

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 8th April, 2021

+ W.P.(C) 3420/2021& C.M. No. 10386/2021(for stay)

UNION OF INDIA AND ANR

..... Petitioners

Through: Mr. Bhagvan Swarup Shukla, CGSC
with Mr. Sarvan Kumar, Advocate &
Mr. S.Kumar, Under Secretary.

Versus

DR. BINAY KUMAR BISWAS AND ORS.

..... Respondents

Through: Mr. Rajeev Kumar Yadav, Advocate
for R-1.
Mr. Aseem Mehrotra, Advocate for
R-3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE AMIT BANSAL

RAJIV SAHAI ENDLAW, J.

1. On 16th March, 2021, when this petition first came up before us, the following order was passed:-

“4. The counsel for the writ petitioner has argued, (i) that a Search-cum-Selection Committee was constituted to fill up posts of Executive Director in each of the six All India Institute of Medical Sciences; (ii) that the said Search cum Selection Committee recommended two candidates for each of the AIIMS; (iii) that the respondent No. 1 herein was one of the recommendees for AIIMS at Kalyani, West Bengal; (iv) that the respondent No.3 was one of the recomendees for AIIMS at Raebareli, Uttar Pradesh; (v) that the Appointments Committee of the Cabinet (ACC), instead of appointing respondent No. 3 at AIIMS Raebareli, Uttar Pradesh, for which he was one of the recommendees, appointed him at AIIMS, Kalyani, West Bengal

and did not appoint respondent No. 1 at any of the AIIMS; and, (vi) that on the respondent No. 1 approaching the Central Administrative Tribunal (CAT), Principal Bench, the CAT vide the impugned order dated 1st October, 2020 has held the appointment of respondent No. 3 for AIIMS, Kalyani, West Bengal to be bad and has directed the ACC to consider the matter again, because no reasons were found to have been given by ACC.

5. The counsel for the petitioners states that respondent No. 1 is the only contesting respondent.

6. The counsel for respondent No. 3 however also appears and states that the respondent No. 3 is functioning at Kalyani, West Bengal as Executive Director of AIIMS.

7. We have enquired from the senior counsel appearing for respondent No. 1, whether there is need for the ACC to give reasons for non-selection.

8. Prima facie it appears that once a Select Committee has been constituted and has drawn up a panel from which ACC is to select, ACC is not required to give reasons for selecting a particular person from the panel and not selecting the others; it is felt that when all the recommendees are working at other high posts, giving reasons prejudicial to them for their non-selection may work to their disadvantage.

9. During the hearing, we have also enquired whether it was the mandate of the Select Committee, to make separate recommendations for each of the AIIMS or it was to be left to the ACC to allocate the recommendees from the panel to whichever AIIMS they deemed appropriate.

10. During the hearing, it is also informed that the entire record of CAT has not been placed on record. In fact, the deliberations of ACC are also not on record, though there is some controversy

with the senior counsel for respondent No. 1 contending that the same were not placed before CAT either.

11. Whichsoever counsel desires to place reliance on whichsoever part of the record of the CAT, is at liberty to place the same before the next date.

12. The petitioner to also place before us the mandate of the Search cum Selection Committee. Even if the record of deliberations of ACC have not been placed before the CAT, the same be also placed before this Court.

13. List on 8th April, 2021.”

2. The counsels for the petitioners have brought to the Court, in a sealed cover, a file and have handed over the same to the Court Master. The Court Master has opened the seal and the File has been perused.

3. The counsels have also taken us through (i) Office Memorandum (OM) dated 25th May, 2009 of the Department of Personnel and Training (DOPT) on the subject of “setting up of Search Committees/Search-cum-Selection Committees”; (ii) OM dated 30th July, 2007 of the DOPT, also on the subject of “setting up of Search Committees/Search-cum-Selection Committees”; (iii) the counter affidavit filed by the petitioners before the Central Administrative Tribunal (CAT) and particularly to paragraphs 3 to 15 of the brief facts of the case as stated therein; (iv) the “advertisement for the post of Executive Director each in AIIMS at Raebareli (Uttar Pradesh), Gorakhpur (Uttar Pradesh), Bathinda (Punjab), Bibinagar (Telangana), Deoghar (Jharkhand) and Kalyani (West Bengal)”, in pursuance whereof applications for the subject appointments including by respondent nos. 1 and 3 were made; (iv) Minutes of the Meeting of the sub-Committee of the

Search-cum-Selection Committee held on 17th June, 2019, 18th July, 2019, 30th July, 2019 and 2nd August, 2019, to screen the applications for the candidates to be considered for interview/personal talk for the aforesaid posts including the annexures thereto; and, (v) the format in which the applications for appointment to the aforesaid posts were invited.

4. On perusal of the aforesaid documents we are unable to find any mandate to the Search-cum-Selection Committee constituted in the present case, to prepare a separate panel for appointment of Executive Director to each of the aforesaid AIIMS. The advertisement invited applications for the post of Executive Director in each of the six AIIMS, with the same qualification, upper age limit, pay and allowances and other terms and conditions therefor. The advertisement required eligible candidates to apply for the post i.e. for the post of Executive Director, without requiring them to specify in the application, the AIIMS for which they were applying and without requiring them to, if desirous of applying for more than one AIIMS, to file multiple applications. The advertisement further provided that “The Executive Director will act as the Chief Executive Officer (CEO) of the respective Institute”. The proforma for making the application required the applicant to specify “Choice of AIIMS (In order of preference)”. It is thus clear and neither counsel has controverted, that the Search-cum-Selection Committee was to prepare a panel, from which ACC could appoint any candidate to any of the AIIMS. The action of the Search-cum-Selection Committee, in preparing a separate panel for each of the AIIMS, was thus beyond their mandate and has to be ignored and the panel prepared by them has to be considered as panel from which either candidate could be

appointed to any of the AIIMS, irrespective of the AIIMS against which the Search-cum-Selection Committee had put his / her name.

5. The counsel for the respondent no.1 has argued, that from the advertisement aforesaid mentioning the word “each”, it is evident that separate applications were invited for appointment to each of the AIIMS and has further argued that each AIIMS is a separate legal entity, having a separate governing body.

6. We are unable to agree. As aforesaid, the proforma in which the advertisement invited applications, did not prescribe separate application for each AIIMS and on the contrary required the applicants to specify only their choice of AIIMS. The word “each” in the advertisement only indicated that the advertisement was for the post of Executive Director in each of the AIIMS. Also, merely because each AIIMS is a separate legal entity having separate Governing Body, did not prevent recruitment in the aforesaid manner, especially when for the same post, having same qualifications, in each of the AIIMS. From the applicants being required to, in the application, state their choice of AIIMS in order of preference, it is also evident that the candidates, even if not found eligible for the first preference, could be appointed for the subsequent preferences.

7. Once it is so, the premise on which CAT, in the impugned order, has set aside the appointment of respondent No.3 to AIIMS, Kalyani, disappears. Once the name of the respondent no.3 was on the panel prepared by the Search-cum-Selection Committee, ACC, notwithstanding the Search-cum-Selection Committee having empanelled respondent no.3 for AIIMS, Raebareli, was within its right to appoint respondent no.3 to any other AIIMS, subject of course to being willing therefor. It is not as if the

respondent no.3 has been appointed by the ACC, without his name being on the panel prepared by the Search-cum-Selection Committee.

8. As far as the reasoning of CAT, of the ACC having not given any reasons for not appointing respondent No.1, who was first in the panel recommended for AIIMS, Kalyani, to the said AIIMS and for having appointed the respondent No.3 who was recommended for AIIMS, Raebareli to AIIMS, Kalyani is concerned, a perusal of the note which was put up by the Cabinet Secretary to the ACC for consideration of ACC shows that, the respondent No.1, recommended for AIIMS, Kalyani, was then employed with the Employees State Insurance Corporation (ESIC); ESIC though had given No Objection Certificate (NOC) to respondent No.1 for applying for the post of Director in AIIMS, for which applications were invited on an earlier occasion, had not furnished the fresh NOC as had been sought, in spite of the matter having been taken up with ESIC. In view of the said position accepted by the ACC, the respondent no.1 was not appointed to any of the AIIMS.

9. The counsel for the respondent No.1 has argued that there was no basis for the aforesaid reason. Attention is invited to page 71 of the file, being the letter dated 15th March, 2019 of the respondent no.1 to ESIC, requesting ESIC to forward the application of the respondent no.1 for the post of Executive Director, AIIMS, Kalyani, to the Ministry of Health, Government of India with the required documents. Attention is also invited to page 116 of the file, being a letter dated 20th November, 2019 of ESIC, New Delhi to ESIC, Kolkata, with reference to letter dated 14th November, 2019 of the respondent no.1 to ESIC, New Delhi, communicating that the respondent no.1 had been granted permission to apply for the post of

Executive Director, AIIMS, Kalyani. It is thus argued that the reason given by the Cabinet Secretary and accepted by the ACC is wrong. Reference is made to *Sunil Alag Vs. Union of India* (2015) 221 DLT 199 (DB) and *Waris Rashid Kidwai Vs. Union of India* 1998 SCC OnLine Del 195 (DB), to contend that judicial review extends over decisions of ACC.

10. The counsel for the petitioners controverts. It is argued that the application of the respondent no.1 for the post of Executive Director, AIIMS, Kalyani was required to be forwarded through official channels, as the respondent no.1 also had requested ESIC, with which he was then / now employed, vide his letter dated 15th March, 2019 at page 71 aforesaid. It is contented that ESIC never forwarded the application along with NOC till the date of consideration by ACC, inspite of follow up and it is for this reason that the candidature of the respondent no.1 was not considered inspite of being on the panel prepared by the Search-cum-Selection Committee. It is argued that the letter dated 20th November, 2019 at page 116 aforesaid is merely from ESIC, New Delhi to ESIC, Kolkata and is not addressed to the Ministry of Health, Government of India and the petitioners could not have acted thereupon.

11. Needless to state, the counsel for the respondent no.1 opposes vehemently.

12. The fact however remains that there is nothing on record to show that the application of the respondent no.1 for the post of Executive Director, AIIMS, Kalyani was forwarded by ESIC as was required to be done. CAT, in the impugned order has not dealt with the said aspect and thus its reasoning, that there were no reasons for the ACC to act as it did, cannot be sustained. The reasons aforesaid are evident on record.

13. Else, the judgments relied upon by the counsel for the respondent no.1 himself hold, (a) there can be no debate about the Executive Government decision on the suitability – on the merit of an officer, while deciding whether to position him / her in a particular post; the wisdom of the Executive cannot be gone into; (b) however what is open to review is the process of decision making; (c) ACC can differ and refuse to appoint an officer to a post, despite recommendation by the Selection Committee; however there has to be a justifiable reason therefor; and, (d) the records should manifest that there was due application of mind, which preceded the decision and that such decision was impelled by reasons which were germane or relevant to the subject matter; the reasons may not necessarily be elaborately spelt out.

14. We are thus satisfied that there is no irregularity in appointment of respondent no.3 as Executive Director, AIIMS, Kalyani and in not appointing respondent no.1 to the said post.

15. We may record that the controversy before CAT also extended to, the respondent no.3 having been appointed despite not finding mention in the list of eligible candidates prepared by the Screening Sub-Committee of Search-cum-Selection Committee, to be called for interview and having been appointed without even being interviewed by the Search-cum-Selection Committee. However there are detailed pleadings and documents in that regard and on the basis whereof we have satisfied ourselves of the fallacy of the aforesaid plea of the respondent no.1 before CAT. The documents on record show that the respondent no.3 had also participated in the selection process earlier undertaken for the post of Director, AIIMS and which is higher to that of Executive Director, AIIMS, the Search-cum-

Selection Committee then constituted had empanelled the respondent no.3 for interview. On the respondent no.3 being not included in the list of eligible candidates for interview for the post of Executive Director, the respondent no.3 represented and which representation found favour and respondent no.3 included in the list of eligible candidates for interview. We may record that similarly others also, on their representations against non-inclusion in list of eligible candidates for interview finding favour, were interviewed and one of them at least also appointed; no grievance was made by the respondent no.1 with respect to them.

16. We may also record that the respondent no.3, prior to his appointment as Executive Director, AIIMS, Kalyani, i.e. at the time when the applications for the said post were invited, was Professor and Head (Physiology) at AIIMS, Patna.

17. The petition is thus allowed. The impugned order dated 1st October, 2020 is set aside and the OA No. 799/2020 preferred by the respondent no.1 is dismissed.

18. The counsel for the petitioner may collect the file handed over in Court today, from the residence of one of us (Rajiv Sahai Endlaw, J.) after the order has been corrected and released.

RAJIV SAHAI ENDLAW, J.

AMIT BANSAL, J.

APRIL 08, 2021

ak/at..

(Corrected & released on 15th April, 2021)