

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

Date of decision: 26th May, 2011

+ W.P.(C) 1484/2011 & CM No.3142/2011 (for stay)

DR. KISHORE MADHUKAR PAKNIKAR Petitioner

Through: Mr. Rudra Kahlon, Adv.

Versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Ravinder Agarwal, CGSC with
Mr. Nitish Gupta, Adv. for R-1 & 2
with Mr. Rattan Pal, Under
Secretary, (DST) & with Dr. Suman
K. Agrawal, Director, Deptt. Of
Science & Technology.
Mr. Gaurav Tomar, Adv. for R-3.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers 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 |

RAJIV SAHAI ENDLAW, J.

1. The petitioner working in respondent no.3 Agharkar Research
Institute (ARI) of the Maharashtra Association for Cultivation of Science
(MACS), an autonomous institute of the respondent no.2 Department of

Science & Technology of the Govt. of India, applied for the selection to the post of Director of ARI and the Selection Committee constituted for the said purpose drew up a panel of two people only, in which the petitioner was placed at second position. This writ petition is filed averring that the documents submitted by the person namely Dr. Sangwan whose name appears first on the said panel, were found to be fudged and as such he was not appointed; that the petitioner being second on the panel, claims a right of appointment and seeks mandamus directing the respondents to process the approval required for appointment of the petitioner. It is further the case of the petitioner that the respondents were intending to start a fresh procedure for recruitment for the post of Director. The petitioner relying upon a Office Memorandum dated 30th July, 2007 of the Ministry of Personnel, Government of India, Clause 5(iv) whereof provides as under:-

“(iv) The panel recommended by the Committee will be valid for one year. If no selection is made from the panel within a period of one year, a fresh Committee shall be constituted to prepare a fresh panel. Such a Committee may also consider the names of persons recommended in the earlier panel.”

contends that the respondents are not entitled to draw up a fresh panel before the expiry on 28th June, 2011 of validity of present panel containing his name.

2. The writ petition came up first before this Court on 21st April, 2011 when it was enquired from the counsel for the respondents no.1 & 2 appearing on advance notice as to how, before 28th June, 2011, they could start a fresh selection process.

3. The counsel for the respondents no.1 & 2 on instructions from Mr. Bhupendra Kumar, Assistant, Department of Science and Technology made a statement on that date that the respondents no.1 & 2 did not intend to before expiry of one year initiate proceedings for fresh selection.

4. It was however the contention of the counsel for the respondents no.1 & 2 on 21st April, 2011 that the vigilance inquiry qua Dr. Sangwan was still underway and no report had been received and in fact neither any appointment till then had even been offered to him, nor any order rejecting his name from the panel also had been made. It was thus contended that without the name of Dr. Sangwan who is first on the panel being rejected,

the petitioner being second on the panel could not have been considered for appointment.

5. It was however the contention of the petitioner on 21st April, 2011 that the letter dated 3rd November, 2010 of Dr. T. Ramasami, Secretary, Ministry of Science & Technology to one of the members of the Selection Committee indicated that a decision had already been taken not to appoint Dr. Sangwan and without considering the petitioner for appointment, the recruitment exercise should be re-done. The said letter is as under:

“Dear Dr. Banerjee,

I receive your letter no. 11/86/2010/Adm./173 dated October 29, 2010. All facts of the case, along with copies of your letter and their enclosures have already been presented to the Hon’ble Minister (S&T & ES). I have also requested him to call you for a possible meeting and then advice us of the next best course of actions.

In my opinion, in light of your findings, it is only fair that we redo the entire exercise. I am not in favour of decisions from the entire process. This would be my input on the Hon’ble Minister (S&T & ES) too.

I hope that you would agree with this recommendation.

Regards,

Yours sincerely,

Sd.

(T. RAMASAMI)”

6. Even though, this Court on 21st April, 2011 was of the opinion that the petitioner had no right to seek appointment and the Appointing Authority is within its right not to appoint any person on the panel recommended by the Selection Committee but upon the counsel for the petitioner referring to *R.S. Mittal Vs. Union of India* (1995) Suppl. (2) SCC 230 laying down that though there is no vested right to be appointed to the post for which a candidate has been selected, but the Appointing Authority cannot ignore the panel or decline to make the appointment and when a person has been selected then ordinarily there is no justification to ignore him for appointment unless there is a justifiable reason to decline to appoint him, notice of the writ petition was issued.

7. Counter affidavit has been filed by the respondents no.1 & 2 as well as by the respondent no.3 MACS-ARI. The respondent no.3 has supported the petitioner. The counsels were heard in part yesterday i.e. 25th May, 2011. It being the contention of the petitioner that the Secretary aforesaid is inimical towards the petitioner and is dragging feet to allow the panel to lapse, the respondents were directed to produce the records relating to

appointment and investigation if any undertaken qua Dr. Sangwan before this Court today.

8. The records have been so produced and the counsels have been further heard.

9. It is the contention of the counsel for the petitioner that though the petitioner cannot claim any right of appointment but does have a right of consideration for appointment and which is being denied to him. He contends that such consideration in the present case has to be by the Appointments Committee of the Cabinet (ACC) and the Secretary aforesaid is intentionally not placing the file of the petitioner before the ACC for consideration. Reliance in this regard is placed on:-

(i) ***Surinder Singh Vs. State of Punjab*** (1997) 8 SCC 488 laying down that a candidate in the waiting list in the order of merit has a right to claim that he be appointed if one or the other selected candidate does not join.

(ii) Judgment dated 16th November, 1999 titled ***A.P. Aggarwal Vs. Govt. of NCT of Delhi*** also laying down that it is not open to the

Government to ignore the panel which had already been approved and accepted and resort to a fresh selection process without giving any proper reason for resorting to the same, specially when it is not the case that the persons on the panel are not fit to occupy the post.

(iii) Judgment dated 1st July, 2008 in W.P.(C) No.7767/2007 titled ***Sh. Anuj Kumar Bharti Vs. National Book Trust*** laying down that the panel of selected candidates cannot be scrapped during the period of its validity except for well founded reasons and that upon it being found that the person first on the panel is un-deserving, offer ought to have been made to the person next in panel and quashing the advertisement inserted for re-initiating the process of selection.

(iv) Judgment dated 6th January, 2010 in W.P.(C) No.8202/2009 titled ***Ms. Manju Vs. The Director, Department of Education*** where the appointment of a person, third in the selection process and even though not on the panel prepared of first two candidates only was upheld *inter alia* for the reason that if fresh selection process

were to be undertaken it would cause serious prejudice and would also entail financial implications.

(v) Judgment dated 2nd March, 2001 in Appeal (Civil) Nos.1692-94/2001 titled *Dr. A.K. Doshi Vs. Union of India* where the Supreme Court found the Secretary to the Appointment Committee in that case, to have by not placing the material/file before the Selection Committee effectively ensured non-appointment of the person concerned and who by virtue of his position on the panel had become entitled to appointment.

10. The contention of the counsel for the petitioner on the basis of the procedure for appointment as disclosed in the counter affidavit of the respondents no.1 & 2 is that the proposal for his appointment is required to be sent to the ACC for consideration and it is upto the ACC to appoint or not to appoint the petitioner and the Secretary cannot, by not even putting up the proposal for consideration of the ACC, deprive the petitioner of the right of consideration. With reference to the plea of the respondents that the matter relating to the fudging of the documents by Dr. Sangwan was

under consideration, it is contended that no inquiry even in this regard had been commenced; it is contended that the respondents were maintaining quietus and appear to have been spurred into action only after filing of the present writ petition by the petitioner on 28th February, 2011.

11. The files produced by the respondents today reveal that:

(i) That the post of Director, ARI has been lying vacant since 1st January, 2009 when the earlier incumbent retired and whereafter the person to whom the officiating charge was given also retired on 20th June, 2010.

(ii) That as per Bye Law 14 of ARI, the appointment is required to be made by the Governing Body with the concurrence of the Central Government, by open advertisement and/or by invitation through a Search-cum-Selection Committee to be constituted with prior approval of Department of Science & Technology, Govt. of India.

(iii) In order to select a suitable candidate, an advertisement was published in October, 2008.

(iv) A high level Search-cum-Selection Committee comprising of five members was constituted with the approval of the Department of Personnel & Training, Government of India and which after personal discussions with all the short listed candidates on 29th June, 2010 recommended Dr. Sangwan for the position and the petitioner to be kept in waiting.

(v) Approval of the Hon'ble Minister (Science & Technology) was sought on 18th August, 2010 for appointment of Dr. Sangwan. The counsel for the respondents no.1 & 2 has argued that the file so sent to the Hon'ble Minister, remained in the office of the Minister till 24th February, 2011 when it was retrieved to answer an RTI query and again sent back on 1st March, 2011 to the Minister's Office.

(vi) However, one of the members of the Selection Committee on 20th August, 2010 alleged that Dr. Sangwan had manipulated his biodata.

(vii) It is only while so re-sending the file to the Minister on 1st March, 2011 that the communication dated 20th August, 2010 against Dr. Sangwan was brought to the notice of the Minister and his advice on action to be taken thereon sought.

(viii) That it was only on 11th March, 2011 i.e. after filing of this writ petition that move was initiated to seek opinion of the Law Ministry, whether to proceed with the appointment of Dr. Sangwan after due diligence by vigilance system of his parent Body or to accept the recommendations of respondent no.3 MACS-ARI for appointment of the petitioner and to proceed in this regard or to scrap the whole process and to re-do the entire exercise and on 16th March, 2011 the file sent to the Law Ministry.

(ix) That the Assistant Legal Advisor in the Law Ministry on 18th March, 2011 opined that the proposal for appointment of Dr. Sangwan after due diligence by the vigilance system should be proceeded with further.

(x) Though respondents no.1 & 2 in their counter affidavit have stated that upon receipt of communication aforesaid dated 20th August, 2010, the respondents had requested the Chief Vigilance Officer, Council of Scientific and Industrial Research (CSIR) where Dr. Sangwan is working to get the matter investigated on priority basis but the records show and on enquiry it is confirmed that inquiries from Vigilance Department of CSIR were commenced only on **16th March, 2011**.

12. The counsel for the petitioner has argued that the letter dated 18th November, 2010 of the Secretary to the Ministry who is against the petitioner's appointment discloses that an opinion had been formed for re-doing the entire exercise and which opinion was contrary to the law as aforesaid of the re-doing of the selection process being not permissible during the validity of the panel. He has contended that the Secretary in the present case, to ensure that the candidature of the petitioner is not considered for appointment, did not take any steps whatsoever till the filing of the writ petition for commencement of the inquiry into allegations

against Dr. Sangwan and nothing would have been done till now had the writ petition been not filed.

13. The counsel for the respondents no.1 & 2 has contended that since the question for appointment of the petitioner would arise only if the candidature of Dr. Sangwan is rejected, Dr. Sangwan is a necessary party to the present case. He has further contended that the respondents, even after receipt of report of the Vigilance Department of the CSIR would be required to grant a hearing to Dr. Sangwan and only if find any merit in the allegations against him would be entitled to reject his candidature and the question of considering the petitioner for appointment would arise then only.

14. I have enquired whether Dr. Sangwan has taken any steps whatsoever for expediting his appointment. The answer is in the negative. I have further enquired whether there is any communication whatsoever from Dr. Sangwan in this regard. The answer again is in the negative, except for the communication sent on 23rd March, 2011 by Dr. Sangwan to the Vigilance Department of CSIR. It is admitted that once the panel

lapses on 28th June, 2011, axiomatically, the name of Dr. Sangwan would also lapse.

15. The respondents no.1 & 2 as Annexure R-1 to their counter affidavit have filed the Office Memorandum dated 3rd July, 2006 of the Department of Personnel & Training of the Government of India laying down the Policy and Procedure for the subject appointment. The same *inter alia* provides for the appointment to be “under the purview of the ACC”. It further lays down that the panel recommended by the Selection Committee will have to be implemented “by the Ministry/Department *in toto*” and any deviation in the matter will require prior approval of the ACC.

16. What emerges from the aforesaid is that though approval of the Minister was sought on 18th August, 2010 for sending the proposal to ACC for appointment of Dr. Sangwan but inspite of the receipt of the communication dated 20th August, 2010 regarding manipulation by Dr. Sangwan of his Bio-Data, no action whatsoever was taken, to either process further the appointment of Dr. Sangwan or to have the cloud cast over the suitability of Dr. Sangwan cleared. However the opinion formed

by the Secretary that Dr. Sangwan was not to be appointed and the exercise of selection be re-done is quite apparent from the letter dated 3rd November, 2010 (supra). Even though the said letter records that the Secretary had already presented the representations against Dr. Sangwan to the Hon'ble Minister but the Office Notings on the file and which Office Notings only, experience shows, form the basis for movement of the file, do not show that the Secretary at any time before 1st March, 2011 sought the advice of the Hon'ble Minister as to the action if any required to be taken on the representations against Dr. Sangwan. The only explanation offered during the course of hearing is of the file having remained in the office of the Hon'ble Minister from 18th August, 2010 till 24th February, 2011.

17. The aforesaid would show that, of the one year of the validity of the panel prepared by the Selection Committee, approximately seven months were allowed to be so wasted. Otherwise, seeing the pace at which the file had moved i.e. inspite of the recommendation dated 29th June, 2010 of the Selection Committee, approval of the Hon'be Minister having been sought

only on 18th August, 2011, it appears that whether intentionally or unintentionally, such wastage of time ensured that there was / is no possibility of any appointment being made from the said panel.

18. I must however add that though the petitioner in the writ petition has pleaded that the Secretary is deliberately allowing the panel to lapse but the same would not constitute a plea of *mala fide* or of bias, no reason having been stated for the Secretary being inimical to the petitioner. What however stares one in the face is inaction. No expediency has been shown in ensuring the appointment out of the panel which was prepared. Even if any *prima facie* merit was found in the allegations made against Dr. Sangwan on 20th August, 2010, the same should have been got investigated immediately. The investigation as aforesaid was commenced only on 16th March, 2011 after a long gap of eight months. Such inaction would definitely ensure depriving the petitioner of consideration for appointment, by lapsing of the panel prepared by the Selection Committee.

19. A perusal of the file has shown the Selection Committee to have been constituted not only of high officials but also at a cost of at least ₹3.5

lacs towards TA/DA for members of Selection Committee, of which sanction was obtained. By allowing the panel to lapse, such effort and public money is also wasted. It is even otherwise not in public interest, neither that such efforts of the Selection Committee be allowed to waste nor that the post remains vacant for long. As aforesaid, the post for which appointment was to be made is lying vacant for the last nearly 2½ years now. It also anguishes me to note that the selection process commenced in October, 2008, i.e. three months before the retirement of the then incumbent, has been allowed to drag for nearly three years. The appointment is to the post of Director i.e. Head of ARI. Not much can be expected of an institution, especially a Research Institution, as ARI is, left Head-less for such long spells; the waste thus percolates into the entire institution.

20. I am also not satisfied with the explanation of the file lying in the office of the Hon'ble Minister. It is the duty of the Ministry / Department to follow up the file and to ensure that the attention of the Hon'ble Minister is invited to the matter and time bound matters are accomplished

within the prescribed time. Even if the representations against Dr. Sangwan had been made also to the Hon'ble Minister, without the officials, concerned with ensuring approval for action thereon, putting up a notice, as was ultimately done on 11th March, 2011 (after the filing of this writ petition), no action could have been expected. The petitioner is therefore correct in contending that nothing was being done in the matter, neither to ensure appointment of Dr. Sangwan nor to investigate the allegations against Dr. Sangwan and before which the petitioner could not be considered for appointment and nor to reject the candidature of Dr. Sangwan.

21. The argument of the counsel for the respondents No.1&2 that Dr. Sangwan is a necessary party does not find favour with me. Dr. Sangwan, as aforesaid, is not shown to have done any overt act, neither to ensure his appointment nor to have the cloud of allegations against him, cleared. If at this stage, Dr. Sangwan is to be impleaded as a party and to be heard, the same would definitely sound a death knell for the panel due to lapse on 28th June, 2011.

22. I am also of the view that the matter of appointment being within the “purview” of the ACC, the situation which had so developed ought to have been brought to the attention of the ACC. It was for the ACC to form an opinion as to the allegations against Dr. Sangwan and the action to be taken thereon i.e. whether the same were to be discarded or to be believed and the name of Dr. Sangwan from the panel discarded or the allegations required further investigation. There is nothing to show that the matter was brought to the attention of the ACC. It cannot be believed, as was sought to be suggested, that only a formal approval of ACC is to be obtained. As aforesaid, the policy and procedure for appointment places the appointment within the “purview” of the ACC and not of the Hon’ble Minister. The Supreme Court also in *UOI Vs. N.P. Dhamania* 1995 Supp. (1) SCC 1 held that where the Appointing Authority is the ACC, the Minister has no role. Unfortunately, the appointing authority has not been consulted at all. The word “purview” is a word of wide amplitude. The Shorter Oxford English Dictionary defines “purview” as the “scope or range”. Definitely, the imbroglio aforesaid is within the purview of the ACC.

23. The Supreme Court in *Mahindra & Mahindra Ltd. Vs. UOI* (1979) 2 SCC 529 deplored the practice of allowing administrative posts to remain vacant for long periods of time. It was held that such action betrayed total lack of concern and complete neglect of its obligations by the Government. It was yet further held that such unfortunate and undesirable state of affairs impairs the efficiency of the functioning of the Bodies and shakes the confidence of the public in the integrity of appointments when made. Similarly, *Malik Mazhar Sultan Vs. U.P. Public Service Commission* (2006) 9 SCC 507 also advocates timely determination of vacancies and timely appointments and observes that non-filing of vacancies for long results in creeping of frustration in the candidates. The Division Bench of this Court also recently in *UOI Vs. Sanjeev Kumar Jha* MANU/DE/3493/2010 observed that public interest requires civil posts to be filled up at the earliest so that the civil servant is in place to serve the society.

24. The question which arises is as to the directions now to be given. I am of the opinion that the matter should be placed immediately before the

ACC which is the Appointing Authority, to take an appropriate decision. As aforesaid, the only options are to expeditiously determine the fate of Dr. Sangwan or to consider the appointment of the petitioner. As far as the determination of the fate of Dr. Sangwan is concerned, I fail to understand the delays therein. It is borne out from the record that the Biodata of Dr. Sangwan considered by the Selection Committee was accompanied with the report of the Vigilance Department of CSIR. It should not be time consuming to detect any fudging therein. The ACC is expected to now make up for the lost time and to endeavour to implement the panel *in toto* in terms of Clause (vi) of the Office Memorandum dated 3rd July, 2006 supra, within the period of validity thereof. However, if for any reason the same is not practicable, attention of ACC is invited to ***State of U.P. Vs. Ram Swarup Saroj*** (2000) 3 SCC 699 where the Supreme Court held that a claim of candidate included in the panel is not defeated because currency of panel expires during pendency of litigation when the candidate had staked his claim during the currency of the panel. Applying the said dicta, when the term taken in litigation is to be excluded, I do not see any reason as to why the term during which the persons concerned were in a state of

slumber ought not be excluded from the validity of the term of one year of the panel. The ACC is expected to consider this facet also. In this regard it may also be noticed, that Clause (vii) of the Office Memorandum dated 3rd July, 2006 supra containing the procedure and policy of appointment also provides for the fresh Selection Committee even if any constituted considering the name of persons recommended in the earlier panel.

25. The respondents are accordingly directed to, after complying with any formalities, if any required to be fulfilled in this regard, within a week hereof, place the matter for consideration of the ACC and which is expected to as aforesaid consider the matter expeditiously so that the cost and effort in preparation of the panel valid till 28th June, 2011 is not wasted. The respondents to also inform the Vigilance Department of the CSIR today itself of the order and direct them to as far as possible place their report before the ACC within one week so that the same can be considered by the ACC. It is however clarified that the matter will be put up before the ACC even if the report is not so received. A copy of the present judgment be also placed before the ACC.

26. The photocopies of the office notings aforesaid be placed in the paper book.

The writ petition is disposed of. No order as to costs.

Copy of this order be given *Dasti* under signature of the Court Master.

**RAJIV SAHAI ENDLAW
(JUDGE)**

MAY 26, 2011
bs/gsr