

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

+ **W.P.(C) No.33/2013**

% **12th December, 2013**

DR. ATUL BHARDWAJ Petitioner
Through: Mr. Rajpal Singh, Advocate.

Versus

GOVERNMENT OF NCT OF DELHI AND ORS. ... Respondents
Through: Ms. Zubeda Begum, Advocate with
Ms. Sana Ansari, Advocate for
respondent Nos.1 and 2.
Mr. Sumit Babar, Advocate for
respondent No.3.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

+ W.P.(C) No.33/2013 and C.M. No.73/2013 (interim relief)

1. The petitioner by this writ petition, seeks the relief and directions from this Court for quashing of the recruitment process initiated by the respondent no.2/college for appointment to the post of Lecturer of 'Shalakya Tantra' in terms of the advertisement dated 14.12.2012. Petitioner states that since as per the earlier recruitment process with

respect to which advertisement was issued on 9.9.2000 and 19.2.2010 for the very post of Lecturer in Shalakya Tantra there was completion of process when the candidates including the petitioner sat in the written examination, cleared the written examination, were called for the interview on 11.4.2011, selection committee selected the petitioner, but since illegally no appointment letter was issued to the petitioner, petitioner deserves to be given appointment. Petitioner claims that there cannot be a fresh selection process once earlier selection process has been concluded and consequently there is vested right in the petitioner to seek appointment as per the selection process because respondent no.2 has no valid reasons to scrap the finalized recruitment process.

2. On behalf of respondent nos.1 and 2, what is contended is that in the professional course which is being run by the respondent no.2, namely B.A.M.S. course, the subject of Shalakya Tantra is only to be taught in third semester of the course which is in third year, and since the inspection by the Central Council of Indian Medicine (CCIM) was delayed upto February, 2013 therefore the select panel created for the appointment to the post of Shalakya Tantra in terms of the selection process concluding with the interview conducted on 11.4.2011 was scrapped because appointment of Lecturer of Shalakya Tantra would have caused

unnecessary expenditure upon the respondent no.1/Institute for a subject which was not to be taught for about two years or so after the finalization of the selection process on 11.4.2011.

3. The issue in the present case is as to whether respondent no.2 has a right to scrap a concluded selection process by urging that there is no vested right in a candidate to seek appointment. For this purpose both the parties have relied upon the Constitution Bench judgment of the Supreme Court in the case of *Shankarsan Dash Vs. Union of India (1991) 3 SCC*

47. Both the parties rely upon para 7 and which is reproduced hereunder:-

“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.”

4. A reading of the aforesaid para shows that no doubt qualified candidates in the recruitment process do not acquire any right to the posts and do not have indefeasible right to be appointed against the existing

vacancies, however, Supreme Court has simultaneously held that the State does not have the licence of acting in an arbitrary manner by not filling up the vacancies and the decision not to fill up vacancies has to be taken for bonafide and appropriate reasons. I have therefore to examine in the facts of the present case whether non-filling up of the posts is for bonafide and appropriate reasons.

5. Before proceeding ahead, I would like to refer to a subsequent judgment of the Supreme Court reported as *State of A.P. and Ors. Vs. D. Dastagiri and Ors. (2003) 5 SCC 373* wherein the Supreme Court again reiterates the legal position stated in the case of *Shankarsan Dash(supra)*, and this is contained in para 4 of the judgment which is reproduced hereunder:-

“4. In the counter affidavit filed on behalf of the respondents in Civil Appeal No. 915/2000, in paragraph 16 it is stated that the process of selection was cancelled at the last stage, i.e., before publishing the list of selected candidates on the sole ground that the State Government wanted to introduce prohibition and obviously the Government felt that there was no need of Excise Constables during imposition of prohibition in the State. There is serious dispute as to the completion of selection process. According to the appellants, the selection process was not complete. No record has been placed before us to show that the selection process was complete, but, it is not disputed that the select list was not published. In paragraph 16 of the counter affidavit, referred above, the respondents themselves had admitted that the selection process was cancelled at the last stage. In the absence of publication of select list, we are inclined to think that

the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list was remained to be published, that does not advance the case of the respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment based on the select list. It was open to the State Government to take a policy decision either to have prohibition or not to have prohibition in the State. Certainly, the Government had right to take a policy decision. If pursuant to a policy decision taken to impose prohibition in the State there was no requirement for the recruitment of constables in the Excise Department, nobody can insist that they must appoint the candidates as Excise Constables. It is not the case of the respondents that there was (sic) malafide on the part of the appellants in refusing the appointment to the respondents after the selection process was complete. The only claim was that the action of the appellants, in not appointing the respondents as Excise Constables, was arbitrary. In the light of the facts that we have stated above, when it was open to the Government to take a policy decision, we fail to understand as to how the respondents can (sic) the action of the respondents as arbitrary, particularly, when they did not have any right as such to claim appointments. In the absence of selection and publication of select list, mere concession or submission made by the learned Government Pleader on behalf of the appellant-State cannot improve the case of the respondents. Similarly such a submission cannot confer right on the respondents, which they otherwise did not have.”

6. A reference to the aforesaid para 4 of the judgment in the case of ***D. Dastagiri (supra)*** also shows that no doubt candidates do not have a vested right to claim appointment based on the select list, however, Supreme Court again has observed that the decision of the Government has

to be as per the policy which is framed for valid reasons and that in case there are malafides in scrapping of the select list, Courts can interfere.

7. The first reason which is given by the respondent no.2 to scrap the selection process is that for a period of two years after completion of the selection process the course of Shalakya Tantra was not to be taught because the same was to be taught only in the third year of the B.A.M.S. course. This argument in my opinion is clearly malafide, most arbitrary and not an appropriate/bonafide reason. In my opinion, the action of the respondent no.2 is bereft of valid reason because when we see the reason of non-appointment viz of not incurring unnecessary expenditure, then, that argument shows that at best that appointment should have been deferred/postponed to the beginning of the third year of the course and in which case there would not have been any financial repercussion/expenditure upon the respondent no.2. However, cancelling of complete selection process and then taking trouble for an entire selection process afresh, in my opinion, smacks lack of bonafides and probably of malafides against the selected candidates for unexplained reasons. The reasons of the respondent no.2 not to give appointment to the petitioner on account of financial reasons would be justified only to the extent of deferring of the appointment till commencement of the third year

course, but the reason given cannot justify scrapping of the selection process. Accordingly, in my opinion, the action of the respondent no.2 falls foul of the ratios of the judgments of the Supreme Court in the cases of *Shankarsan Dash (supra)* and *D. Dastagiri (supra)* because action of the respondent no.2 is not validly correlated to the reason given of not incurring expenditure. As already stated above, for not incurring expenditure at best the appointment should have been from a prospective date and not that the entire selection process should have been cancelled. After all, it must be noted that persons like the petitioner lose out on other available opportunities which may have occurred in the meanwhile on an impression of they being successful in a particular selection process. No doubt a vested right will not accrue if there are valid reasons, however, there is a legitimate expectation on the State not to act unfairly or arbitrarily i.e without valid reasons. Therefore, in view of the above, action of the respondent no.2 in not acting as per the selection process concluded in terms of interviews dated 11.4.2011 is quashed and the petitioner since without dispute is a selected candidate in terms of the selection process which concluded on 11.4.2011, he should be granted appointment.

8(i) To question the entitlement of the petitioner to be granted

appointment, respondent no.2 has further contended that the validity of the select panel is of two years, and since the period of two years stands expired, the panel has to be necessarily scrapped and therefore no appointment can be given to the petitioner.

(ii) When counsel for the petitioner was asked to show the rules of the respondent no.2/organization stating that the panel has to be necessarily of two years, no rule of the respondent no.2 could be cited. Counsel for the respondent no.2, however, states that there were no recruitment rules and therefore respondent no.2 is justified in having a period of two years for the valid period of panel. In my opinion, even this second argument which is urged on behalf of respondent no.2 is the most frivolous argument to say the least for the below stated two aspects.

9(i) Firstly, it must be stated that the argument urged on behalf of respondent no.2 is not correct because the Government of NCT of Delhi's notification dated 9.5.2008 which has been filed with the rejoinder affidavit shows that till recruitment and promotion rules are framed of the respondent no.2, rules for similar posts in Government of NCT of Delhi were to apply. Therefore, theoretically there may be no recruitment rules of the respondent no.2, however, respondent no.2 was governed by a particular set of recruitment rules. Therefore, the argument that there were

no recruitment rules, is to be rejected, besides for the second reason which is given hereinafter.

(ii) Secondly, the Supreme Court has now consistently held that a panel lapses and comes to an end when the vacancies are filled in from the select panel. In fact, Supreme Court has consistently held that there cannot be a valid period of panel once the number of vacancies are filled in. Therefore, putting it in another words, it is necessary that vacancies are filled in from the select panel and once they are filled in other persons in the waiting list cannot claim a right to be appointed if after appointment of a particular candidate that candidate leaves or other vacancies in posts take place for various other reasons. This aspect was considered by a Full Bench of this Court in the case of *Maninder Kaur Vs. Delhi High Court and Ors. (1995) 57 DLT 288(FB)*. Paras 36 to 39 of the Full Bench judgment (which refer to the earlier Supreme Court judgments) are relevant and the same read as under:-

“36. The office memorandum dated 8th February 1982 is Annexure P.4 to the writ petition of Malkhan Singh. The said memorandum has also been reproduced in the decision of the Supreme Court in Prem Parkash's case. A perusal of the said memorandum shows that it is applicable in a case where a person is declared successful according to merit list of selected candidates which is based on the declared number of vacancies. The responsibility vests on the appointing authority to appoint such a person even if number of vacancies undergo a change after his name has been included in the

list of selected candidates. It is thus evident that if a candidate has not been selected against the declared number of vacancies no right flows to him on the basis of the aforesaid Memorandum. Mr. Malkhan Singh had applied against one post reserved for scheduled caste. For that post Mr. Padam Singh was selected, recommended and ultimately appointed. Likewise, the declared number of vacancies when Mr. Sanjay Kaul applied were four which were reserved for scheduled castes and scheduled tribes. It was notified in the advertisement that these vacancies shall be filled from general category candidates in the event of suitable candidates from reserved category were not available. Only one candidate Mr. L.D. Maul belonging to scheduled castes community was found suitable. No other candidate from reserve category was found suitable. The High Court, however, prepared a panel of six candidates of general category. The name of Respondent Nos. 9, 7 and 8 were at Serial No. 1, 2 and 3 respectively in the panel prepared in 1988. Mr. Sanjay Kaul was at Serial No. 6 on the panel. There were also other advocates at Serial No. 4 and 5 of that panel. Against the four declared number of vacancies, one from scheduled caste community and three from general category were selected. Mr. Kaul cannot claim right to the appointment against a future vacancy. In case the contention that the entire panel is to be exhausted irrespective of the number of vacancies which may have been notified for selection is accepted, it may lead to continuing the panel in perpetuity which would be arbitrary and would infringe Article 14 and 16 of the Constitution thereby depriving other eligible candidates for being considered for public employment. In this regard we may also notice a recent decision of the Supreme Court in the case of Gujarat State Deputy Executive Engineers' Association Vs. The State of Gujarat & Ors. (1995)ILLJ1047SC . The Apex Court has held that a candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. The effect of making appointments of candidates from the waiting list on candidates who become eligible for competing for vacancies available in future, was expressed by Supreme Court in the following words -

"Awaiting 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 appointments, 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."

37. It is also well settled that empanelment gives no right of appointment. The Supreme Court in the case of State of Bihar & Ors Vs. The Secretariat Assistant Successful and Examinees Union 1986 & Ors. AIR1994SC736 has held -

"It is now well settled that a person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment and by itself does not amount to selection or create a vested right to be appointed unless relevant service rule says to the contrary (See : Shankara and Dash V. (1992)ILLJ18SC and Sabita Prasad & Ors. Vs .State of Bihar & Ors - AIR1992SC243 . We are, Therefore, of the opinion that the directions given by the High- Court for appointment of the empanelled candidates according to their position in the merit list against the vacancies till 1991 was not proper and cannot be sustained. Since, no examination has been held since 1987, persons who became eligible to compete for appointments were denied the opportunity to take the examination and the direction of the High Court would prejudicially effect them for no fault of theirs. At the

same time, due to the callousness of the State in holding the examination in 1987 for the vacancies advertised in 1985 and declaring the result almost three years later in 1990 has caused great hardship to the successful candidates. The State was expected not to act in such a leisurely manner and treat the matter of selection for appointment to services in such a casual manner. We must record our unhappiness on this state of affairs. There is no justification for holding the examination two years after the publication of advertisement and declare the result almost three years after the holding of the examination and not issuing any fresh advertisement between 1985 and 1991 or holding examination for making selections. We expect the State Government to act in a better manner, atleast hereinafter and since Mr. Rao, the learned senior counsel has shared our concern and assured us of advising the State Govern- ment accordingly, we say no more on that aspect at this stage."

38. The decision of the Division Bench in Bhasin's case directing adjustment against future vacancies results in depriving other eligible candidates for being considered for the said vacancies. In our view the ratio of Prem Prakash's case was not correctly applied by the Division Bench. We may also notice that the Division Bench after rightly noticing in Para 89 of the aforesaid report that the principle laid down in Prem Prakash's case will not be attracted seems to **have erred in the later portion of the judgment (Para 106) in directing on strength of Prem Parkash's case that candidates once selector and empanelled must be accommodated in future vacancy which came into existence during the pendency of the writ petition. There are reasons for preparing larger panel than the number of vacancies. It is possible that a recommended candidate may not come forth to join the Service or even after selection and recommendation there may be hurdles in his appointment like medical clearance etc. In order to avoid delay in the recruitment, a larger panel is prepared so that person next on the panel can be recommended for appointment. This, however, would not mean that in case the number of selected and recommended candidates to the extent of the existing vacancies join, the other candidates on panel are required to be adjusted against future vacancies. As held hereinbefore, this would lead to continuing the panel in**

perpetuity which is neither permissible in law nor in the interest of the Service.

39. It is also to be borne in mind that there must be a judicially enforceable right for the enforcement of which a mandamus lies. The Supreme Court in *State of Kerala Vs. A. Lakshmi katty and others*, [1987]1SCR136 has held that a person whose name has been recommended for appointment as a District Judge by the High Court under Article [233\(1\)](#) has no legal right to the post nor was the Governor bound to act on the advise of the High Court and, therefore ,he could not ask for mandamus. The existence of a right is the foundation of the jurisdiction of a court to issue a writ of mandamus. In this view too the law the petitioners have no right to ask for mandamus for their appointment as ADJ.”

10. In view of the ratio of the *Maninder Kaur’s (supra)* judgment and the judgments of the Supreme Court which have been relied upon in the same, as also the subsequent judgments of the Supreme Court which continue to apply the same law, the validity period of a panel argument is only with respect to filling up of the notified vacancies and the validity period of a panel is really no argument for keeping a panel alive for a particular period de hors the issue of filling up of vacancies. The law with respect to validity period of panel is only because vacancies on being filled up the panel lapses for persons in the waiting list, however, the argument urged on behalf of respondent no.2 has no basis when it is argued that panel can lapse although it is the appointing authority itself which decides not to fill up the vacancies for the posts although the select list is otherwise

finalized and no valid reasons exist for scrapping the panel.

11. In view of the above, action of the respondent to initiate selection and recruitment of the Lecturer for the post of Shalakyia Tantra is quashed. Petitioner will be entitled to now get appointment in view of his being the selected candidate in terms of the select list prepared on the interviews being conducted on 11.4.2011. Petitioner be issued the necessary appointment letter for joining the respondent no.2 within four weeks from today because as on today course of Shalakyia Tantra has commenced in the respondent no.2/Institute. If petitioner is required to comply with any other formalities for getting appointment, petitioner will comply with the necessary requirements in accordance with law/rules. Petitioner is entitled to costs of Rs.20,000/- for this petition and which shall be paid by the respondent no.2 within a period of four weeks from today. Writ petition is allowed and disposed of in terms of the aforesaid observations.

DECEMBER 12, 2013
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VALMIKI J. MEHTA, J.