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

% **Decided on : 09.05.2016**

+ LPA 513/2013 with C.M.Nos.11031/2013 & 11033/2013

GOVT OF NCT OF DELHI

..... Appellant

Through: Mr.Sanjoy Ghose and Ms.Pratishtha
Vij, Advocates

versus

DR AMRISH CHANANA & ORS.

..... Respondents

Through: Mr.Sanjay Kumar Visen, Adv.
Mr.M.K.Bhardwaj, Adv. for R-2, R-3,
R-6, R-11 & R-16

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

1. The appellant i.e. Government of NCT of Delhi (GNCTD) is aggrieved by the judgment of the learned Single Judge who held that the appointment of 15 candidates who have been arrayed as respondents in these proceedings, were permanent and regular.

2. The brief facts are that on 09.09.2009 Chaudhary Brahm Prakash Ayurved Charak Sansthan -- a Government of NCT of Delhi controlled autonomous body (hereafter called as 'the society') issued an advertisement calling for applications from eligible candidates for the post of lecturer carrying the pay scale of Rs.15800-39100 with grade pay of Rs.5400/- and other allowances. The advertisement

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stated that the candidates should possess a post graduate degree in the concerned subject i.e. those listed in the various Ayurvedic Disciplines. This advertisement was next time modified. The subsequent advertisement was published on 19.02.2010. It stated (i) that out of 14 post advertised on 09.09.2009, three were kept apart for reserved candidates – i.e. one each for SC/ST and the balance for the other backward class candidates (in Delhi). The advertisement also carried a note/clarification, which reads:

“Posts at Sr.No.1 and 2 will be on contract for a period of 11 months.

Post at Sr.3, will be on temporary basis. Age is relaxable for five years for SC/ST and 3 years for OBC as per Delhi Government instructions. Also relaxable for Government servants as per Delhi Government instructions. However, no dual relaxation will be permitted.

The Sansthan reserves the right to amend or modify any of the eligibility condition or cancel the notification of the vacancies.”

3. Sl.No.1 & 2 – the advertisement stated were to be on contract basis for 11 months and did not pertain to the post of Lecturer but rather that of the vacancies in the cadre of Clinical Registrar and Panchkarma Technician. On 23.11.2011 another advertisement inviting applications from eligible candidates including nine vacancies for the post of lecturer for listed discipline was published. The advertisement inter alia stated *“these starred posts will be filled on contract of 11 months likely to continue upto three years or till regular appointment is made whichever is earlier.”*

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4. Note 1 to the advertisement stated "*all the posts except starred post are temporary but are likely to continue upto 65 years of age*"
5. The respondents who were claiming to be successful candidates approached this Court under Article 226 in writ proceedings contending that though their candidature was approved by the selection committee after interview and even the governing council approved their appointment, they were issued appointment letters which stated that the appointments were on temporary basis. The appointees were kept on probation for one year extendable by another year. The contention of the writ petitioners was that having been successful in a regular recruitment against the available vacancies it could not be treated either as ad-hoc or temporary and rather they were entitled to be treated as permanent members of the cadre. The Government of NCT of Delhi as well as the society which were arrayed as respondents, contended firstly that though the vacancies in the cadre of lecturer and other posts existed on regular basis, in the absence of rules, the appointments of writ petitioners were at best temporary and had to be refilled once the rules were framed and recruitments were resorted to under such rules. It was secondly urged that in terms of the bye-laws of the society, recruitment could be resorted to only in accordance with the appropriate recruitment rules framed in that regard. A specific argument here was that mere existence of sanctioned posts did not entitle the writ petitioners to claim the declaration that they were permanent appointees. The Government of NCT of Delhi relied upon the decision of the Council of Ministers dated 09.05.2008 that the recruitment to the post of the

lecturers and other teaching staff will be as per the recruitment rules for similar post in Government of NCT of Delhi.

6. The note put up to the Council of Ministers which was approved by the latter reads as follows:

"5. 407 posts have been sanctioned for the project with the stipulation that appointment to teaching posts shall not be made till a decision is taken by the Government regarding commencement of academic activities. (Annexure-VI) Recruitment will be as per the recruitment Rules for similar posts in the Government of NCT of Delhi. All Group "A" appointments shall be made by the Sansthan directly (without reference to UPSC), being an autonomous body. Recruitment to Group "B" and "C" posts shall be made through DSSSB as per standing instructions of Government of the NCT of Delhi. Group "D" posts will be "Out-sourced" to the extent possible."

7. It was lastly contended that the comparable institution i.e. Tibbia College and Ayurvedic and Unani College and Hospital notified its rules in May, 2013.

8. The learned Single Judge rejected the Government of NCT of Delhi and the society's contention. It was held that the posts to which the writ petitioners were appointed were regularly sanctioned and that they were permanent vacancies. The learned Single Judge was of the opinion that the use of the expression 'temporary' was not conclusive. He took note of the circular of the Government of NCT of Delhi dated 05.06.2006 to hold that the posts were in fact sanctioned. It was also held that the circumstance that the writ

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petitioners were kept as probationers for a year, extendable by another year was seen as an indication of the fact that the posts though styled as temporary were in fact part of regular and permanent cadre. These findings are recorded in para 22 and 23 of the impugned judgment. On the basis of these findings learned Single Judge held that the petitioners were entitled to reliefs they claimed and accordingly issued a direction that they were to be treated as permanent members of the cadre of lecturers to which they were appointed.

9. Counsel for the appellant firstly contended that in the absence of recruitment rules, the mere existence of the sanctioned post did not mean that the respondent/writ petitioners held the post on a permanent basis. Counsel relied upon the terms of the advertisement, especially the later advertisement of 19.02.2010 which clarified "*earlier advertisement of 09.09.2009 by stating that the post of lecturer was to be filled on temporary basis*". It was submitted that the learned Single Judge correctly noticed that at the time the advertisements were issued, there were in fact no recruitment rules that provided for filling of regular or permanent vacancies. Both the Circular of 05.06.2006 and the Cabinet decision of 09.05.2008 were unanimous on one issue, i.e., that the vacancies were to be filled in accordance with the rules which are similar or analogous to the institution. Since the only other comparable institution, Tibbia College which too did not have any rules, the Society's contention that the posts were filled only on temporary basis was justified and the only correct manner of looking at the appointment of the respondent/writ petitioners. Counsel contended that the subsequent framing of the recruitment rules, in

fact, precluded the claim for relief since that specifically prescribed the manner of filling up of the vacancies. Since the petitioners did not fulfil those criteria, they could not have been declared as regular members of the cadre – which would be the inevitable consequence of giving effect to the impugned judgment. Learned counsel also relied upon Constitutional Bench's judgment of the Supreme Court i.e. ***State of Karnataka vs. Uma Devi*** (2006) 4 SCC 1. It was submitted that the rule enunciated by the Supreme Court is that if sanctioned posts are governed by recruitment rules, they continece norms cannot be departed from. In the present case recruitment rules were framed later for Tibbia College and did not mean that rule in ***Uma Devi's*** case (supra) was inapplicable as erroneously held by the Single Judge.

10. The writ petitioners submit that this court should not interfere with the impugned judgment. They relied upon the terms of the circular dated 05.06.2006 to say that the posts were sanctioned on permanent basis. They contest the GNCTD's position that in the absence of recruitment rules, no regular or permanent post could be resorted to. It is submitted that the vacancies in various posts were advertised firstly on 09.09.2009. The society sought to clarify that advertisement later on 19.02.2010 by stating that the recruitment for the post of lecturer would be on temporary basis. However, the effect of both the advertisements clearly was that those appointed as lecturers selected were kept on probation after which they would be continuing in service. They also rely upon the offer of appointment of one of the successful candidates, which clearly stated that the appointment was to be on temporary basis "*but is likely to continue*

till attaining the age of retirement i.e. 65 years or may be decided by the competent authority". It is urged that the subsequent advertisement of 23.11.2011 clarified that some vacancies especially those of lecturer were to be filled on contract basis but even that advertisement stated that other posts were to be treated as temporary but likely to continue till 65 years. It was thus argued that the application of recruitment rules framed later could not have been the basis of denying the benefits of regular appointment once the existence of sanctioned posts were admitted and recourse to a constitutionally sanctioned recruitment process was made by the appointing authority.

ANALYSIS AND CONCLUSION

11. It is clear from the above decision that the Government of NCT of Delhi's grievance is not as to whether the posts advertised were sanctioned vacancies; rather it is whether the procedure for filling up of these post conformed to existing claims/norms. The first contention which the appellant Government of NCT of Delhi urges is that the SANS rules having force of law i.e. rules framed under Article 309 of the Constitution or laws which govern the subject matter, regular recruitment to permanent vacancies is per se impermissible. This court cannot countenance such an argument. In one of its earlier decision the Supreme Court in **B.N. Nagarajan vs. State of Mysore** AIR 1966 SC 1942 ruled as follows:

5. It would be convenient to deal with this argument at this stage. Mr Nambiar contends that the words "shall be as set forth in the rules of recruitment of such service specially made in that behalf" clearly

*show that till the rules are made in that behalf no recruitment can be made to any service. We are unable to accept this contention. First it is not obligatory under proviso to Article 309 to make rules of recruitment, etc., before a service can be constituted or a post created or filled. This is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in rules. Secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services. It was settled by this Court in *Ram Jawava Kapur v. State of Punjab* [(1955) 2 SCR 225] that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these laws. We see nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law. It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule or act.*

12. The reliance placed upon *Uma Devi's* case (supra) in our opinion is inapt and uncalled for. *Uma Devi's* case (supra) pertains to a factual situation where the appointing authorities flout existing norms – be that statutory or executive. *Uma Devi's* case (supra) is premised on an application of Article 14 and insists that where norms exist, they require adherence to and that the executive exigencies is no

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defence for their defiance. However, that is not the situation in this case. There is no context to the following facts:

- (i) That the post to which the respondents/applicants were sanctioned by the Government of NCT of Delhi cabinet and approved by the governing council of society (evident from the circular dated 05.06.2006 and cabinet decision on 09.05.2008);
- (ii) These posts were advertised – on 09.09.2009, 19.02.2010 and 23.11.2011 widely.
- (iii) The writ petitioners and others who were eventually selected and appointed respondents to these advertisements, went through recruitment process and were successful in it.
- (iv) The Selection committee of the society – which is controlled by the Government of NCT of Delhi approved the appointments of these writ petitioners.
- (v) The writ petitioners were appointed and initially kept on probation for a year.

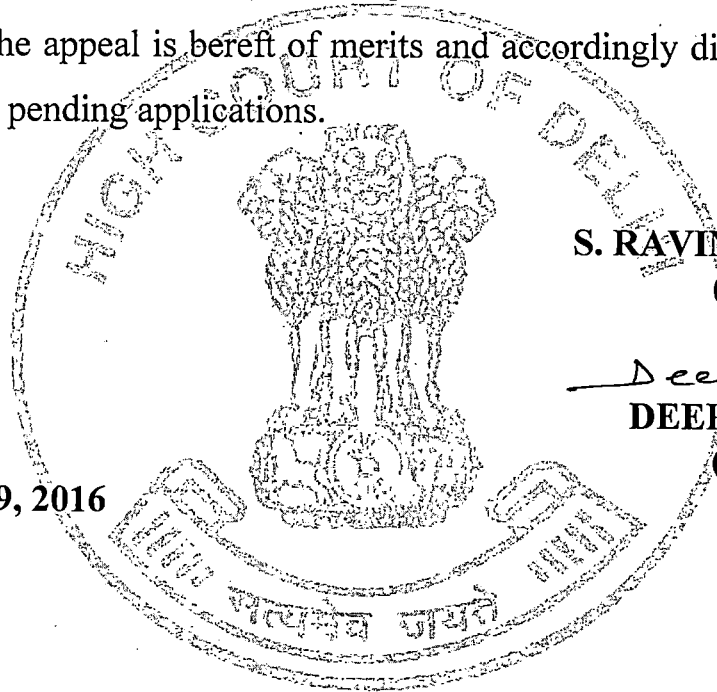
13. Having regard to these circumstances, the contention urged that Tibbia college framed norms and rules that would have by a reference applied to the society in this case and that should be the basis for holding that the respondents' appointments were not regular, in the opinion of this court is not only insubstantial but misconceived; as long as the final appointment is preceded by a fair procedure i.e. existence of vacancies notified and published widely to enable eligible candidates to compete for the post. The candidates appointed in fact were selected by such procedure, the existence or otherwise of norms in other institutions – or rather the framing of norms

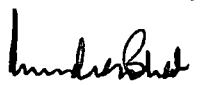
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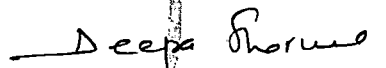
subsequently could not have been the basis for holding that the respondents' appointments were not regular.

14. In these circumstances, having regard to these facts, this court is of the opinion that there is no infirmity in the impugned judgment as sought to be urged by the Government of NCT of Delhi. For the above reason, it is held that the respondents were directly treated as regular appointed employees of the society in the impugned judgment. They are also entitled to all consequential benefits.

15. The appeal is bereft of merits and accordingly dismissed along with the pending applications.




S. RAVINDRA BHAT
(JUDGE)


DEEPA SHARMA
(JUDGE)

MAY 09, 2016

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