

IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (S) No. 1395 of 2018
With
I.A. No. 3724 of 2020
With
I.A. No. 4061 of 2020

Prof. Dr. Tulsi Mahto, (Head of Department of Forensic Medicine and Toxicology, RIMS, Ranchi) son of late Khiru Mahto, aged about 64 years, Resident of Quarter No. 03, Doctors Colony, RIMS Campus, Bariatu, P.O. & P.S. Bariatu, District- Ranchi

... **Petitioner**

-Versus-

1. State of Jharkhand through the Chief Secretary-cum-ex Officio Chairman, RIMS, Health, Medical Education and Family Welfare Department, Govt. of Jharkhand, Nepal House, Doranda, P.O. & P.S. Doranda, District- Ranchi
2. Additional Chief Secretary, Health, Medical Education and Family Welfare Department, Govt. of Jharkhand, Nepal House, Doranda, P.O. & P.S. Doranda, District- Ranchi
3. Joint Secretary to Health, Medical Education and Family Welfare Department, Govt. of Jharkhand, Nepal House, Doranda, P.O. & P.S. Doranda, District- Ranchi

... **Respondents**

CORAM: HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioner	: Mr. Rajendra Krishna, Advocate
For the Respondent-RIMS	: Dr. Ashok Kumar Singh, Advocate
For the Respondent-State	: Mrs. Darshana Poddar Mishra, A.A.G.-I

05/20.07.2020. **I.A. No. 3724 of 2020 With I.A. No. 4061 of 2020**

Heard Mr. Rajendra Krishna, learned counsel for the petitioner, Dr. Ashok Kumar Singh, learned counsel for the respondent-RIMS and Mrs. Darshana Poddar Mishra, learned counsel for the respondent-State.

This writ petition has been heard through Video Conferencing in view of the guidelines of the High Court taking into account the situation arising due to COVID-19 pandemic. None of the parties have complained about any technical snag of audio-video and with their consent this matter has been heard on merit.

Mr. Rajendra Krishna, learned counsel for the petitioner submits that he is not pressing both the interlocutory applications.

Accordingly, I.A. No. 3724 of 2020 and I.A. No. 4061 of 2020 stand dismissed as not pressed.

W.P. (S) No. 1395 of 2018

The petitioner has preferred this writ petition for direction to the respondents to complete the process for appointment in terms of the advertisement dated 19.09.2017 on the post of the Director, RIMS. The further prayer is made for direction to the respondents to appoint the petitioner on the post of Director, RIMS as he was at waiting list no.1. Pursuant to Advertisement no.1/2018, the same was challenged by I.A., which was allowed and amended writ petition was filed.

Mr. Rajendra Krishna, learned counsel for the petitioner draws attention of this Court to the advertisement at page 37 of the writ petition and submits that in view of this advertisement, the petitioner and others have applied for the post of Director, RIMS. By way of referring Annexure-3 to the writ petition, he submits that the name of the petitioner was at waiting list no.1. He further submits that No Objection Certificate has been given to Dr. Dinesh Kumar Singh, the erstwhile Director of RIMS, by Banaras Hindu University on 29.01.2018. He further submits that in the meantime, earlier advertisement was not given effect to and fresh advertisement was there, which has been brought on record at Annexure-8, page 53 of the writ petition. He also submits that cause of action is still survive as the issue in question has not been decided as yet. He further submits that this writ petition can be disposed of in absence of Dr. Dinesh Kumar Singh, who was earlier the Director of RIMS, as now the case shifts to the State Government.

Dr. Ashok Kumar Singh, learned counsel for the respondent-RIMS by way of referring Clause 4 of the advertisement at page 37 of the writ petition submits that in view of Clause 4 of the advertisement, only the Government servant was required to obtain N.O.C. from their respective organization. He further submits that the person who was not in Government service, there was no requirement of obtaining any N.O.C. The Governing Council of RIMS has taken into consideration the N.O.C. and subsequently Dr. Dinesh Kumar Singh was appointed. He further submits that during the pendency of this writ petition, Dr. Dinesh Kumar Singh has already resigned from the post of the Director, RIMS and in absence of Dr. Dinesh Kumar Singh, this writ petition has become infructuous. Dr. Ashok Kumar Singh, learned counsel for the respondent-RIMS refers the judgment delivered by the Hon'ble Supreme Court in the case of ***Dinesh Kumar Kashyap v. South East Central Railway***, reported in **(2019) 12 SCC 798** and submits that mere inclusion of a candidate's name in the selection list gave him no right and if there was no right, there could be no occasion to maintain the writ petition for enforcement of a non-existing right.

Paragraphs 34 and 38 of the said judgment are quoted herein below:

"34. Still further, in exercise of power of Judicial Review, this Court is not to substitute the decision of the Railways and to direct candidates in the waiting list to be appointed. In three Judge Bench judgment reported as Kali Dass Batish case (supra), it has been held that mere inclusion of a candidate's name in the selection list gave him no right, and if there was no right, there could be no occasion to maintain a writ petition for enforcement of a non-existing right. It has been also held that however vide the power of judicial review under Article 226 or 32 of the Constitution, there is self-recognised limit to exercise such power. The Court held as under: -

"15. In this matter, the approach adopted by the Jharkhand High Court commends itself to us. The Jharkhand High Court approached the matter on the principle that judicial review is not available in such a matter. The Jharkhand High Court also rightly pointed out that mere inclusion of a candidate's name in the selection list gave him no right, and if there was no right, there could be no occasion to maintain a writ petition for enforcement of a non-existing right.

*

*

*

17. In *K. Ashok Reddy v. Union of India*, this Court indicated that however wide the power of judicial review under Article 226 or 32 there is a recognised limit, albeit self-recognised, to the exercise of such power. This Court reiterated a passage from *Craig's Administrative Law* (2nd Edn., p. 291), vide SCC p. 315, para 21, as under:

"The traditional position was that the courts would control the existence and extent of prerogative power, but not the manner of exercise thereof. ... The traditional position has however now been modified by the decision in GCHQ case [Council of Civil Service Unions v. Minister for the Civil Service, 1985 AC 374 : (1984) 3 All ER 935 : (1984) 3 WLR 1174 (HL)]. Their Lordships emphasised that the reviewability of discretionary power should be dependent upon the subject-matter thereof, and not whether its source was statute or the prerogative. Certain exercises of prerogative power would, because of their subject-matter, be less justiciable, with Lord Roskill compiling the broadest list of such forbidden territory..."

The observations of Lord Roskill, referred to above, are from Council of Civil Service Unions v. Minister for the Civil Service (GCHQ case) as under: (All ER p.956d-e)

'But I do not think that that right of challenge can be unqualified. It must, I think, depend on the subject-matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject-matter is such as not to be amenable to the judicial process.'

18. Finally, this Court emphasised judicial restraint by citing with approval a passage in *de Smith's Judicial Review of Administrative Action* (vide *K. Ashok Reddy case* SCC p. 316, para 23) as under:

"Judicial self-restraint was still more marked in cases where attempts were made to impugn the exercise of discretionary powers by alleging abuse of the discretion itself rather than alleging non-existence of the state of affairs on which the validity of its exercise was predicated. Quite properly, the courts were slow to read implied limitations into grants of wide discretionary powers which might have to be exercised on the basis of broad considerations of national policy."

Based on this reasoning, it was acknowledged that the transfer of a Judge of the High Court based on the recommendation of the Chief Justice of India would be immune from judicial review as there is "an inbuilt check against arbitrariness and bias indicating absence of need for judicial review on those grounds. This is how the area of justiciability is reduced.... [Ibid., para 24] "

19. We, respectfully, reiterate these observations, and expect them to be kept in mind by all courts in this country invested with the power of judicial review."

xxx

xxx

xxx

38. Thus, in exercise of power of judicial review, I do not find any

reason to interfere in the decision-making process of the Railways, so as not to appoint the appellants against Group D posts advertised on 15.12.2010."

Dr. Ashok Kumar Singh, learned counsel for the respondent-RIMS also refers to the judgment delivered by the Hon'ble Supreme Court in the case of ***Kerala SRTC v. Akhilesh V.S.***, reported in **(2019) 14 SCC 96** and submits that the law stands settled that mere existence of vacancies or empanelment does not create any indefeasible right to appointment.

Paragraphs 4 and 5 of the said judgment are quoted herein below:

"4. We have heard the counsel for the parties and opine that the order of the High Court is unsustainable. The cadre strength has rightly been held not to be a relevant consideration. The High Court has erred in issuance of mandamus to fill up a total of 97 vacancies, including those arising subsequently but during the life of the rank list. Vacancies which may have arisen subsequently could not be clubbed with the earlier requisition and necessarily had to be part of another selection process. The law stands settled that mere existence of vacancies or empanelment does not create any indefeasible right to appointment. The employer also has the discretion not to fill up all requisitioned vacancies, but which has to be for valid and germane reasons not afflicted by arbitrariness. The appellant contends a financial crunch along with a skewed staff/bus ratio which are definitely valid and genuine grounds for not making further appointments. The Court cannot substitute its views over that of the appellant, much less issue a mandamus imposing obligations on the appellant Corporation which it is unable to meet.

5. Suffice it to observe from Kulwinder Pal Singh v. State of Punjab: 12. In Manoj Manu v. Union of India, it was held that (at SCC p. 176, para 10) merely because the name of a candidate finds place in the select list, it would not give the candidate an indefeasible right to get an appointment as well. It is always open to the Government not to fill up the vacancies, however such decision should not be arbitrary or unreasonable. Once the decision is found to be based on some valid reason, the Court would not issue any mandamus to the Government to fill up the vacancies."

Mrs. Darshana Poddar Mishra, learned counsel for the respondent-State adopts the argument advanced by Dr. Ashok Kumar Singh as *mutatis mutandis*.

This Court has perused the advertisements and appointment of Dr. Dinesh Kumar Singh. It transpires that Dr. Dinesh Kumar Singh has already left the organization. Now fresh advertisement is there, which has been brought on

record by way of I.A. No.3724 of 2020 dated 27.06.2020. The instant writ petition has been filed in the year 2018 and in the meantime much water has flown and subsequent advertisement is there. This Court comes to a conclusion that this writ petition has become infructuous. The arguments advanced by Mr. Rajendra Krishna, learned counsel for the petitioner is only academic in nature, which can be decided in another appropriate writ petition.

Accordingly, this writ petition stands dismissed.

(Sanjay Kumar Dwivedi, J.)

Ajay/