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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 16.09.2013

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PRONOUNCED ON: 23.09.2013

LPA 358/2013 & CM No.8408/2013

SHIVAJI COLLEGE & ORS Appellants
Through: Mr. V.P. Singh, Sr. Advocate
with Mr. Anurag Mathur, Advocate.

Versus

RAJIV KUMAR & ORS Respondents
Through: Ms. Jyoti Singh, Sr. Advocate
with Ms. Tinu Bajwa and Mr. S.S. Nehra,
Advocates for R-1.
Ms. Maninder Acharya, Sr. Advocate with
Mr. M. Singh and Mr. Sunil Singh,
Advocates.

LPA 450/2013, CM APPL.9830, 9831/2013

UNIVERSITY OF DELHI Appellant
Through: Mr. V.P. Singh, Sr. Advocate with
Mr. Anurag Mathur, Advocate.

versus

DR RAJIV KUMAR & ORS Respondents
Through: Ms. Jyoti Singh, Sr. Advocate
with Ms. Tinu Bajwa and Mr. S.s. Nehra,
Advocates for R-1.
Ms. Maninder Acharya, Sr. Advocate with
Mr. M. Singh and Mr. Sunil Singh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT

1. The Shivaji College (hereafter referred to as 'the College') and the Delhi University (hereafter referred to as 'the University') preferred these two appeals against an order of the learned Single Judge which allowed the first respondent's writ petition. By the writ petition, the said respondent had challenged the cancellation/recall of his appointment.

2. The facts are that the respondent was working in the College as an *ad hoc* Lecturer when an advertisement was issued on 13.05.2008 notifying the applications for the post of Lecturer in Chemistry. The three vacancies were notified; one was reserved for Scheduled Caste candidates, and other for Other Backward Class category candidates and the third was unreserved. It is not disputed that the respondent applied against an unreserved category post. The advertisement contained a note which read as follows: -

"4. The College reserves its right to change the number and/or nature of the posts and/or not to fill any or all posts advertised without assigning any reason."

3. On 01.09.2008, the Selection Committee's deliberations were completed; the respondent participated in the process and was placed at Serial No. 2 of the Selection List. It is again not in dispute that another candidate, i.e., Ms. Vandana Katoch was placed at Serial No.1 and was appointed. As the college required the services of

another Lecturer, it appointed the respondent, further under the advertisement extracted above. Apparently, certain complaints were made to the University with regard to the appointment issued to the respondent - which he had by then accepted. Consequently, the University wrote to the College on 21.10.2008 stating that it had examined the matter in the light of the document provided by the College. The latter further stated that the College had already appointed the Lecturer in Chemistry without advertising those posts; the University stated that in terms of Ordinance XII (3) (1) all vacancies of teachers had to be filled up after the advertisement. In its opinion, the appointment of the respondent was in violation of the said provision. In these circumstances, that on 22.11.2008, the respondent was issued a show cause notice calling upon him to state why his appointment should not be cancelled or his services terminated. The respondent was also given a personal hearing and the Governing Body of the College thereafter recommended that his appointment be cancelled. It was in these circumstances that the respondent approached the Court by filing W.P. (C) 743/2009. It is not in dispute that during the pendency of these proceedings on account of interim orders, his services in the college were continued. The learned Single Judge relying upon the decision of the Supreme Court in *Suvidya Yadav & Ors. v. State of Haryana & Ors*, (2002) 10 SCC 269 and another judgment of this Court and was of the opinion that since the advertisement itself had indicated that the number of posts could be varied, Ordinance XII (3) (1) could not be interpreted in a narrow manner and that the cancellation of appointment was

unjustified. The Writ Petition was, therefore, allowed.

4. The University in its appeal argued that the provisions of Ordinance XII (3) (1) are mandatory at the relevant time when the post was advertised, there was no vacancy either anticipated or foreseeable, learned Senior Counsel for the University stressed upon the fact that the College had in the past flouted Ordinance XII (3) (1) and filled the post without advertising them by adopting the device of demanding creation of posts on account of increased workload. Counsel pointed out that all appointments had to be reported to the University under Ordinance XVIII (5). In the present case that provision was observed in breach as far as the respondent was concerned. Learned counsel relied upon various decisions of the Supreme Court including *Arup Das & Ors. v. State of Assam & Ors.*, (decided on 27.01.2012); *Prem Singh & Ors. v. Haryana State Electricity Board*, (1996) 4 SCC 319; *Madan Lal v. State of J&K & ors*, AIR 1995 SC 1088; *Surender Singh v. State of Punjab*, AIR 1998 SC 18 and *Ashok Kumar v. Chairman, Banking Services Recruitment Board*, AIR 1996 SC 976 and *Rakhi Ray & Ors. v. High Court of Delhi & Ors.*, (2010) 2 SCR 239. It was submitted that all these judgments have clearly ruled that filling up future vacancies is impermissible in law. In the present case, argued learned Senior Counsel Ms. Maninder Acharya that the post in question to which the respondent was appointed was created on 25.09.2008 - after the appointment letter had been issued on 02.09.2008. The post, therefore, was clearly and undisputedly a future vacancy for which another recruitment process calling for applications based on public

advertisement was essential.

5. Learned Senior Counsel for the respondent Ms. Jyoti Singh submitted that the college in the present case had acted correctly in issuing the appointment letter. She relied upon the note-4 of the advertisement to say that the college was aware about the possibility of another vacancy and, therefore, provisioned for it at the time of the commencement of recruitment process. She relied upon the internal notings of the college file produced during the course of the proceedings in the writ petition and stated that on 21.08.2008, 29.08.2008 and 13.09.2008, the Chairman of the Governing Body had been notified specifically that the workload in the Department concerned had increased and that as a result another post had to be filled. The following extracts of the notings were relied upon: -

“4. Workload submitted by O.S.D. to the Chairman on 21/08/08, 29/8/08 and 13/9/08.

Post No.12: - OBS (as per roster) – filed

Post No.13: - SC (as per roster) – filled

Post No.14:- General (as per roster) – filled by Dr. Rajiv Kumar

5. Selection Committee held on 1/09/08 for the General Candidates. Dr. Rajiv Kumar placed 2nd in the panel. Dr. Rajiv Kumar was already working as Ad-hoc Lecturer in Chemistry for the last 2yrs and also at the time of Selection Committee.

6. Eminent Scientists like Prof Parmar, Prof. A.K. Bakshi and Prof Rita Kacker were in the Selection Committee. It was discussed and decided in the Selection Committee that two posts will be filled up in the General Category as workload was

for 15 teachers. It was even suggested that this be recorded in the Selection Committee proceedings but the Chairman said that this is an administrative matter and could not be recorded in the minutes of the Selection Committee, whose job was to select a panel of candidates. The Chairman opined that within six-months, the period for which the panel was valid, if any fresh work load was to come-up in the view of the increased number of seats in the colleges, the next candidate on the panel could be appointed against this vacancy.”

6. It is argued that the above clearly demonstrated that the Selection Committee itself was apprised of the need to fill up another post after its creation. The respondent was not only qualified but was eminently eligible as he had worked in the college since 2006. He was even high in the merit and was placed at Serial No.2 in the Selection List. He could not, therefore, be faulted by the college which had indeed even obtained legal opinion to say that the appointment was justified.

7. Counsel relied upon the judgment reported as *Suvidya Yadav & Ors. v. State of Haryana & Ors (supra)* to say that in that case too, post was created after the advertisement and appointment made to it, was held to be valid. It was argued that likewise in the present case the respondent's appointment could not have been treated as illegal or irregular and that the mandate of Ordinance XII (3) (1) have been fulfilled.

8. Before this Court proceeds to discuss the merits, it would be essential to extract the relevant provisions of the Ordinances, i.e., Ordinance (XII) (3) (1) and XVIII (5). Ordinance (XII) (3) (1) reads as follows: -

“3. (1) All vacancies of teachers shall be filled after advertisement and by open recruitment, save in the case of vacancies, appointment to which may be required to be made urgently in the interest of organization of teaching in the College concerned for a period not exceeding four months or beyond the term in which it is made whichever is earlier.”

9. Ordinance XVIII (5) requires intimation by the college to the University before an advertisement is issued proposing to fill vacancies of staff or teachers; it reads as follows: -

“(5) The Governing Body, before advertising an appointment on the teaching staff shall give notice to the University of their intention so to do and shall take into consideration any representation which the University may make thereon within fourteen days.”

10. It can be seen from the narration of facts that the respondent asserts that his appointment was regular since note 4 of the advertisement conferred discretion to the College to vary the number of vacancies and appoint another candidate. The University and the College, on the other hand, argue that the appointment was contrary to the stipulation in Ordinance XII (3) (1) as the vacancy was in effect created after the respondent was appointed and was a future vacancy.

11. The rule requiring the public employer to appoint individuals only against the notified vacancies and not exceed the advertised number is based on a sound public policy consideration, i.e., that if such course were to be adopted, those who qualify and might become eligible during the selection process or even thereafter but before the occurrence of vacancies would be deprived of the opportunity to apply for it. There are other considerations as well. Candidates may

well chose not to apply if the number of vacancies are few; given the opportunity and awareness that the number of vacancies are more, some of them may wish to apply and take a chance. In any event, filling up of posts and vacancies which have not been advertised carries with it a burden of suspicion which the public employer has to dispel. In the present instance, the college initially sought to rely upon note 4 to say that it had the discretion to fill another post. The facts, however, are very telling. The advertisement was issued on 13.05.2008; there is no material on the record suggestive of the likelihood of the vacancy before or contemporaneously with the conduct of the selection process. The notings of the college in its relevant records - which have been extracted above - would reveal that the move for the creation of another post on account of increased workload occurred after the advertisement was issued. What is more important is that in fact it gathered momentum barely two weeks before the interview was to be held. It can, therefore, be reasonably assumed that when the advertisement is issued, there was no necessity felt for increase in the number of posts; at least no document or noting evidencing such a supposition is placed on the record. The move to increase the number of posts happened just before the selection process and in fact culminated in the creation of the post on 25.09.2008, although the select list holding Ms. Vandana Katoch at Serial No.1 had been declared 25 days earlier on 1st September itself. The college does not say that the sanction for this purpose was obtained from the University; there is no document in support of such conclusion. Equally, it is a matter of record that the college did not

notify the University in terms of Ordinance XVIII (5).

12. The Supreme Court's observations in *Arup Das*' matter (supra) are as follows: -

“26. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2-11-1991 and the selection process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies -- in this case on posts which were newly created -- must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid.”

13. In *Rakhi Ray*'s matter (supra), it was held as follows: -

“9. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as

"the recruitment of the candidates in excess of the 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 amounts 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. (Vide Union of India and Ors. v. Ishwar Singh Khatri and Ors. (1992) Supp 3 SCC 84; Gujarat State Deputy Executive Engineers' Association v. State of Gujarat and Ors. MANU/SC/1109/1994 : (1994) Supp 2 SCC 591; State of Bihar and Ors. v. The Secretariat Assistant S.E. Union 1986 and Ors. MANU/SC/0877/1993 : AIR 1994 SC 736; Prem Singh and Ors. v. Haryana State Electricity Board and Ors. MANU/SC/1151/1996 : (1996) 4 SCC 319; and Ashok Kumar and Ors. v. Chairman, Banking Service Recruitment Board and Ors. MANU/SC/0258/1996 : AIR 1996 SC 976).

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12. In State of Punjab v. Raghubir Chand Sharma and Ors. MANU/SC/0680/2001: AIR 2001 SC 2900, this Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that 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.”

14. The principle which emerges from the above judgments is that every vacancy should ordinarily be notified to ensure maximum public participation of eligible candidates. Denial of this would amount to violation of Articles 14 and 16 of the Constitution of India. Some of the judgments - notably *Arup Das*’ (supra) have even gone so far as countenance filling up of what can be considered as vacancies that are anticipated in due course such as those occurring on account of retirements. However, the Supreme Court has uniformly and in almost all instances ruled against the filling up of future vacancies where such post did not exist at the time of the advertisement. In the present case, the reliance on note 4 in the advertisement, in this Court’s opinion, cannot be of any assistance to the respondents. The materials on record clearly establish that on that date there was no anticipated vacancy; clearly the later events, i.e., the move for creation of a vacancy later on account of increased workload happened three months after the advertisement. What is more the vacancy occurring in the college was created on 25.09.2008. In these circumstances, the college could not have filled the second vacancy and appointed the respondent. This Court is conscious of the fact that

the conclusion that it has arrived at would create hardship to the respondent since he had been the beneficiary of an interim order during the pendency of the writ proceedings. Yet that cannot be a determinative factor as such interim order cannot confer any equities to protect what is obviously an irregular appointment made contrary to the Ordinances of the University and in violation of Article 14 and 16 of the Constitution of India.

15. For the above reasons, the judgment and order of the learned Single Judge has to be and is accordingly set aside. It is held that the respondent's appointment was cancelled for good and valid reasons.

16. The appeals are accordingly allowed but with no order as to costs.

17. A copy of this order be given *dasti* under the signatures of Courtmaster.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

SEPTEMBER 23, 2013
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