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

% Judgment delivered on: 05.04.2024

+ W.P.(C) 4949/2024 & CM APPL. 20278/2024

DR SHASHI BHUSHAN Petitioner

versus

UNIVERSITY OF DELHI & ANR. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Abhik Chimni, Advocate

For the Respondents : Mr. Mohinder J.S. Rupal and Mr. Hardik Rupal, Advocates for University of Delhi

CORAM:**HON'BLE MR. JUSTICE TUSHAR RAO GEDELA****J U D G M E N T****TUSHAR RAO GEDELA, J. (ORAL)****[The proceeding has been conducted through Hybrid mode]**

1. This is a writ petition under Article 226 of the Constitution of India, 1950, *inter alia*, seeking the following reliefs :-

"a) Issue a writ of mandamus or any other appropriate writ, order, or direction directing the Respondents to appoint the Petitioner to the vacant position of Assistant Professor in the Department of Geography at the Respondent College.

b) Respondent University to appoint the petitioner to the post of Assistant Professor (Geography) before the expiry of the waitlist panel.

c) To issue a writ of Mandamus or any other writ, order, or directions directing the Respondent University to keep the post open during the pendency of the present writ petition."



2. Mr. Chimni, learned counsel appearing for the petitioner submits that admittedly the petitioner had participated in the recruitment process for the post of Assistant Professor of the Department of Geography, Kalindi College, University of Delhi. He submits that after selection the petitioner was the first candidate in the waitlist. He submits that one Ms. Usha Rani who was at Sl. No.1 in the list of selected candidates, was offered the appointment and had consequently joined the college as Assistant Professor in the Geography Department. Subsequently, the said Ms. Usha Rani had resigned from the respondent/college and proceeded to join another college at the same post. He submits that the post of Assistant Professor allocated to the Scheduled Caste fell vacant on such resignation of Ms. Usha Rani. He submits that the petitioner being the waitlist candidate no.1 has a right to be offered appointment to the said vacant post. That having not been done, the present writ petition has been filed.

3. Learned counsel draws attention of this Court to the OM dated 13.06.2000 to submit that the respondent is under an obligation to operate the reserve panel/waitlisted panels prepared on the basis of the selection, particularly where the incumbent who had joined, resigns leaving the post vacant or dies within six months of such joining. The respondent ought to fill up the said vacant post by calling for candidates from the waitlist. In the present case Mr. Chimni submits that the same has been done violating the said OM.

4. *Per contra* Mr. Mathur, learned counsel appearing for the respondent no.2 college hands out the communication dated 03.04.2024



issued by the University of Delhi to all the Principals/Directors of the colleges and institutions falling under the University of Delhi.

5. By referring to para 4 of the said communication, he submits that the University had clarified that in case of an offer to the appointment to the post of Assistant Professor in the waitlisted candidate category created on resignation of the candidate who joined to the post and later resigned, it would mandate issuance of fresh advertisement for such vacant post following due process and procedures envisaged under the ordinance of the University. He also draws attention to para 5 of the said communication to submit that the University had issued such communication based on the judgment of the Supreme Court in *Sudesh Kumar Goyal vs. State of Haryana and Others* reported in (2023) 10 SCC 54. He also reads out para 6 of the said communication to submit that the petitioner would not be eligible for consideration keeping in view the clause (i) of the said para 6 which is applicable in cases of resignation of previously selected candidate tenders resignation. He submits that in the present case, the petitioner seeks offer of appointment to the post which has become vacant on the resignation of the previously selected candidate. As such, according to Mr. Mathur, the petitioner has no cause of action.

6. This Court has considered the arguments of the learned counsel for the petitioner as also the respondent.

7. For the purposes of appreciating the contentions of Mr. Mathur as also Mr. Chimni it is apposite to extract the relevant paragraphs of communication dated 03.04.2024 which are as under:



“4. Secondly, it has also been observed that some of the Colleges/Institutions while operating the panel for appointment of teaching staff in Colleges/Institutions drawn by the Selection Committee under Clause 7 (4-a) of Ordinance XVIII of the University issue offer of appointment to the post of Assistant Professor to the waitlisted candidate against the vacancy created on resignation of the candidate who joined the post and later resigned. In such cases, it mandates issuance of fresh advertisement following due processes and procedure envisaged under Ordinances of the University.

5. In this regard, reference is invited to the judgment of Hon'ble Supreme Court of India in Civil Appeal No.10861 of 2013 titled *Sudesh Kumar Goyal s. State of Haryana & Ors* wherein it has been pronounced that if one of the selected candidates joins and then resigns, it gives rise to a fresh vacancy which could not have been filled up without issuing a proper advertisement and following the fresh selection process.

6. The candidates in the waitlist can be given the offer of appointment if an only if the selected candidate did not join in the given timeframe. Thus, the post which has fallen vacant due to any of the reason(s) given below cannot be filled from the person in the waitlist.

- (i) Resignation of selected candidate.
- (ii) Death/VRS/Resignation of an employee
- (iii) Post has fallen vacant due to the incumbent appointment at any other higher position/principal etc.”

8. It is apparent that the University after having examined the ratio laid down by the Supreme Court in *Sudesh Kumar Goyal (supra)* issued the communication/ clarification as to under what circumstances a waitlisted candidate can be offered appointment and sufficiently clarified that resignation of previous incumbent would not give any right of appointment to such waitlist candidate.

9. It is not disputed by Mr. Chimni that in the present case, the said Ms. Usha Rani who was originally figuring at Sl. No.1 of the final list of selected candidate had in fact joined the services. For whatever reason, not germane to the issue at hand, the said Ms. Usha Rani had resigned



from the services, which was accepted and she moved further. The said resignation of Ms. Usha Rani had created the vacancy which cannot be disputed. The issue arisen in the present case appears to be clearly covered by the conditions in para 6 of the communication dated 03.04.2024 issued by respondent no.2 University. That apart, it is trite that no candidate, even in the final select list has an indefeasible right to appointment. It is only the consideration which is a right flowing from the judgments of the Hon'ble Supreme Court. The Supreme Court in the case of ***Shankarsan Dash v. Union of India*** reported in (1991) 3 SCC 47 has held that:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, (1974) 3 SCC 220; Neelima Shangla v. State of Haryana, (1986) 4 SCC 268 or Jatinder Kumar v. State of Punjab, (1985) 1 SCC 122.”

10. That apart, it is trite that no mandamus can be issued to direct the Government or the State to fill up certain or all vacancies. The discretion to fill up vacancies or not, is with the Eminent Domain. Admittedly, the petitioner figures at Sl. No.1 of the waitlist. The issue with respect to the status of a candidate in the waitlist need not be



restated. When a selected candidate in the final selection list himself has no more than a right of consideration, those candidates who would fall in the wait list would not even have that right, subject to any rules or notification in that context. The petitioner has been unable to demonstrate any right obtaining from any rule or a statute or an ordinance of the University or the college whereby the petitioner could agitate such grievances.

11. To that effect it would be apposite also to refer to the judgment of the Supreme Court in *State of Karnataka and Others vs. Bharthi S.* reported in **2023 SCC OnLine SC 665**. The relevant paragraphs are quoted hereunder:

10. It is true that Proceedings dated 11.04.2003 is only an executive instruction and cannot override the application of Rules that govern services. The Rules that govern the services are the Karnataka Education Department Services (Department of Public Instructions) (Recruitment) Rules, 1967 as amended in 2001. On a close reading of the relevant rule applicable to the services i.e. Entry 66, it is clear that there is no obligation on the State to make appointments. Mere publication of the Additional List does not create any right to be appointed. There is no such mandate in the Rule. Entry 66 of the Rules merely provides that the Selection authority shall prepare and publish an Additional List of candidates not exceeding ten percent of the vacancies and the said list shall cease to operate from the date of publication of notification for subsequent recruitments.

11. The position of law is also clear. In Subha B. Nair v. State of Kerala which has also been relied upon by the State, it has been held that:

“8. A decision on the part of an employer whether to fill up the existing vacancies or not is within its domain. On this limited ground in the absence of discrimination or arbitrariness, a writ court ordinarily would not interfere in such matters.

9. Similar view has also been expressed by this Court in K. Thulaseedharan v. Kerala State Public Service Commission, (2007) 6 SCC 190.



19. The question as to whether there existed 7 vacancies or 16 vacancies in the aforementioned situation loses all significance. We would assume that as per the requisition, 9 more vacancies could be filled up but it is trite that if the employer takes a policy decision not to fill up any existing vacancy, only because a person's name is found in the select list, the same by itself would be a ground to compel the Bank to fill them up.”

13. The position that emerges from the above decisions is that the duty to fill up vacancies from the Additional List (waiting list) can arise only on the basis of a mandatory rule. In the absence of such a mandate, the decision to fill all the vacancies from the Additional List, is left to the wisdom of the State. We will however add that State cannot act arbitrarily and its action will be subject to judicial review.

12. Mr. Chimni had argued that in the absence of rules to the contrary, the DoPT Notification dated 13.06.2000 would come into effect and the petitioner would have a right under such Notification. The said argument is noted only to be rejected. The question of whether the Notification is applicable or not, is not primary to the present case. The overwhelming judgment of the Supreme Court in that regard as also considered by the University of Delhi in its communication dated 03.04.2024 would sufficiently propel this Court to conclude that there is no right with the waitlisted candidate to seek any such appointment. The other issue which would also come up for consideration in this case would be that the petitioner does not dispute that Ms. Usha Rani, consequent upon her selection was in fact offered appointment, had accepted and subsequently resigned from the said post. The said process would indicate that the original advertisement regarding such post was already exhausted by virtue of her mere joining the post itself. Consequent thereto the question of consideration of operating the wait list would not arise unless rules prescribe any such procedure. The



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respondents would obviously have no choice other than filling up said post by issuance of fresh advertisement.

13. Having regard to the aforesaid, it is clear that the petitioner has no ground even to maintain the writ petition. Consequently, the writ petition is dismissed *in limine*.

TUSHAR RAO GEDELA, J.

APRIL 5, 2024/ns