

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C.) No. 10638/2009**

% **Judgment Reserved on: 04.02.2010**
Judgment Delivered on: 16.02.2010

AJAY KUMAR JAIN PETITIONER

! Through: Mr. Sunil Aggarwal, Advocate.

VERSUS

\$ LIEUTENANT GOVERNOR, DELHI AND OTHERS RESPONDENTS

^ Through: Mr. Rakesh Tikku, Advocate.

CORAM:
HON'BLE MR. JUSTICE S.N. AGGARWAL

1. Whether reporters of Local paper may be allowed to see the judgment? **YES**
2. To be referred to the reporter or not? **YES**
3. Whether the judgment should be reported in the Digest? **YES**

S.N.AGGARWAL, J

The petitioner is a practising Advocate of this Court. He was appointed as one of the Presidents of the District Consumer Forum, Delhi by respondents No. 1 to 3 on 24.12.2003 for a fixed term of five years. His appointment was under Section 10 of the Consumer Protection Act, 1986 which provides for re-appointment of the President of District Forum provided he:

- (i) Fulfills the qualification and other conditions as required; and
 - (ii) His name has been recommended by the Selection Committee.
2. The tenure of the petitioner as President, District Consumer Forum was to come to an end on 23.12.2008. However, before his term came to an end, the office of respondent No. 3 had issued an advertisement dated

16.12.2008 (at page 20 of the paper book) and had invited applications from eligible candidates for filling up of one vacancy of President, District Consumer Forum, Delhi, likely to be caused on retirement of the petitioner w.e.f 23.12.2008. In the said advertisement, the Department had reserved its right to form a select panel for filling up of vacancies that may arise in the years 2008 and 2009 and also the vacancy that may remain unfilled in the event of the selected candidate not joining the post, without any obligation on its part to make appointment from the waiting list.

3. Pursuant to the above advertisement dated 16.12.2008, the petitioner had applied for his re-appointment to the post of President, District Consumer Forum, Delhi by making an application on 19.12.2008. The interviews were held by the Selection Committee for filling up of one vacancy advertised vide advertisement dated 16.12.2008 on 05.03.2009. A select panel of following four persons was prepared:

- (i) Shri Bharat Bhushan Choudhary;
- (ii) Shri Ajit Kumar Bharihoke;
- (iii) Shri Ajay Kumar Jain (petitioner herein); and
- (iv) Shri Ram Kishan Yadav.

4. Shri Bharat Bhushan Choudhary, being selected candidate at serial No. 1 in the select panel, was offered appointment and he had joined as President, District Consumer Forum, Delhi on 30.04.2009. In the meanwhile, one more vacancy of President, District Consumer Forum, Delhi had arisen in the Department on account of resignation by Shri Virender Singh, President, Central District Consumer Forum on 06.04.2009. This vacancy was advertised by the respondents by issuing another advertisement on 21.07.2009 (at page 33 of the paper book) and applications were invited from eligible candidates for filling up of the said

vacancy caused because of resignation of Shri Virender Singh. The petitioner did not apply against the vacancy advertised by the respondents on 21.07.2009. He, however, made representations to the respondents for his appointment on the basis of his being at serial No. 3 in the earlier select panel instead of filling up of the said vacancy by way of fresh recruitment. Since the petitioner did not hear any favourable response to any of his representations made by him to the respondents for his appointment, he has filed the present writ petition for directions to the respondents to appoint him to the vacant post of President, District Consumer Forum, Delhi instead of filling up the vacancy by way of fresh recruitment.

5. In response to notice of this writ petition, Mr. H.P. Meena, Assistant Director (Consumer Affairs), Government of NCT of Delhi has filed his affidavit in reply to the petition on behalf of the respondents. He has taken a stand that the present writ petition is not maintainable because the advertisement dated 16.12.2008 pursuant to which the petitioner had applied for his re-appointment, was issued only for one post and since the candidate at serial No. 1 in the select panel namely Shri Bharat Bhushan Choudhary had accepted the offer of appointment and had joined the service, the panel/wait list stood exhausted. The respondents have also stated in their counter affidavit that they used to issue separate advertisement for filling up of district-wise vacancies and the select panel also used to be made by them for filling up of vacancies district-wise. According to the respondents, the select panel used to be operated and exhausted only for the district for which the post used to be advertised and to be filled up. The respondents have stated that since in the present case they had advertised only one vacancy vide advertisement dated 16.12.2008, they were under no legal obligation to

appoint candidates from the wait list of the said panel against future vacancies. According to the respondents, the petitioner does not have any vested right to ask for a writ of mandamus for his appointment as this right is vested only with the Department. The respondents have prayed for dismissal of this writ petition.

6. In rejoinder to the reply affidavit of the respondents, the petitioner has reiterated and re-asserted his plea for his appointment as President, District Consumer Forum, Delhi from the wait list prepared by the Department pursuant to advertisement dated 16.12.2008 instead of filling up of the vacancy through fresh recruitment process initiated vide advertisement dated 21.07.2009.

7. I have heard the learned counsel for the parties and have also perused their written arguments filed by them on record. I have also carefully gone through the entire record of the case.

8. Mr. Sunil Aggarwal, learned counsel appearing on behalf of the petitioner, had argued that the petitioner is entitled for his appointment to the post of President, District Consumer Forum, Delhi against the additional vacancy that arose on 06.04.2009 on account of resignation by Shri Virender Singh, President, Central District Forum which vacancy according to him was liable to be filled up by the respondents from the reserved panel prepared by the respondents pursuant to advertisement dated 16.12.2008 as the said advertisement given for filling of one vacancy was with a stipulation that a reserved panel will be made for filling up of additional vacancies that may arise in the years 2008 & 2009. It was contended that since the petitioner was the next available candidate in the reserved panel of 2008, he was entitled for his appointment instead of respondents issuing a fresh advertisement for filling up the vacancy caused by the resignation of Shri Virender Singh on

06.04.2009.

9. Per contra, Mr. Rakesh Tikku, learned counsel appearing on behalf of the respondents, had argued that the petitioner has no vested right to claim appointment only because his name appears in the waiting list of the select panel of 2008. In the course of his argument Mr. Tikku had given up the plea of the respondents taken by them in their reply affidavit that they used to advertise and fill up the vacancies district-wise. However, his argument was that the select panel prepared by the respondents pursuant to advertisement dated 16.12.2008 stood exhausted upon appointment of Shri Bharat Bhushan Choudhary, at serial No. 1 in the select panel as the advertisement was only for one vacancy existing at that time. According to him, though the respondents have reserved their right to form a panel for filling up the future vacancies that may arise in the years 2008 and 2009 but this does not cast any legal obligation on the respondents to fill up the future vacancies from wait list of the earlier panel as the same, according to him, will deprive all those who become eligible for their appointment after setting the earlier selection process in motion. Mr. Tikku had also argued that the respondents had issued a fresh advertisement dated 21.07.2009 for filling up the vacancy caused by the resignation of Mr. Virender Singh in the larger public interest so as to have a wider range of available talent. It was submitted by him that since the earlier advertisement was issued in December 2008 for filling up of only one vacancy that existed at that time and because thereafter almost 7-8 months had elapsed, the respondents in their wisdom thought it fit to invite applications afresh rather than working on the old panel. Mr. Tikku had submitted that the respondents have completed the selection process pursuant to subsequent advertisement dated 21.07.2009 and have selected one

Mr.Mendiratta for the vacant post. It was submitted that Mr.Mendiratta who has been selected pursuant to subsequent advertisement dated 21.07.2009 is not a party respondent in the present writ petition and, therefore, his rights are likely to be prejudiced in the matter without giving any hearing to him.

10. This Court would not like to go into the question of right, if any, of Mr.Mendiratta, stated to have been selected pursuant to subsequent advertisement dated 21.07.2009, because the Division Bench of this Court vide its order dated 05.10.2009 in L.P.A. No. 457/2009 has directed that any appointment to the post of President, District Consumer Forum, Delhi, if made by the respondents, shall be subject to the final outcome of the present petition. In view of the said order of the Division Bench, this Court is required to examine the legal right of the petitioner for his appointment on the basis of his name included in the earlier select panel prepared pursuant to advertisement dated 16.12.2008. In case petitioner is found entitled for his appointment, then whether it would affect or would not affect the rights of a subsequent selectee, would have no meaning.

11. It was not disputed by the counsel appearing on behalf of the petitioner that the respondents had advertised only one vacancy vide advertisement dated 16.12.2008 pursuant to which the petitioner had applied for his re-appointment. The petitioner is actually harping upon the select panel prepared by the respondents for filling up of future vacancies that arose on 06.04.2009. The foundation of his claim is that since one more vacancy of the post of President, District Consumer Forum, Delhi had arisen within one year of the date of preparation of the panel, the said vacancy was liable to be filled up from the candidates awaiting their appointment from the earlier select panel prepared

pursuant to advertisement dated 16.12.2008. For this he has referred to and relied upon the advertisement dated 16.12.2008 which contains a stipulation in the following terms:

“Number of Vacancy: 01 (One)

Apart from selecting candidates against the vacancy mentioned above, the Department reserved the right for form panel of candidates to fill the additional vacancies that may arise during the year 2008 & 2009 or as a result of a selected candidate failing to join, without any obligation of appointment to the waiting list candidates. The panel so prepared would be valid for a period of one year from the date of approval by the competent authority.”

12. A perusal of the above stipulation contained in the advertisement dated 16.12.2008 would show that the respondents had reserved a right with them to form a select panel of candidates to fill up the additional vacancies that may arise in the years 2008 and 2009 without any obligation on their part to appoint anybody from the waiting list. This clause in the advertisement is only an enabling clause giving a right to the Government to form a panel of candidates so as to fill up the additional vacancy or the vacancy arising due to non-joining of the incumbent. The said right of the Government does not confer any corresponding legal right in favour of the person in the waiting list. This is made expressly clear even in the advertisement that the said right of the Government is *“without any obligation of appointment to the wait listed candidates”*. Merely the fact that a vacancy has arisen during the period of one year of the panel that by itself does not give any absolute legal right to the petitioner. It seems that the aforementioned clause regarding preparation of panel for filling up of future vacancies of 2008 and 2009 was given in the advertisement so as to provide enough flexibility to the Government, depending on the contingencies and requirement, to appoint a person from the waiting list rather than

undertaking the long route of filling up the additional/resultant vacancy through the mode of fresh advertisement.

13. In the present case the select panel prepared by the respondents pursuant to advertisement dated 16.12.2008 stood exhausted upon appointment of Shri Bharat Bhushan Choudhary who was at serial No. 1 in the select list as there was only one notified vacancy at that time. It is a settled legal proposition that the vacancies cannot be filled up over and above the number of vacancies advertised as, the recruitment of the candidates in excess of notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution, of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amount to improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational, otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. Reference in this regard can be made to judgments of the Hon'ble Supreme Court in ***Union of India & Others Vs. Ishwar Singh Khatri & Others, (1992) Supp 3 SCC 84; Gujarat State Deputy Executive Engineers' Association Vs. State of Gujarat & Others, (1994) Supp 2 SCC 591; State of Bihar & Others Vs. The Secretariat Assistant S.E. Union 1986 & Others, AIR 1994 SC 736; Prem Singh & Others Vs. Haryana State Electricity Board & Others, (1996) 4 SCC 319; and Ashok Kumar & Others Vs. Chairman, Banking Service Recruitment Board & Others, AIR 1996 SC 976.***

14. In ***Surinder Singh & Others Vs. State of Punjab & Others, AIR***

1998 SC 18, it was held by the Hon'ble Supreme Court as under:

“A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointment, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service..... Exercise of such power has to be tested on the touchstone of reasonableness.... It is not a matter of course that the authority can fill up more posts than advertised.”

15. In ***State of Punjab Vs. Raghubir Chand Sharma & Others, AIR 2001***

SC 2900, the Hon'ble Supreme Court was seized of a case where only one post was advertised and the candidate whose name appeared at serial No. 1 in the select list had joined the post, but subsequently resigned. The Hon'ble Apex Court rejected the contention that the post can be filled up offering the appointment to the next candidate in the select list observing as under:

“With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently.”

16. In ***Mukul Saikia & Others Vs. State of Assam & Others, AIR 2009***

SC 747, it was held by the Hon'ble Supreme Court that the currency of

the select list expires as soon as the number of posts advertised are filled up and the appointments beyond the number of posts advertised would amount to filling up future vacancies and said course is impermissible in law.

17. Counsel for both the parties have placed reliance upon a judgment of Hon'ble Supreme Court in ***R.S. Mittal Vs. Union of India, reported as 1995 (2) SLR 437***. In the said judgment, it was held by the Hon'ble Supreme Court as under:

“It is no doubt correct that a person on the select panel has no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government. No reason whatsoever, not to talk of a justifiable reason, was given as to why the appointments were not offered to the candidates expeditiously and in accordance with law. The appointment should have been offered to Mr. Murgod within a reasonable time of availability of the vacancy and thereafter to the next candidate. The Central Government's approach in this case was whole unjustified.”

18. The judgment of the Hon'ble Supreme Court in R.S. Mittal's case (supra) does not help or advance the case of the petitioner for his appointment against future vacancies. In that case, the Hon'ble Supreme Court had dealt with appointments to be made against notified vacancies whereas in the present case, the petitioner is claiming right of his appointment against future vacancy of 2009 only on the basis of a stipulation contained in the advertisement for preparation of a wait list panel without any obligation on the part of the Department to make appointment out of the wait list.

19. In view of law laid down by the Hon'ble Supreme Court in the aforementioned cases, this Court is of the opinion that the petitioner has

no legal or constitutional right for his appointment against a future vacancy. Hence, I do not find any merit in this writ petition, which fails and is hereby dismissed but with no order as to costs.

FEBRUARY 16, 2010
'BSR'

S.N.AGGARWAL, J