

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

+ **W.P.(C) No.893/2016**

% **20th January, 2017**

ANIL KUMAR SHARMA Petitioner

Through: Ms. Sayongita Yadav, Advocate.

versus

GURU GOBIND SINGH INDRAPRASTHA UNIVERSITY & ORS.

..... Respondents

Through: Mr. Vaibhav Kalra, Advocate for
respondent Nos.1 and 2.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This writ petition which is filed under Article 226 of the Constitution of India is pending in this Court since 3.2.2016. No notice has yet been issued in the writ petition. On the first call before lunch, the counsel who appears for the petitioner sought accommodation on the ground that the main counsel is not available and will be available after lunch. Even on the second call after lunch, once again accommodation is prayed for, and which cannot be granted as it is opposed by the respondent nos. 1 and 2. Earlier orders passed in this writ petition show that repeated adjournments were sought by the petitioner for filing additional documents.

The counsel for the respondents, as per the facts of the case detailed below, is justified in arguing that adjournment should not be granted because the same issues and same reliefs, which were prayed for earlier by the same petitioner by filing a writ petition, were rejected in terms of a detailed judgment passed by this Court on 17.9.2013 in W.P.(C) No.4930/2010 and that in fact even an appeal filed by the petitioner being LPA No.195/2014 was simply withdrawn by seeking to make a representation only, and thereby giving finality to the judgment dated 17.9.2013 in W.P.(C) No.4930/2010.

2. Two issues arise in this writ petition, and which also arose in the first writ petition filed by the petitioner, and which was decided on 17.9.2013. The first issue was with respect to the entitlement of the petitioner placed in the waiting list for appointment and the second issue was of wrongful considering the marks of viva voce in the interview. These aspects were considered and rejected in the earlier judgment dated 17.9.2013, as per paras 3 to 10 of the judgment dated 17.9.2013, and which paras read as under:-

“3. On behalf of the petitioner, two arguments are urged to claim the reliefs as prayed in this writ petition. First argument which is addressed is that if vacancies existed even after the selected number of candidates; six in number in this case; had joined, then such vacancies should be filled in from the persons in the wait list. Second argument which is urged is that there cannot be a selection process whereby final selection is made only on the basis of viva voce marks in the interview and it was necessary that once written test is prescribed as in this case,

marks of the written test must also be considered alongwith the marks in the interview for preparing a select list of the candidates.

4. So far as the first argument of the petitioner is concerned, petitioner places reliance upon last para at page 2 of the impugned order dated 4.12.2009 which shows that 8th person in the select list i.e one Sh. Vikas Gupta got appointment because an employee of the respondent University, namely Sh. Gajendra Saini was relieved for joining JNU. It is argued that if Sh. Vikas Gupta who was 8th person, and therefore not within the first six persons who were selected, was appointed because of his name being found in the wait listed candidates, petitioner therefore being immediately after Sh. Vikas Gupta at No.9 in the list, ought to have been appointed because there exists a vacancy (and which is not disputed by the respondent University) petitioner should be appointed against that vacancy. In support of this argument, reliance is placed upon the judgment of the Supreme Court in the case of **Sandeep Singh Vs. State of Haryana and Anr. (2002) 10 SCC 549**.

5. In my opinion, the argument raised that since petitioner was in the waiting list of candidates (Serial Nos.7 to 9 in the list) and therefore he could have been appointed because a subsequent vacancy arose, is an argument which is not sound. A Full Bench of this Court in the case of **Maninder Kaur Vs. Delhi High Court and Ors. (1995) 57 DLT 288(FB)** has dealt with this issue by referring to various judgments of the Supreme Court. The Full Bench of this Court in the case of **Maninder Kaur (supra)** has held that once the selected candidates join as per the vacancies available, then thereafter, other persons in the wait list cannot claim a right to join merely because a person who had joined, leaves or subsequently there arose a vacancy. This is so stated by the Full Bench in the case of **Maninder Kaur (supra)** in the following words in paras 36 to 39 and which 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 Govern- ment 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) 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 Government 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. The position which emerges on record in the facts of the present case is that admittedly for the post of technical assistant/workshop instructor in the unreserved category there were six vacancies. As per the select list, which was published of nine candidates, petitioner was put at serial No.9. All the first six persons joined. Thereafter, one person Sh. Ajit Partap Singh who was at No.7 in the list resigned and therefore one Sh. Anup Guha was appointed. Thereafter Sh. Vikas Gupta who was at Serial No.8 was appointed as already stated. Therefore, the fact of the matter is that all the six unreserved vacancies were filled in at the outset. Though respondent No.1 appears to prima facie have acted illegally for appointing Sh. Anup Guha and Sh. Gajendra Saini inasmuch as once the requisite number of vacancies were already filled in by the time six persons had joined, thereafter persons in the wait list could not have been appointed, however, that aspect need not detain us because there is no issue to be decided by this Court in terms of prayers in the writ petition for cancellation of the appointment of Sh. Anup Guha and Sh. Gajendra Saini.

7. The only issue before this Court is the claim of the petitioner to be appointed because there existed a vacancy and he was put at No.9 in the select list i.e he was the third person in the wait list candidates. As already stated above, once the requisite number of persons as per the advertised vacancies join, there is no legal right of appointment in a person appearing in the wait list panel. Reliance which is placed upon by the petitioner in the case of *Sandeep Singh (supra)* is misconceived because in the facts in the case of *Sandeep Singh (supra)* the number of posts were fixed only tentatively in the advertisement and it was specifically stated in the advertisement that vacancy position may change. Therefore, Supreme Court directed filling up of the vacancies which existed at the time of selection. In the facts of the present case there were no tentative vacancies and the selection process was for a specified number of vacancies viz six in number for the unreserved candidates. The judgment in the case of *Sandeep Singh (supra)* therefore does not help the petitioner.

8. The second argument which is urged on behalf of the petitioner is that there could not be selection of the candidates only on the ground of marks obtained in the interview i.e viva voce test cannot be a basis for selection of the candidates once a written test was also conducted. Reliance in this regard is placed upon the judgment of the Supreme Court in the case of ***Praveen Singh Vs. State of Punjab and Ors. 2001 (1) S.C. Service Law Judgments 118.***

9. In my opinion, the reliance which is placed upon the judgment in the case of ***Praveen Singh (supra)*** is misconceived because as per the facts in the case of ***Praveen Singh (supra)*** selection process was to be conducted as per specific marks which were fixed for the written test and also the interview. Once specific marks were fixed for the written test and the interview, then, in such circumstances Supreme Court observed that the marks of both the written test and the interview have to be considered for declaring the list of the selected candidates. Supreme Court in this judgment does not state that only on the basis of viva voce persons cannot be selected. In fact, in para 13 of the judgment as per the citation submitted by the petitioner, Supreme Court states that there may be posts in which interview can be a safe method of appointment. The present is not a case where persons have been selected on the basis of interview because there was a written test, and certain number of persons who qualified in the written test were called for the interview. Therefore the written test has been used only as a screening mechanism for deciding the number of persons who would be called for the interview. The judgment in the case of ***Praveen Kumar (supra)*** relied upon by the petitioner does not state that such a process is illegal. Therefore the argument urged on behalf of the petitioner that the selection process in this case is finalized only as per marks in the interview is only correct at the first blush because selection in the present case is a two step process i.e firstly clearing of the written test for being called in for the interview and thereafter only marks of the interview being considered for selection.

10. I also agree with the argument urged on behalf of the respondent University that petitioner having appeared in the selection process with open eyes, but was not selected, and therefore he cannot now turn around and question the selection basis. I agree that the petitioner is estopped from challenging the selection process after having participated in the same but not succeeding in the same. This has so been held by the Supreme Court in the case of ***Chandra Prakash Tiwari & Ors. Vs. Shakuntala Shukla and Ors. (2002) 6 SCC 127.*** (emphasis added)

3. In view of the above, the present writ petition which is more or less word to word, comma by comma, a copy of the earlier writ petition, leave aside the minor changes, is clearly an abuse of process of law and an endeavor to overreach the judicial process which has achieved finality in

terms of the earlier judgment of this Court dated 17.9.2013, and petitioner being unsuccessful in the LPA filed by him which was simply withdrawn for making a representation. There is no fresh cause of action which has accrued in the petitioner for again seeking to file the writ petition for the same causes of actions and reliefs. The mere fact that a representation is filed by the petitioner after the withdrawal of the LPA will not mean that there arises a fresh cause of action because fresh cause of action arises on fresh facts, and there are no fresh facts or fresh issues which require adjudication and which have not been decided as per the judgment dated 17.9.2013.

4. Writ petition is therefore dismissed with costs of Rs.25,000/-, and which costs shall be paid by the petitioner to the Guru Gobind Singh Indraprastha University and which is being represented by respondent nos.1 and 2. Costs shall be paid within six weeks.

JANUARY 20, 2017
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VALMIKI J. MEHTA, J