

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

Date of decision: 9th January, 2012

+ **LPA 360/2004**

% **DR. DILLIP KUMAR PARIDA** **Appellant**
Through: Mr. Devendra Singh & Mr.
Ghanshyam, Advs.

Versus

A.I.I.M.S. & ORS. **Respondents**
Through: Mr. Sumit Babbar & Sheikh Faraz
Iqbal, Advs. for AIIMS.
Mr. Dinesh Diwedi, Sr. Adv. with
Ms. Geetanjali Mohan & Mr. Ketan
Madan, Advs. for R-5.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The respondent All India Institute of Medical Sciences (AIIMS) had on 26.03.2002 invited applications to fill up 164 posts of Assistant Professors in various disciplines. The appellant herein, then working as a Research Associate in the Department of Radiotherapy, AIIMS, had applied for the said post in the discipline of Radiotherapy. He was however not selected. W.P.(C) No.4107/2003 was filed by him impugning the selection to the said post of Dr. Satyajit Pradhan, then working as Senior Lecturer in the Department of Radiotherapy, Institute of Medical Sciences, Banaras Hindu University, and placement of Dr. Sushmita Pathy, then also working

as Senior Research Associate in Department of Radiotherapy, AIIMS, at serial No.1 in the waiting list for the said post, ahead of the appellant who was placed at serial No.2 in the waiting list. The appellant, in the said writ petition also sought a direction for his own appointment to the said post. The said writ petition filed by the appellant along with another writ petition being W.P.(C) No.3834/2003 preferred by one Dr. Sudhir Kumar Majhi seeking appointment in response to the same advertisement to the post of Assistant Professor (ENT), were dismissed vide common judgment dated 12.02.2004.

2. Aggrieved therefrom, the present appeal was filed. The said appeal was dismissed vide judgment dated 06.02.2006. The appellant however applied for review and which review was allowed vide order dated 06.02.2009; axiomatically the judgment dated 06.02.2006 dismissing the appeal was recalled and the appeal posted for disposal on merits.

3. It appears that Dr. Satyajit Pradhan who was selected for the said post did not join and Dr. S. Pathy who was placed at serial No.1 in the waiting list was appointed to the said post. The said Dr. S. Pathy filed SLP (C) No.5317/2009, converted into Civil Appeal No.10353/2010, to the Supreme Court against the order allowing the review petition filed by the appellant. The said appeal was disposed of vide order dated 08.12.2010 clarifying that this appeal will be decided not only in the light of the Resolution dated 15.01.1997 of the Governing Body of AIIMS but also considering the pleas as to the validity of the said Resolution and the applicability thereof to the case in hand.

4. We have heard the counsel for the appellant, the senior counsel for Dr. S. Pathy and the counsel for AIIMS.

5. The senior counsel for the respondent Dr. S. Pathy at the outset has contended that in the intervening nearly nine years since the appointment under challenge, not only is the appellant now occupying the post of Professor in Guwahati but the respondent Dr. S. Pathy has also been promoted and is presently working as Associate Professor and due for promotion as Additional Professor. He has thus contended that neither would the appellant be now interested in joining to a junior post of Assistant Professor nor Dr. S. Pathy can be dislocated after such a long lapse of time. According to him, the present appeal has become infructuous for the said reason alone.

6. The counsel for the appellant however contends that the appellant for the sake of being in Delhi in the premium institute viz. AIIMS is still willing to forego the senior post occupied by him in the Institute at Guwahati and willing to join AIIMS as Assistant Professor.

7. Though notwithstanding the willingness shown by appellant, we find considerable merit in the contention of the senior counsel for Dr. S. Pathy of the present appeal having become infructuous and of the infeasibility and impracticability in now after lapse of nine years setting aside the appointment of Dr. S. Pathy and of directing appointment of the appellant, even if find force in the appeal. It cannot be lost sight of that Dr. S. Pathy after such long lapse of time, even if found to have been wrongly rated ahead of the appellant, cannot now after nine years be removed, having

missed out the other opportunities in the interregnum. The work / contribution made by Dr. S. Pathy in the last nine years also cannot be disregarded. We are therefore of the view that this appeal against the judgment in a proceeding filed under discretionary jurisdiction of this Court is liable to be dismissed on this ground alone.

8. The Supreme Court in *Jagtar Singh Vs. Director, CBI* 1993 SUPP. (3) SCC 49 even though finding refusal of appointment to be erroneous held that keeping in view the time lapse it would not be in the interest of justice to issue a direction to that effect. Similarly in *V.J. Thomas Vs. UOI* 1985 (Supp.) SCC 7, it was observed that even in service jurisprudence the clock of history sometimes cannot be put back and even if an error in appointment / promotion is found, no relief can be granted. A Division Bench of this Court also in judgment dated 19.08.2008 in *Ashok Kumar Pandey Vs. UOI* MANU/DE/1139/2008 held that after long delay the process of selection cannot be and ought not to be reopened in the interest of proper functioning and morale of the services. A reference in this regard may also be made to *Malcom Lawrence Cecil D'Souza Vs. UOI* 1975 (Supp.) SCC 409, though in the context of promotion holding that re-opening after lapse of many years is likely to result in complications and difficulties and to *UOI Vs. Kishorilal Bablani* (1999) 1 SCC 729 laying down that after more than 10 years (in that case) the process of selection and notification of vacancies cannot be and ought not to be re-opened as it would jeopardize the existing position. It is even otherwise the settled principle of law that in exercise of powers under Article 226, this Court in the entirety of the facts and circumstances and in the interest of justice is empowered to deny the relief

even if finding merits in the case and / or grant the relief even if the petitioner is not found entitled thereto (see *Chandra Singh Vs. State of Rajasthan* (2003) 6 SCC 545, *ONGC Ltd. Vs. Sendhabhai Vastram Patel* (2005) 6 SCC 454, *Taherakhatoon Vs. Salambin Mohammad* (1999) 2 SCC 635, *Filmistan Exhibitors Ltd. Vs. N.C.T., thr. Secy. Labour* 131 (2006) DLT 648 and *Babu Ram Sagar Vs. Presiding Officer, Labour Court* MANU/DE/9235/2006)

9. Be that as it may, the controversy, for complete disposal needs to be adjudicated on merits as well.

10. The controversy on merits otherwise is in a narrow ambit and relates to the procedure for appointment. We may observe that even otherwise this Court, in exercise of powers of judicial review, is not concerned with the choice exercised in selection of candidates for the posts and cannot sit in appeal over the said choice and is concerned only with the error if any in the procedure prescribed for making of the said choice (see *UOI Vs. Kali Dass Batish* (2006) 1 SCC 779).

11. AIIMS was established under the All India Institute of Medical Sciences Act, 1958. Vide Section 14 of the said Act, AIIMS, for the promotion of the objects specified under Section 13, is empowered to appoint persons to Professorships, Readerships, Lecturerships and other posts of any description in accordance with the Regulations. Vide Section 10(2) of the Act, the Governing Body has been made the Executive Committee of AIIMS, to exercise such powers and discharge such functions as AIIMS may by Regulations made in this behalf confer or impose on

itself. Section 10(5) empowers AIIMS to constitute as many Standing Committees as it thinks fit for exercising any power or discharging any functions etc. The said Standing Committee is to consist exclusively of the members of AIIMS as provided for in Section 4 of the Act. Section 29 of the Act empowers AIIMS to with the previous approval of the Central Government and by notification in the Official Gazette make regulations consistent with the Act and the Rules made thereunder *inter alia* as to the procedure to be followed by the Governing Body and the Standing Committees in the conduct of their business, exercise of their powers and discharge of their functions. It is not in dispute that a Standing Selection Committee constituted under Section 10 of the Act supra exists for selection of candidates for appointment to Group 'A' posts and the post subject matter of this proceeding is a Group 'A' post.

12. It is also not in dispute that Rules known as All India Institute of Medical Sciences Recruitment Rules, 1981 were framed for appointment to all posts in AIIMS. The counsel for the appellant however contends that the said Rules are in the nature of draft rules and were never notified and thus cannot be said to be statutory rules. The senior counsel for Dr. S. Pathy contends that no such plea was taken at any earlier point of time and has been taken for the first time during arguments.

13. Be that as it may, even if the said Rules are not statutory rules, it being the admitted position that the same have been in existence since 1981 and being followed, their non notification cannot come in the way of AIIMS providing for its own mechanism for recruitment. Moreover, we find that the "experts" on whose findings the appellant is relying, were inducted in

the selection process in accordance with the said Rules only and if the Rules were not to be referred to or relied upon, then the “experts” would also disappear and the case of the appellant fall flat. Faced with the same, the counsel for the appellant has also not pressed the plea of the validity of the said Rules.

14. Rule 19 of the Rules *supra inter alia* provides that the Director of AIIMS “may” with the approval of the President invite experts who may include Members of the Institute’s Faculty and such others from outside who are eminent in their respective field to assist the Standing Selection Committees in making selections of suitable candidates to teaching posts and such other posts as may be considered necessary by the Director. Else, under Rule 18, it is the Standing Selection Committee constituted under Section 10 of the Act which has been entrusted with the task of making recommendations for appointments to be made in the Institute.

15. It is not in dispute that in the selection procedure under challenge three experts of which two were external and one internal were associated. The counsel for the appellant with reference to the grades awarded by the experts and by the members of the Standing Selection Committee to the appellant and to Dr. S. Pathy contended that while the grades awarded by the three experts to the appellant were A, A+ and A+, the grades awarded to Dr. S. Pathy were B-, B- and B-; the grades awarded by the members of the Standing Selection Committee to the appellant and Dr. S. Pathy were the same save that one of the members of the Standing Selection Committee had awarded grade ‘A’ to Dr. S. Pathy and grade ‘B+’ to the appellant.

16. The argument of the counsel for the appellant is that none of the members of the Standing Selection Committee had any knowledge and experience in the discipline of Radiotherapy and were thus not competent to judge the suitability of the candidates in the said discipline; on the contrary, the experts in the discipline had found the appellant much superior to Dr. S. Pathy and the appellant having been graded better than Dr. S. Pathy by the experts ought to have been appointed and the respondents erred in placing Dr. S. Pathy above the appellant in the waiting list. Dr. Satyajit Pradhan, the selected candidate having opted out, we are not concerned with his grades / selection.

17. The counsel for the appellant to buttress his contention aforesaid also relies on the Resolution dated 15.01.1997 of the Governing Body of AIIMS. As per the said Resolution, the practice prevalent previous thereto was of only the experts giving their grading / marking and the members of the Standing Selection Committee not grading / marking the applicants for the posts; the said Resolution brought about a change by requiring the members of the Standing Selection Committee to also grade / mark the candidates and the final selection being made on the basis of grading / marking given by the experts as well as the members of the Standing Selection Committee; only in the event of a tie in the grading, was the final decision to rest with the Chairman of the Selection Committee. The counsel for the appellant on the basis of the said Resolution urges the importance of the experts and contends that till 1997 only the experts were to grade / mark and the Standing Selection Committee to recommend for appointment on the basis of the said grades / markings of the experts. It is thus argued that in the

event of the conflict between the grading / marking of the Standing Selection Committee and the experts, the grading of the experts are to prevail. It is alternatively argued that even if the grades given by the experts and by the members of the Standing Selection Committee were to be cumulatively considered, the grades of the appellant were better than the grades of Dr. S. Pathy. He thus argues that the selection of Dr. S. Pathy having grades inferior to that of the appellant is improper and liable to be set aside.

18. Per contra, the senior counsel for Dr. S. Pathy has contended that the only argument of the appellant / writ petitioner before the learned Single Judge was that the opinion of the experts was binding on the Standing Selection Committee as well as the Governing Body; that the learned Single Judge has held that under the Act and the Rules the duty / obligation for appointments is of the Standing Selection Committee for appointments; that the Act does not recognize the experts; that the role of the experts was merely to assist in the selection process; that the opinion of the experts was thus not binding on the Standing Selection Committee or the Governing Body. He has further contended that the appellant has not made any allegations of *mala fide* etc. against the members of the Standing Selection Committee and has not contended any other procedural flaw in the selection and thus no case for interference therewith is made out. He reaffirms that the role of the experts is only advisory. A copy of the 1999 Regulations of AIIMS is also handed over to demonstrate that the experts co-opted in the selection process are not members of the Standing Selection Committee which is to comprise of seven other members only besides the Chairman,

Vice Chairman and Director. He states that the Standing Selection Committee of AIIMS in the present case did not agree and which it was entitled to, with the opinion of the experts of the appellant being better than Dr. S. Pathy. It is contended that in the absence of any allegations of bias against the members of the Selection Committee, the selection process cannot be found fault with. He has also contended that the Resolution dated 15.01.1999 has to be read in consonance with the Act and the Rules and cannot be read in supersession thereof.

19. The counsel for the AIIMS has supported the arguments of senior counsel for the respondent Dr. S. Pathy.

20. The counsel for the appellant in rejoinder has shown that the Minutes of the Resolution dated 15.01.1997 were duly confirmed.

21. AIIMS besides being a statutory body is a specialized body and having provided for a constitution of a Standing Selection Committee, we are in agreement with the contentions on behalf of the respondent No.5 that the role of the experts co-opted in the selection process is merely advisory and the members of the Standing Selection Committee are not bound by the opinion of the experts and are entitled to evaluate the applicants for the various posts independently of the same.

22. On that nature / value of such recommendations, reference may be made to:

- (i) ***Dr. Ashok K. Mittal v. University of Delhi*** ILR (1996) 2 Del 489 where a Division Bench of this Court held that the Governing Body of the college was the appointing and the

deciding authority and no error could be found in its decision while considering the report of the Selection Committee, to re-advertise the post;

- (ii) ***M.P. Rural Agriculture Extension Officers Association v. State of M.P.*** (2004) 4 SCC 646 holding that even though Pay Commission is an expert body, it is still open to the State to accept or not to accept its recommendations;
- (iii) ***Union of India v. Telecom Regulatory Authority of India*** 74 (1998) DLT 282 laying down that to hold the recommendations of the Regulatory Authority to be binding on the licensing authority i.e. the Government would amount to changing the basic structure of the Telegraph Act and to putting the Government under the control of the Regulatory Authority thereby curtaining, restricting and circumscribing the power of the Government;
- (iv) ***MTNL v. TRAI*** 84 (2000) DLT 70 in which the Division Bench did not differ from the aforesaid dicta;
- (v) ***Dr. H. Mukherjee v. UOI*** AIR 1994 SC 495 holding that Government as appointing authority has absolute power to approve or disapprove list of recommendations and that the Government can take into consideration the developments subsequent to the selection made by the UPSC and to hold otherwise would not be in public interest and may lead to serious complications if the Government is enjoined to act

notwithstanding serious matters having come to its notice subsequent to the recommendation made by the UPSC.

- (vi) ***Sethi Auto Service Station v. DDA*** 129 (2006) DLT 139 where also a Division Bench of this Court held that if the recommendatory body is not the final authority to take the decision, merely because some favourable recommendations are made at some level of decision making process, that will not bind the superior or higher authority;
- (vii) ***Lakhwinder Singh v. UOI*** (2008) 7 SCC 648 where also the assessment of the Selection Board was held to be purely recommendatory in character and the power of the appointing authority to accept or vary the recommendation of the Selection Board was held to be implicit;
- (viii) ***State of Kerala v. A. Lakshmikutty*** (1986) 4 SCC 632 where the recommendations of the High Court for appointment of District Judges were held to be not binding though the circumstances in which the State could differ were laid down;

23. We may mention that the experts co-opted in the selection process are intended to evaluate the academic aspects of the candidates while on the other hand the Standing Selection Committee is concerned not only with the academic aspects but also with the other parameters viz. of suitability, demeanor, adaptability etc.

24. Having found so and there being no case of any bias, we do not find any merit in the appeal. We thus dismiss the appeal. No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

JANUARY 09, 2012

‘gsr’