was done by a Screening Committee and their report was available before the Selection Committee. Respondent No. 3 no doubt had constituted an in house committee but this in itself has not caused any prejudice to the petitioner or vitiated the selection process. The object and purpose of the Screening Committee was to just scrutinize the application and not make selection. The selection was to be made by the Selection Committee and not by the Screening Committee. The Selection Committee has made the selection.

14. Respondents 1-3 have placed on record along with the counter affidavit, the report submitted by the Screening Committee. The said report reads as under:-

“ The Screening Committee after taking into consideration the Recruitment Rules and the Guidelines for the Post of Director, Institute of Human Behaviour and Allied Sciences (IHBAS) has come to the following conclusion:

1. There are five applicants for the post of Director, IHBAS.

- (i) Dr. Meena Gupta
- (ii) Dr. Indira Sharma
- (iii) Dr. D.C. Jain
- (iv) Dr. Sunil Pradhan
- (v) Dr. N.G. Desai

2. Three candidates as mentioned below are “self nominated” which is contrary to the guidelines.

- (i) Dr. Meena Gupta (16/08/49)
- (ii) Dr. Indira Sharma(23/06/49)
- (iii) Dr. D.C. Jain (06/04/49)

The above mentioned three candidates are over age and would be retiring in less than 2 years, if any one of them is appointed; the post has to be filled in less than two years which will only create instability in the Institute. All the above three are not eligible.

3. Dr. Sunil Pradhan (25/06/57) fulfills the illegibility(sic) criteria based on his age, qualification, and nomination but does not fulfill the criteria of both teaching and administrative experience as required under the rules.

4. Dr. N.G. Desai fulfills the eligible criteria of age, qualification, teaching & research and administrative experience and nomination.

As per the recruitment rules for the Post of Director, Dr. N.G. Desai is the only candidate who fulfills all criteria.”

15. A perusal of the said report shows that the Screening Committee had misdirected themselves. Candidature of three candidates including respondent No. 4 was rejected on the ground that they were self nominated and this was contrary to the guidelines. The recruitment rules as finalized have been quoted above. The recruitment rules do not state that a candidate cannot be self nominated or no application would be entertained directly from a candidate. On the other hand, the recruitment rules stipulate that the post of a Director is a selection post and the method of recruitment is by deputation or direct selection. As pointed out by the respondents, advertisements had been published inviting applications for the post of Director. The said advertisements did not specify that a candidate cannot make a self application and he must be nominated by a third person.

16. It appears that letters were also written by the former Director of the respondent No. 3 institute to Vice-Chancellors of Indian Universities, Principal/Dean of Medical Colleges etc. of other institutes asking them to forward names of persons who in their opinion were suitable for the said post. In the said letter it was stated that a person cannot nominate himself. The reason

was obvious and calls for no explanation. The addressees were asked to nominate or recommend a third person. In such cases, self nomination was prohibited. However, any person who was eligible was entitled to apply for appointment to the post of Director pursuant to the advertisements.

17. The second reason given by the Screening Committee to reject the candidature of three persons including respondent No. 4 was that they were over age and would be retiring in two years. I have referred to the deliberation and the decision of the Executive Council in this regard. The Recruitment Rules stipulate that the candidate should not be more than 50 years but this was relaxable in case of Government servants or specifically qualified candidates. Thus, there was no absolute bar. The recruitment rules do not stipulate any other requirement with regard to the period of tenure except that the appointment to the post of Director would be for a period of five years or upto the age of 60 years, whichever is earlier. It is, therefore, apparent that the Screening Committee had erred and made mistakes while examining the applications. In any case, the report of the Screening Committee was not binding and final. The Screening Committee did not interview any of the candidates. The ultimate authority and right to select was vested with the Selection Committee. The Selection Committee deemed appropriate to call and give personal hearing

to four candidates out of five candidates who had applied. The four candidates were interviewed and thereafter recommendation to select respondent No. 4 was made. The said recommendation has been accepted. I may note here that the petitioner was nominated by Dr. D. Rangarajan who was a Member of the Selection Committee but had recommended the name of the respondent No. 4, in preference over the petitioner.

18. The second contention raised by the learned counsel for the petitioner was that the respondent No. 4 does not meet and satisfy the eligibility criteria as he had worked as a professor only for a period of two years, was over age and had been a Director of LRS Institute of T.B. and Respiratory Diseases only for a period of ten months and that too as an additional charge in the absence of a regular Director. It was submitted that the petitioner does not qualify and meet the eligibility requirement Nos. (II) and (III) mentioned above. At first blush, I was inclined to agree with the learned counsel for the petitioner as admittedly respondent No. 4 had been only given additional charge as a Director of L.R.S. Institute of T.B. and Respiratory Diseases, New Delhi, while he continued to hold the post of Additional Director General, Directorate of Health Services. I may also note that the respondent No. 4 had not undergone the selection process for the appointment to the said post of Director, L.R.S. Institute of T.B.

and Respiratory Diseases. However, on deeper consideration I do not find any merit in the said contention. I may note here that scope of judicial review in matters of selection by an expert committee is not similar to that of an appellate authority and is limited. This Court cannot go into comparative merits and minds of the members of the Selection Committee, who had applied themselves to assess the merits and qualifications of the candidates. The members of the Selection Committee were experts and high ranking Government officers with the Government of Delhi. They have given a unanimous report recommending respondent No. 4. It was for the members of the said Selection Committee to decide whether L.R.S. Institute of T.B. and Respiratory Diseases, New Delhi is an institute of repute or not and, therefore, whether respondent No. 4 satisfies the condition of Clause (III) i.e. has served as a Director/head of an institute of comparable eminence. It is not for the Court to go into the question whether L.R.S. Institute of T.B. and Respiratory Diseases is an institute of comparable excellence or not. However, I may note that the post of Director, L.R.S. Institute of T.B. and Respiratory Diseases carries a pay scale of Rs.22400-24500. Besides, respondent No. 4 had more than thirty years experience and was head of the Department of Neurology since 1981.

19. The recruitment rules do not specifically stipulate that a person should have been appointed as a Director/head of an institute of comparable eminence by way of selection process. The requirement in the recruitment rules is that a candidate should have served as a Director/head of an institute. There is no other requirement and it is not stated that additional charge or ad hoc or officiating appointment shall not be treated and regarded as sufficient. The recruitment rules do not make any distinction between an additional charge/officiating appointment or ad hoc appointment and substantive appointment. The recruitment rules only specify that the person should have worked as a Director or as a head of an institute. There is no further stipulation and condition. It may be relevant to state here that the post of Additional Director General of Health Services also carries the same pay scale of Rs.22400-24500. Posts of Additional Director General of Health Services, head of institutes and organizations have been quoted at Serial No. I (ii) in Schedule 3 of the notification dated 8th October, 1996 issued by the Ministry of Health and Family Welfare in the Rules called Central Health Services Rules, 1996.

20. Decision of a Division Bench in ***Union of India versus D.P. Sharma***, reported in 123 (2005) DLT 706 relied upon by the

counsel for the petitioner is distinguishable as it relates to interpretation of FR-49 and the pay scale admissible to a person who is given current duty charge. The question of experience and eligibility requirement under the recruitment rules is entirely different. The recruitment rules have to be interpreted on the basis of the language used and employed therein. The recruitment rules do not use the words “substantive post”. The only requirement is that the candidate should have served or worked as a Director/head of an institute of eminence. The service may be in any capacity and is not relevant for the rule. The qualification required is not dependent upon the type of holding or capacity in which the post of Director/head was held but performance and discharge of functions and duties as a Director/head is relevant. It cannot be said that the said eligibility criteria is not met by the respondent No. 4.

21. On this aspect, I may refer to the case of ***State of Madhya Pradesh and Another Vs. Laxmi Shankar Mishra***, reported in (1979) 2 SCC 270, wherein the Supreme court referred to and interpreted the expression “should have worked on the post for a minimum period of seven years” and rejected the contention that the relevant provision required that candidates should have worked on a substantive post for period of seven years. It was accordingly observed as :-

“9. Mr Gambhir, learned Counsel for the petitioner urged that the expression: “should have worked on the post for a minimum period of 7 years in the same institution” would, in the context of the rule and the consequences flowing from it, mean only a substantive post on which the Head Master/Principal was confirmed and the confirmed holder of the substantive post for a period of 7 years would be entitled to absorption as envisaged by Rule 3(b). On a pure grammatical construction of the expression it would indisputably appear that the person claiming to be absorbed must have worked on the post of Head Master/Principal of a High/Higher Secondary School for a minimum period of 7 years. Emphasis is on the experience gained by working on the post of Head Master/Principal. A person incharge of the post also works and discharges the duties and functions of the post of which he has taken charge. Even an officiating incumbent of the post does discharge the functions and duties of the post. While examining the relative positions of confirmed Deputy Engineers and Officiating Deputy Engineers in *S.B. Patwardhan v. State of Maharashtra* this Court observed that the officiating Deputy Engineers discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in the respective assignments. Viewed from this angle, the confirmed holder of a substantive post would be discharging the functions attached to the post and when some one is placed in that very post in an officiating capacity or directed to hold charge of the post, he would be required to perform the duties and discharge the functions of the post rendering identical service. If the rule expressly did not make any differentiation between the person working as a confirmed holder of substantive post and an incharge or officiating holder of the post, is there

anything in the expression itself which by necessary implication excludes service in any other capacity except as a confirmed Head Master/Principal in a substantive post? A confirmed holder of a substantive post may look tautologous because one can only be confirmed in the substantive post.”

22. In ***Doctor Asim Kumar Bose versus Union of India and Another***, reported in (1983) 1 SCC 345, the Supreme Court examined rules of the Central Health Services and on construction thereof held that service rendered in ex-officio capacity as an Associate Professor could be counted towards requisite teaching experience. The Supreme Court observed that there was no provision in the rules therein that the experience must be gained on or after regular appointment. There is no difference in experience acquired on regular appointment or experience acquired with ex-officio designation. The rules did not state that experience gained in an ex-officio capacity shall not be counted or ignored as relevant experience for determining eligibility.

23. If the relevant rules were differently worded and required substantive appointment to the post of Director/head of the institute, the position may have been different. A person may not be a permanent or substantive employee for the purpose of gaining experience, as experience gained even while holding

additional charge, is experience gained while serving on the said post.

24. In view of the above discussion, I do not find any merit in the present writ petition and the same is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

JULY 03, 2008
VKR