

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

+ W.P.(C) No. 5691/2013

% **13th February, 2015**

ROSHAN BHIMRAO PATIL Petitioner
Through: Mr. Nagesh Gajghate, Adv.

versus

THE SECRETARY, DEPARTMENT OF ELECTRONICS AND
INFORMATION TECHNOLOGY & ORS. Respondents
Through: Ms. Seema Sharma, Adv. for R-2 and
3.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition filed under Article 226 of the Constitution of India, petitioner seeks appointment to the post of Accountant with the respondent no. 2/ERNET India on the ground that petitioner's name figures at serial no.3 in the select list, and, the person at serial no.1 in the select list resigned after 39 days and even the second person on the select list has not joined.

2. The law with respect to the entitlement of a person to claim appointment on the basis of his being placed in the select list is well settled

and it has been held by the Supreme Court in its various judgments that the validity of the select list comes to an end when those number of persons in terms of the number of vacancies join and merely because a person who has joined thereafter leaves the services will not mean that persons in the select list who were lower down will be entitled to appointment. A select list exhausts itself when all persons in the same join the posts. A Full Bench of this Court in the case of ***Maninder Kaur Vs. Delhi High Court & Ors. 57(1995) DLT 288*** has held that a select list/panel exhausts itself once the requisite number of candidates have joined their services and I have had an occasion to refer to the Full Bench judgment in the case of ***Udai Krishna Dhaon Vs. Union of India & Ors. 2013 XAD (Delhi) 186*** and the relevant paras of this judgment are paras 5 and 6 and which read as under:-

5. Before proceeding further, at this stage, I would seek to refer to the relevant paras of the Full Bench judgment of this Court in the case of ***Maninder Kaur Vs. Delhi High Court and Ors. (1995) 57 DLT 288 (FB)***, and which paras hold that a select list/panel exhausts itself once the requisite number of people who are asked to join, join their posts. The Full Bench of this Court relied upon various judgments of the Supreme Court and which held that a person in the waiting list has no right to be appointed on a future vacancy (which arises subsequently) once the panel/select list exhausts itself on the necessary number of persons joining. The relevant paras of ***Maninder Kaur's*** case 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 arid 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)IILLJ18SC 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.”

6. I may state that the view of the Full Bench of this Court is in terms of the decisions of the Supreme Court and which judgments have

been referred to and relied upon in subsequent judgments of the Supreme Court including the judgment in the case of ***Rakhi Ray and Ors. Vs. High Court of Delhi and Ors. (2010) 2 SCC 637*** relied upon by the petitioner. The paras of this judgment holding that people in the waiting list have no right to be appointed once the requisite number of people join are paras 8,9, 12, 13 and 24 and which read as under:-

“8. In **Surinder Singh and Ors. v. State of Punjab and Ors.** AIR 1998 SC 18, this Court held as under:

“14.....’9. 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”

16. Exercise of such power has to be tested on the touch- stone of reasonableness.... It is *not a matter of course that the authority can fill up more posts than advertised.*”

9. Similar view has been re-iterated in **Madan Lal v. State of J & K and Ors.** AIR 1995 SC 1088; **Kamlesh Kumar Sharma v. Yogesh Kumar Gupta and Ors.** AIR 1998 SC 1021; **Sri Kant Tripathi v. State of U.P. and Ors.** (2001) 10 SCC 237; **State of J & K v. Sanjeev Kumar and Ors.** (2005) 4 SCC 148; **State of U.P. v. Raj Kumar Sharma and Ors.** (2006) 3 SCC 330; and **Ram Avtar Patwari and Ors. v. State of Haryana and Ors.** (AIR 2007 SC 3242).

12. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles [14](#) and [16\(1\)](#) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, process of selection comes to an end. Waiting list etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of notification/advertisement. The unexhausted select list/waiting list becomes meaningless and cannot be pressed in service any more.

13. In the instant case, as 13 vacancies of the General Category had been advertised and filled up, the selection process so far as the General Category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to record room.

24. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment.”

3. In view of the admitted facts emerging on record that there was only one post and the person at serial no.1 after joining has resigned, and

even though the second person has not joined, the select list is deemed to have been exhausted after joining of the person at serial no.1, and therefore petitioner cannot be granted appointment.

4. Dismissed.

FEBRUARY 13, 2015
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VALMIKI J. MEHTA, J.