

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

+ **W.P.(C) No.6589/ 2013**

% **21st October, 2013**

JUSTICE UDAI KRISHNA DHAON (RETD.) Petitioner
Through: Mr. Shankar Raju, Advocate.

Versus

UNION OF INDIA AND ORS. ... Respondents
Through: Mr. Sumeet Pushkarna, CGSC with
Ms. Sana, Advocate for UOI.

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, the petitioner who is a retired Judge of the Allahabad High Court (who was also subsequently appointed as Chairman of the Railway Claims Tribunal), seeks the relief for being appointed as a Member (Judicial) of National Consumer Disputes Redressal Commission (NCDRC) on the ground that his name appears at serial no.5 in the select list of candidates who were to be appointed.

2. I may at the outset itself note that even as per para 2.8 of the writ petition, the select list of five candidates of which petitioner was placed
W.P.(C) No.6589/2013 *Page 1 of 16*

at serial no.5 was with respect to two vacancies of Member (Judicial) in NCDRC pursuant to the notification dated 21.7.2011.

3. The case of the petitioner is that out of five candidates in the select list, the first two candidates, namely, Justice J. M. Malik (Retd.) and Justice K.S. Chaudhary (Retd.) joined. As per the petitioner, against a subsequent vacancy, Justice Ajit Bharihoke (a retired Judge of this Court) was asked to join inasmuch as the third person in the select list did not accept the offer of appointment. Petitioner claims that validity of the panel is one year in terms of the subject notification dated 21.7.2011 and para 8 whereof categorically states that the vacancy arising during the validity period of the panel may be filled from among the panel. This para 8 reads as under:-

“8. The panel of appointment recommended by the Selection Committee will be valid for a period of one year from the date of the final meeting of the Committee. Any vacancy arising during the validity period may be filled from among the panel.”

4. The select list in this case was prepared as per the selection committee meeting held on 13.2.2012 and petitioner claims that this panel was operative till 13.2.2013 by virtue of aforesaid clause 8 and in this period Justice R.C. Jain (Retd.) who was a Member (Judicial) in NCDRC retired in December, 2012 and therefore petitioner has an entitlement to be appointed.

Petitioner claims that petitioner was asked for his consent for appointment
W.P.(C) No.6589/2013

by the letter dated 24.8.2012 after the Appointment Committee of the Cabinet (ACC) recommended his name, and the petitioner gave his consent for appointment vide letter dated 27.8.2012. Petitioner impugns the communication issued to him on 10.7.2013 stating that the petitioner cannot be appointed as a Member (Judicial) in NCDRC as a decision has been taken to advertise the vacancy which has arisen on the term of Justice R.C. Jain (Retd.) coming to an end.

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 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)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.”

7. On behalf of the petitioner, the following arguments are urged before this Court:-

(i) Petitioner was in the select list of candidates whose validity was one year in terms of para 8 of the notification dated 21.7.2011, and since within one year of the panel being created as stated in the said para 8 of the notification, the term of appointment of Justice R.C. Jain (Retd.) in NCDRC came to an end, consequently the petitioner was entitled to be appointed against that vacancy.

(ii) The aforesaid argument is buttressed by the argument that petitioner was given an offer of appointment in terms of the letter dated 24.8.2012 and which the petitioner accepted by his letter dated 27.8.2012. Petitioner

claims a conclusive right to be appointed in terms of the offer of appointment which he accepted more so because according to the petitioner his name was approved by ACC and the impugned communication gives no reason for declining the appointment.

(iii) Petitioner claims a right to be appointed on account of his name existing in the panel in terms of the judgment of the Division Bench of this Court in the case of *Bijender Singh Vs. Govt. of NCT 2012 (190) DLT 340*.

8(i) On behalf of the petitioner, in support of the arguments reliance for the purpose of point no.(i), is placed upon paragraph 7 of the Supreme Court judgment in the case of *Rakhi Ray and Ors. (supra)* and which reads as under:-

“7. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article [14](#) read with Article [16\(1\)](#) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide **Union of India and Ors. v. Ishwar Singh Khatri and Ors.** (1992) Supp 3 SCC 84; **Gujarat State Deputy Executive Engineers' Association v. State of**

Gujarat and Ors. (1994) Supp 2 SCC 591; **State of Bihar and Ors. v. The Secretariat Assistant S.E. Union 1986 and Ors.** AIR 1994 SC 736; **Prem Singh and Ors. v. Haryana State Electricity Board and Ors.** (1996) 4 SCC 319; and **Ashok Kumar and Ors. v. Chairman, Banking Service Recruitment Board and Ors.** AIR 1996 SC 976.”

(ii) On the basis of aforesaid para which is relied upon it is contended that there is an exception to the normal rule of the select list having exhausted once there are rare and exceptional circumstances and an emergent situation existing and which is argued to exist in the present case.

9(i) In support of the argument of reasons having not been given for declining the appointment, reliance is placed upon *Union of India and Anr. Vs. Bhaskarendu Datta Majumdar (2010) 9 SCC 38.*

(ii) With respect to entitlement to be appointed on account of a vacancy existing which can be offered to a selected candidate, reliance is placed upon *R.S. Mittal Vs. Union of India 1995 Supp (2) SCC 230.*

10. In my opinion, none of the arguments urged on behalf of the petitioner carry any merit and the writ petition being without merit is dismissed for the reasons given hereinafter.

11. I have already reproduced the relevant paras of the Full Bench judgment of this Court and which makes it categorically clear that a select list exhausts itself on the necessary persons joining. In the present case,

admittedly the advertisement issued was with respect to two vacancies and two persons joined. In fact, the third member, namely Justice Ajit Bharihoke (Retd.) also joined, however, in this regard I do not say one way or the other inasmuch as the appointment of Justice Ajit Bharihoke (Retd.) is not challenged before me and the stand of the respondents in this regard is not known. Therefore, once the vacancies stood filled up from the select list, merely because subsequently a vacancy arises, the same cannot be filled up from the wait listed candidates. In my opinion, it makes no difference even if an offer was made to the candidates in the select list inasmuch as that offer and its acceptance thereof would have no legal basis in view of the consistent ratio of the Supreme Court in its judgments that wait listed candidates cannot claim appointments once the requisite number of persons joined the posts. In fact there was no contract of appointment as the petitioner was only asked for his consent and no appointment letter was issued. Also, the judgment in the case of *R.S. Mittal (supra)* relied on behalf of the petitioner can have no application because that judgment dealt with the situation where the denial of appointment was with respect to a selected candidate for the vacancy against which that select candidate was to be appointed. Also, the judgment in the case of *Bhaskarendu Datta Majumdar (supra)* relied upon by the petitioner again has no application

because that judgment dealt with the aspect of ACC differing with the recommendation/advice given by Public Enterprises Selection Board (PESB) and in that context it was observed that when ACC differs with the recommendations of PESB, then, reasons must be given by the ACC. In the present case, the issue is not of ACC differing with the recommendations of PESB and in fact ACC in the present case had originally approved the selection of the petitioner, albeit which is bound to be in terms of the petitioner having a legal right to be appointed against an advertised vacancy.

12. That takes us to the argument urged on behalf of the petitioner by referring to para 7 of the judgment in the case of *Rakhi Ray and Ors. (supra)*. No doubt, there are observations in para 7 in the case of *Rakhi Ray and Ors. (supra)* that in rare and exceptional circumstances, and in an emergent situation, the normal/general rule can be deviated from which provides that select list exhausts itself after the necessary vacancies stand filled in, however, this argument cannot help the petitioner for two reasons. Firstly whether there exists a rare and exceptional circumstance or an emergent situation would not be for the petitioner to decide but for the appointing authority to decide. Secondly, I do not find that there is any rare and exceptional circumstance or an emergent situation in the present case merely on account of the fact that the petitioner was allegedly given an offer

of appointment which he accepted (in fact it was only for a consent) and a vacancy has subsequently arisen on account of the term of Justice R.C. Jain (Retd.) as a Member (Judicial) in NCDRC coming to an end. These are normal circumstances and the same cannot be treated as a rare and exceptional circumstance or an emergent situation as is sought to be argued on behalf of the petitioner.

13. No doubt, para 8 of the notification dated 21.7.2011 states the validity of the panel to be one year and vacancy arising during that period to be filled in from among the panel, however, surely the letter issued by the Government department cannot over write a settled law of the land as consistently laid down by the Supreme Court that a select list exhausts itself once the necessary appointments are made, and persons who are thereafter in the waiting list can claim no right to be appointed against future vacancies. The notification/letter dated 21.7.2011 being against the settled legal position cannot create any vested right in favour of the petitioner and therefore the Government was fully justified to direct that advertisement will be issued for the vacancy which has arisen on account of term of Justice R.C. Jain (Retd.) as a Member (Judicial) coming to an end. At the cost of repetition, it may be stated that merely because ACC has declined the proposal as stated in the letter dated 10.7.2013 addressed to the petitioner

cannot mean that ACC has acted illegally. As already stated above, the wait listed persons have no legal right to be appointed on vacancies being filled in.

14. Reliance placed upon by the petitioner in the case of *Bijender Singh (supra)* also does not help him because that judgment nowhere states that although the Supreme Court holds the select list to stand exhausted on the requisite number of persons joining, yet in terms of a letter or notification or administrative action there would be an entitlement of a wait listed candidate to get appointed against a future vacancy. I do not think that Division Bench holds, and as is argued on behalf of the petitioner that the Division Bench has laid down a ratio which is against the consistent view of the Supreme Court that the wait listed person has no right to be appointed against a future vacancy.

15. In view of the above, I do not find any illegality in the action of the Government in directing that post of Member (Judicial) in NCDRC which has fallen vacant on the term of Justice R.C. Jain (Retd.) coming to an end will be filled up in terms of the fresh selection process and on vacancy being advertised. Of course, the petitioner if he thinks fit, can always in accordance with law apply for appointment with respect to the said advertised vacancy.

16. Writ petition is accordingly dismissed, leaving the parties to bear their own costs.

OCTOBER 21, 2013
Ne

VALMIKI J. MEHTA, J.