DIR. S.C.T.I. FOR MED. SCI & TECH. & ANR. A

v.

M. PUSHKARAN

NOVEMBER 23, 2007

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[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Service Law: Appointment—Select list candidates—Right of appointment—Held: Mere inclusion of the name of candidates in the select list does not confer upon the candidates legal right to C *appointment subject, to* **bonafide** *action on part of the State—On facts, selectee should have been offered appointment when posts were vacant—Policy decision to abolish the post as also contracting out the services was taken much after selectee challenged non-appointment—* D *Thus, no reason not to offer appointment.*

The question which arose for consideration in this appeal was whether the respondent whose name appeared at no. 4 in the select list had any legal right for being appointed against the post of three security guards advertised by the appellant-institute, when the post became E **vacant and when the appellant had taken policy decision to abolish the post as also contract out security services.**

Dismissing the appeal, the Court

HELD: 1.1. Only because the name of a person appears in the F **select list, the same by itself may not be a ground for offering him an appointment. The selectees do not have any legal right of appointment subject, *inter alia*, to *bona fide* action on the part of the State. Therefore, the superior court in exercise of its power of judicial review would not ordinarily direct issuance of any writ in absence of any pleading and** G **proof of *mala fide* or arbitrariness on the part of the employer.**

[Paras 11 and 16] [470-C, D; 472-F, G]

1.2. The application of law would depend upon the fact situation

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A **obtaining in each case. The respondent was to be offered with the appointment at a point of time when no policy decision was taken. Thus, there was no reason not to offer any appointment in his favour. Why the select panel was ignored has not been explained. Even the purported policy decision was not in their contemplation. Furthermore, the**
B **respondent is an ex-serviceman. He in ordinary case should have been offered appointment particularly when three posts were vacant. The decision to abolish posts was not taken at a point of time when he had filed the writ petition. It was expected that when the third candidate refused to join the post, he should have been offered the same. The**
C **policy decision to abolish the posts as also contracting out the security services was taken by the appellant much thereafter, the respondent challenged his non appointment. The judgment of High Court that the respondent need not challenge the decision taken by the Government Body, when there was no decision in the resolution was adopted by the**
D **Governing Body to abolish the post but only to fill up the permanent posts on contract basis, the next person included in the list for regular appointment was to be considered, cannot said to be perverse. Therefore, it is not a fit case for interference with the order of High Court.**

[Paras 17, 18, 19 and 20] [469-D, E; 473-D, E, F, G]

E *Shankarsan Dash* **v.** *Union of India,* **[1991] 3 SCC 47;** *R.S. Mittal* **v.** *Union of India,* **[1995] Supp 2 SCC 230;** *Asha Kaul (Mrs.) and Anr.* **v.** *State of Jammu and Kashmir,* **[1993] 2 SCC 573;** *A.P. Aggarwal* **v.** *Govt. of NCT of Delhi and Anr.,* **[2000] 1 SCC 600;** *Food Corpn. Of India and Ors.* **v.** *Bhanu Lodh and Ors.,* **[2005] 3 SCC 618;** *All India SC & ST*
F *Employees' Association and Anr.* **v.** *A. Arthur Jeen and Ors.,* **[2001] 6 SCC 380;** *Pitta Naveen Kumar and Ors.* **v.** *Raja Narasaiah Zangiti and Ors.,* **[2006] 10 SCC 261;** *State of Rajasthan and Ors.* **v.** *Jagdish Chopra,* **(2007) 10 SCALE 470;** *Union of India and Ors.* **v.** *S. Vinodh Kumar and Ors.,* **(2007) 11 SCALE 257 and** *State of M.P. and Ors.* **v.** *Sanjay Kumar Pathak*
G *and Ors.,* **(2007) 12 SCALE 72, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5368 of 2007.

From the final Judgment and Order dated 4.12.2006 of the High
H Court of Kerala at Ernakulam in W.A. No. 2075/2006.

L. Nageshwara Rao, Ragenth Basant, Liz Mathew and Senthil Jagadeesan for the Appellants. A

P.S. Narasimha, M. Gireesh Kumar and Khwairakpam Nobin Singh for the Respondent.

The Judgment of the Court was delivered by B

S.B. SINHA, J. 1. Leave granted.

2. A short question which arises for consideration in this appeal is as to whether the respondent herein had any legal right for being appointed against the post of three security guards advertised by the appellant – C institute.

3. The basic fact of the matter is not in dispute. An advertisement was issued for appointment to the post of security guards. There were three permanent posts. The select list contained names of five candidates. D The name of the respondent appeared at Sl. No. 4 therein. It was finalized on 11.04.2005. It had a validity period of one year i.e. upto 10.04.2006. Whereas two candidates were offered appointments on 13.04.2005 and 5.05.2005, the third candidate was offered appointment on 13.06.2005. He declined the same. Respondent, however, for reasons best known to E the appellant, was not offered any appointment. He filed a writ petition questioning his non-appointment on 12.12.2005.

4. On or about 13.07.2005, however, a purported policy decision was taken to contract out some of the services in a phased manner to make the administration efficient and cost effective in the following terms: F

> "After detailed deliberations, it was resolved that (i) a copy of the request sent to the Employment Exchange, Thiruvananthapuram may simultaneously be circulated/posted by the Institute to all the Employment Exchanges in Kerala especially in case of direct G recruitment of Group – D posts specifying the number of candidates to be sponsored for each post so as to achieve a wider coverage; (ii) in the case of Group C and B Direct recruitment posts, paper advertisement shall, continue to be resorted in one or two leading newspapers and (iii) *for temporary vacancies/* H

A *leave vacancies of Cleaning Attendants/ Security Guards, the external contract system prevalent in BMT Wing may be extended to the Hospital Wing also in a phased manner."*

5. A resolution was adopted by the Governing Body in a meeting B held at the Institute on 29.12.2005 in the following terms:

"We have been deliberating for quite sometime on contracting out some of the services on a phased manner to make it more efficient and cost effective. It is noted that the security at BMT Wing, Poojappura that was contracted out on a trial basis has been found C successful.

It was noted that at present there are 2 permanent vacancies of Security Guards and 2 permanent posts of Drivers that are lying vacant.

D It was resolved to abolish these vacant posts and services may be contracted out/hired and ratify the decision of the Director not to fill the two vacant posts of Security Guards and Drivers on permanent basis."

E 6. A learned Single Judge of the High Court by a judgment and order dated 20.09.2006 *inter alia* opined:

"5. I do not think that the petitioner has made out a case for interference. No doubt, the petitioner approached this Court on 12.12.2005. Ext. R1(b) decision is dated 29.12.2005. But, I do F not think that that is sufficient to overturn the decision of the management. The question as to which are the posts to be filled up, is all a management decision. Ordinarily, it is not for this Court to veto the wisdom of the employer in regard to the posts which are to be retained and posts which are to be abolished. A decision G to abolish a post cannot be attacked by a person figuring in a rank list, unless, no doubt, an extraordinarily case of malice or *per se* arbitrary action is established. Apparently, the respondents felt that the post need not be retained, having regard to the advantages that would flow from contracting of these services as also the pecuniary

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loss that would otherwise flow. It is hard to characterize such a decision as arbitrary, as sought to be shown in the Reply Affidavit. It is settled law that a person in the rank list has no legal right to command the employer to appoint him. This is not a case where after having taken a decision to fill up the posts, the respondent is not offering appointment to the petitioner. Ext. R1(b) is not challenged by petitioner. In such circumstances, the Writ petition fails and it is dismissed."

7. On an intra-court appeal preferred by the respondent herein from the said judgment and order, the Division Bench, however, reversed the same, *inter alia*, holding:

"...If the vacancy was abolished necessarily there was no question of appointment either on substantial or on temporary basis. There is a decision to fill it up on temporary basis. Thus, contract appointment reveal the existence of the vacancy. The 3rd among the vacancies notified was one really intended to be filled up even on 13.6.2005 when the 3rd rank holder in the list had been offered appointment. The decision contained in Ext. R1(b) is the decision taken by the Governing Body. The petitioner/ appellant need not challenge the decision taken by the Government Body, when there is no decision in Ext. R1(b) to abolish the post but only to fill up the permanent posts on contract basis. Then, the next person included in the list for regular appointment has to be considered..."

8. Appellants are, thus, before us:

9. Mr. L. Nageshwara Rao, learned senior counsel appearing on behalf of the appellants, submitted that the Division Bench of the High Court committed a serious error in holding that there was a vacancy on a temporary basis.

It was urged that keeping in view a number of decisions of this Court, the impugned judgment is wholly unsustainable. Reliance in this behalf has been placed on *Shankarasan Dash* v. *Union of India,* [1991] 3 SCC 47; *State of Bihar and Ors.* v. *Md. Kalimuddin and Ors.,* [1996] 2 SCC 7 and *Punjab State Electricity Board and Ors.* v. *Malkiat Singh,*

A [2005] 9 SCC 22.

10. Mr. P.S. Narasimha, learned counsel appearing on behalf of the respondent, on the other hand, would submit that the institution had four departments. In some of the departments a policy decision to contract out the services was taken; but, so far as the department in which the B respondent was to be appointed, no policy decision had been adopted for contracting out the job of the security persons and in that view of the matter the respondent had a legitimate expectation of his being appointed.

11. The law operating in the field in this behalf is neither in doubt C nor in dispute. Only because the name of a person appears in the select list, the same by itself may not be a ground for offering him an appointment. A person in the select list does not have any legal right in this behalf.

D The selectees do not have any legal right of appointment subject, *inter alia*, to *bona fide* action on the part of the State. We may notice some of the precedents operating in the field.

12. In *Shankarsan Dash* v. *Union of India,* [1991] 3 SCC 47, this Court held:

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> "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 F 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* G *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 H 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, Neelima Shangla* v. *State of Haryana,* or *Jatendra Kumar* v. *State of Punjab.*" A

13. Yet again in *R.S. Mittal* v. *Union of India,* [1995] Supp 2 SCC 230, this Court held: B

"It is no doubt correct that a person on the select panel has *no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the* C *select panel or decline to make the appointment on its whims.* When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to D appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government. No reason whatsoever, not to talk of a justifiable reason, was given as to why the appointments were not offered to the candidates expeditiously and in accordance with law. The appointment should E have been offered to Mr. Murgad within a reasonable time of availability of the vacancy and thereafter to the next candidate. The Central Government's approach in this case was wholly unjustified."

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(Emphasis supplied)

14. In *Asha Kaul (Mrs.) and Anr.* v. *State of Jammu and Kashmir,* [1993] 2 SCC 573, this Court held:

"8. It is true that mere inclusion in the select list does not confer G upon the candidates included therein an indefeasible right to appointment (*State of Haryana* v. *Subhash Chander Marwaha*; *Mani Subrat Jain* v. *State of Haryana*; and *State of Kerala* v. *A. Lakshmikutty*) but that is only one aspect of the matter. The other aspect is the obligation of the Government to act fairly. The H

A whole exercise cannot be reduced to a farce. Having sent a requisition/request to the Commission to select a particular number of candidates for a particular category, — in pursuance of which the Commission issues a notification, holds a written test, conducts interviews, prepares a select list and then communicates to the B Government — the Government cannot quietly and without good and valid reasons nullify the whole exercise and tell the candidates when they complain that they have no legal right to appointment. We do not think that any Government can adopt such a stand with any justification today..."

C {[See also *A.P. Aggarwal* v. *Govt. of NCT of Delhi and Anr.*, [2000] 1 SCC 600]}.

15. In *Food Corpn. Of India and Ors.* v. *Bhanu Lodh and Ors.*, [2005] 3 SCC 618, this Court held:

D "14. Merely because vacancies are notified, the State is not obliged to fill up all the vacancies unless there is some provision to the contrary in the applicable rules. However, there is no doubt that the decision not to fill up the vacancies, has to be taken *bona fide* and must pass the test of reasonableness so as not to fail on the E touchstone of Article 14 of the Constitution. Again, if the vacancies are proposed to be filled, then the State is obliged to fill them in accordance with merit from the list of the selected candidates. Whether to fill up or not to fill up a post, is a policy decision, and F unless it is infected with the vice of arbitrariness, there is no scope for interference in judicial review."

16. It is, therefore, evident that whereas the selectee as such has no legal right and the superior court in exercise of its power of judicial review would not ordinarily direct issuance of any writ in absence of any pleading G and proof of *mala fide* or arbitrariness on the part of the employer. Each case, therefore, must be considered on its own merit.

17. In *All India SC & ST Employees' Association and Anr.* v. *A. Arthur Jeen and Ors.*, [2001] 6 SCC 380, it was opined:

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"10. Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid down by the Constitution Bench of this Court, after referring to earlier cases in *Shankarsan Dash* v. *Union of India.*

[See also *Malkiat Singh* (supra), *Pitta Naveen Kumar and Ors.* v. *Raja Narasaiah Zangiti and Ors.*, [2006] 10 SCC 261, *State of Rajasthan & Ors.* v. *Jagdish Chopra,* (2007) 10 SCALE 470, *Union of India & Ors.* v. *S. Vinodh Kumar & Ors.*, (2007) 11 SCALE 257 and *State of M.P. & Ors.* v. *Sanjay Kumar Pathak & Ors.,* (2007) 12 SCALE 72.

18. The application of law would, therefore, depend upon the fact situation obtaining in each case. The judgment of the High Court in view of the aforementioned authoritative pronouncements cannot be said to be perverse. The respondent was to be offered with the appointment at a point of time when no policy decision was taken. There was, thus, no reason not to offer any appointment in his favour. Why the select panel was ignored has not been explained. Even the purported policy decision was not in their contemplation. We, therefore, do not see any reason to interfere with the impugned judgment.

19. Furthermore, the respondent is an ex-serviceman. He in ordinary case should have been offered appointment particularly when three posts were vacant. The decision to abolish posts was not taken at a point of time when he had filed the writ petition. It was expected that on 16.06.2005 when the third candidate refused to join the post, he should have been offered the same.

20. The policy decision to abolish the posts as also contracting out the security services was taken by the appellant much thereafter, viz., on or about 29.12.2005. We are, therefore, of the opinion that it is not a fit case where we should interfere with the impugned judgment. The appeal is dismissed. No costs.

N.J. Appeal dismissed.