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

+ LPA 247/2014

GOVT OF NCT OF DELHI & ANR.

..... Appellants

Through Mr. Sanjoy Ghose, ASC & Ms. Prathistha
Vij, Advocate.

versus

ARUN KUMAR & ORS.

..... Respondents

Through Mr. Sarvesh Bisaria & Mr. Prakash
Chandra Sharma, Advocates for respondent No. 1.
Mr. Arun Birbal, Advocate for respondent No. 2.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE SUNITA GUPTA

ORDER

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31.08.2016

This appeal by the Government of NCT of Delhi has to be dismissed in view of the decision of the coordinate Division Bench dated 9th May, 2016 passed in LPA No. 513/2013 titled *Government of NCT of Delhi versus Dr. Amrish Chanana and Others*. The analysis and conclusion recorded in the said judgment read as under:-

“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 Jawara 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 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 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.”

2. Learned counsel appearing for Rajesh Kumar submits that the said decision should not be followed in the present case for Arun Kumar, the first respondent, had participated in the second selection process and was not selected. We do not find any merit in the said contention for the reason that if the appointment of the first respondent as held in the case of ***Dr. Amrish***

Chanana (supra) is accepted as confirming a right, then the first respondent's participation in the second selection process would not undo his earlier selection. Therefore, the distinction sought to be made by counsel for the second respondent is unacceptable and has to be rejected. In these circumstances, the decision relied by the second respondent in the case of *Madras Institute of Development Studies and Another versus Dr. K. Sivasubramaniyan and Others*, AIR 2015 SC 3643 would not be applicable.

3. Learned counsel for the second respondent had also relied upon *Vijoy Kumar Pandey versus Arvind Kumar Rai and Others*, (2013) 11 SCC 611 in support of his contention that the appeal filed by the Government of NCT of Delhi merits acceptance. We are bound by the decision of the Coordinate Division Bench of this Court and in these circumstances we do not find any merit in the said contention.

4. For the aforesaid reasons, the appeal is dismissed. In the facts of the case, there will be no order as to costs.

SANJIV KHANNA, J.

SUNITA GUPTA, J.

**AUGUST 31, 2016
VKR**