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**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA No. 1108 of 2004

New Delhi this the 13th day of December, 2004.

**HON'BLE MR. SHANKER RAJU, MEMBER (J)
HON'BLE SHRI S.K. MALHOTRA, MEMBER(A)**

1. Yogesh Kumar Verma,
s/o Sh. Jai Prakash
16/236, Street No. 1,
R/o New Defence Colony,
Railway Road, Murad Nagar,
Ghaziabad (UP).
2. Mahesh Pandey,
s/o Sh. D.B. Pandey,
R/o J-905, Park Street,
Talkatora Stadium,
New Delhi.
3. Sanjeev Kumar
s/o Sh. Om Prakash,
R/o H.No. 32A,
Village & Post Majra Dabas
Delhi.
4. Deepika Kumari
d/o Sh. Bineshwar Ram,
R/o F-34, Street 10/19, Indira Park,
Palam Colony,
New Delhi. ...Applicants

(By Advocate: Shri Harvir Singh)

-Versus-

1. Secretary,
Ministry of Health & Family Welfare,
Nirman Bhawan,
New Delhi.
2. Director General,
Ministry of Health & Family Welfare,
Nirman Bhawan,
New Delhi.



3. Medical Superintendent,
Safdarjung Hospital,
New Delhi.

4. Principal,
VMMC College,
Safdarjung Hospital,
New Delhi. ...Respondents

(By Advocate: Shri S.M. Arif)

ORDER

By Shri Shanker Raju, Member (J):

Applicants impugn respondents' order dated 29.4.2004 whereby, in pursuance of a letter from Ministry of Health and Family Welfare dated 21.4.2004, appointments of the applicants, having been found against the instructions of DOP&T, the services were dispensed with w.e.f. 30.4.2004 (A.N.).

2. The brief factual matrix is relevant to be highlighted.

3. In pursuance of an advertisement published in the Employment News inviting applications for filling up four posts (one reserved for OBC and remaining three for general category) of Lab. Attendant on temporary basis and further to be regularized, applicants applied for the said post and they were directed to appear before the Selection Committee. After interview, applicants had been medically examined and they were offered appointments vide Memorandum dated 10.07.2003 of even date. Subsequent to acceptance of the said offer by the applicants, they were appointed on the post of Lab Attendant vide order dated **29.07.2003** and in pursuance thereof they joined

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their duties. Though initially they were not being paid the salary yet later on the same was paid till the date of their termination.

4. While considering the applications received in response to the advertisement, the Selection Committee held between 12.6.2003 to 28.5.2003, in all selected one OBC candidate Ajay Kumar and three general candidates, namely, Smt. Asha Rani, Sh. Amit Kumar and Sh. Mithilesh Kumar Pandey whereas applicants, four in number, had been placed in the panel and their services had been dispensed with, which gives rise to the present O.A.

5. Learned counsel of the applicant Shri Harvir Singh has assailed the impugned order on following three legal issues:

- i) Before cancelling the appointment and dispensing with the services, no show cause notice was issued to the applicants;
- ii) As per the Memorandum, whereby the appointment was offered, one of the conditions to dispense with the service is payment of pay and allowance for the period of notice. As this has not been paid to the applicants, the order is nullity;
- iii) It is stated that the termination order is non-speaking.



6. Learned counsel has relied upon the following decisions to support the claim on the ground of non-payment of salary and allowance in lieu of notice period:

- i) Prabhu Dayal Birari vs. M.P. Rajya Nagrik Apoorti Nigam Limited. (2000) 7 SCC 502.
- ii) Lakhan Lal Tripathi vs. Commandant General & Anr., (2000) 10 SCC 184.
- iii) Smt. Kusum Gupta Alias Kusum Bansal vs. Haryana State Small Industries, (1986) 3 SCC 506.
- iv) SSRMS Cochin vs. K.V. Gopinath, Sorter 1973 (3) SCC 867.

7. Learned counsel of the applicants further states that pursuant to the selection, 11 other posts of Lab Attendant had been advertised and in that view of the matter learned counsel draws our attention to letter dated 12.11.2003 addressed to DGHS wherein it is admitted that the vacancies were existing on the date when panel was formed, however, the applicants had not been adjusted despite recommendations of the Principal concerned.

8. In this view of the matter, learned counsel, relying upon the decision of the Apex Court in **Prem Singh & Others vs. Haryana State Electricity Board & Others**, (1996) 4 SCC 319, contends that appointments which are not made on future vacancies, not anticipated by the respondents, should have been continued and the appointment of the applicants should have been deemed on those anticipated vacancies.



10. Shri Harveer Singh, learned counsel for the applicants also relies upon the case of the Apex Court in **All India SC & ST Employees Association & Anr. vs. A. Arthur Jeen & Ors.**, (2001) 6 SCC 380, to contend that when additional vacancies were advertised during the recruitment process, the appointments made cannot be stated to be invalid.

11. A reliance has been placed on a decision of the Apex Court in **Virender S. Hooda & Ors. vs. State of Haryana & Anr.**, (1999) 3 SCC 696, to contend that candidates not finding place in the merit list prepared to the extent of advertised vacancies but hopeful of getting appointments on account of their position in waiting list, against vacancies arising after commencement of selection process, the appointments cannot be disturbed. In this view of the matter, it is stated that the vacancies were existing even on the date of earlier advertisement. After the new advertisement was issued and selection process was completed, the vacancies were not exhausted for panel candidates. New advertisement issued in July, 2002 clearly substantiate the plea of the applicants.

12. Learned counsel further relied upon the decision of the Apex Court in **Dr. R.P Tripathi vs. Chancellor, Lucknow University & Ors.**, (1999) SCC (L&S) 639 to contend that once the posts are validly created even if created a little later, the selection to that post, could not be faulted as the process of selection was legal and valid.

13. Lastly the applicant's counsel has relied upon the decision of the Apex Court in **Vijay Kumar Sharma & Ors. vs. Chairman,**



School Service Commission & Ors, (2001) 4 SCC 289 to contend that when vacancies existed, denial of appointment by allowing the panel to exhaust, is illegal.

14. On the other hand, respondents' counsel Shri S.M. Arif vehemently opposed the contentions and produced the record for our perusal. According to him, as per the minutes of the meeting held on 2.4.2004, the applicants, who were only offered the appointment by extending the terms and conditions, were not issued appointment letters. As the original vacancies advertised were four, the applicants were erroneously offered appointments. Having no indefeasible right even being wait-listed candidates in panel, the dispensation of service is legal and in accordance with rules. According to the respondents, subsequent vacancies in the proposal of the Principal has no meaning as the cadre controlling authority is Ministry of Health and it is only DGHS who has right to accord permission to fill up the subsequent posts as there was no anticipated vacancies. Moreover, as there is no stipulation as to the variance of vacancies in the advertisement, only four persons were appointed.

15. Shri Arif further states that the advertisement issued in July, 2003 is for 11 posts of Lab Attendant and the process of scrutiny is still continuing. It is further stated that as the applicants had not applied for the posts in response to the subsequent advertised vacancies, they cannot be considered against any future or sanctioned vacancies.

16. It is stated by Shri Arif that as the appointment of applicants numbering 4 were found to be against the instructions and for want



of posts, the same would not give an indefeasible right to them to continue in service. However, it is stated that by way of indulgence and on compassionate ground, applicants had been paid the salary and allowances for the period they had functioned and performed their duties for seven months as Lab Attendant.

17. We have carefully considered the rival contentions of the parties and perused the material on record.

18. After consideration of the rival contentions of the parties and perusal of record the objection of the respondents that the applicants are yet to be appointed as appointment letters have not been issued, is overruled. The applicants were offered the appointments and after completion of all formalities relating to service e.g. medical verification etc. and acceptance of terms and conditions by the applicants, the respondents vide their letter dated 29.7.2003 appointed the applicants to the post of Lab Attendant along with four others and allotted them rank numbers. In pursuance of having joined their duties with a joining report, the aforesaid is a deemed appointment in service. Respondents are estopped from taking a contrary view as it is detrimental to the rights of the applicants whose position has already been altered.

19. However, the trite law is that invalid appointee / candidate placed in the waiting list or even empanelled, has no indefeasible right for appointment as it is the prerogative of the Government to fill up the vacancies or not.



20. As regards the contentions raised by the applicant for violation of principles of natural justice and deprivation of right to reasonably defend, the Apex Court in **Prem Prakash vs. UOI**, AIR 1984 SC 1831 and also in **Jawant vs. State of M.P.**, 2002(9) SCC 700 applied the principle of audi alteram partem but an appointment made de hors the rules is invalid and does not create a right and the principles of natural justice are not attracted in the light of the decision of the Apex Court in **Union of India vs. O. Chakardhar**, 2002 SCC (L&S) 361. The necessity of according a reasonable opportunity is with a view that once appointed, service should not be dispensed with without following due process of law but once the appointment is found against the instructions and beyond the sanctioned strength as advertised, it does not create a right for affording a reasonable opportunity to show cause as the same is not a ritual to perform in each case but the rules would apply keeping in view the peculiar facts and circumstances of the case. In this view of the matter the contention raised by the applicant is liable to be rejected.

21. As regards pay and allowances in lieu of notice period, we find that in the Memorandum offering appointments to the applicants they were appointed on probation for two years and without assigning any reasons their services can be terminated and in that event one of the conditions is either to issue one month's notice or pay in lieu thereof. Having regard to the decision of the Apex Court in **Kusum Gupta's** case (supra) and as one of the terms and conditions include payment of salary in lieu of notice period, non-compliance thereof has rightly been assailed by the applicants. But in our considered view the



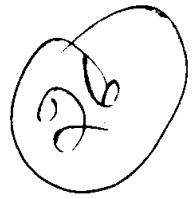
applicants are only entitled for the pay in lieu of notice period but reinstatement is out of question as they had been appointed beyond the sanctioned vacancies as on the date of advertisement. The Apex Court in **Ashwani Kumar Singh vs. U.P. Public Service Commission & Others**, (2003) 11 SCC 584 has observed as under:

Non-appointment of wait listed candidates on the vacancies which existed on account of some selected candidates having not joined need not perforce to fill up the same from the merit list.

23. Delhi High Court in **Sanjay Kumar vs. Govt. of NCT of Delhi & Ors.**, 2004(3) ATJ 317 held that on a vacant post, those candidates who were otherwise eligible failed to obtain fix percentage are precluded from seeking mandamus to fill up all the vacancies merely because certain posts remained unfilled.

24. The Apex Court in the matter of **State of Orissa & Ors. vs. Bhikari Charan Khuntia & Ors. Etc.**, 2004 (2) ATJ 195, held as under:

“A Constitution Bench of this Court in **Shankarsan Dash vs. Union of India** (1991(2) SCR 567) held that candidates whose names appear in the merit list do not acquire indefeasible right of appointment if vacancies exist. The State is under no obligation to fill up all or any of the vacancies, unless the relevant recruitment rules so indicated. Though, the State is under no legal duty to fill up all or any of the vacancies, it does not mean that State has licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for proper reasons. If vacancies of any of them are filled up, the State is bound to respect the comparative merit of candidates as reflected in the recruitment test and no discrimination can be permitted. This position was reiterated in **All India SC & ST Employees Association and Anr. Vs. A.**



Arthur Jeen and Ors. (2001 (6) SCC 380) and Ludhiana Central Cooperative bank Ltd. vs. Amrik Singh and Ors. (2003 (6) Supreme 196).

9. As was observed by this Court in Government of Orissa through Secretary, Commerce and Transport Department, Bhubaneshwar vs. Haraprasad Das and Ors. (1998 (1) SCC 487), whether to fill up or not to fill up a post, is a policy decision and unless it is arbitrary, the High Court or the Tribunal has no jurisdiction to interfere with such decision of the Government and direct it to make further appointments. In the present case, even no selections made and not even any select list was in existence. Even if there had been any such selection or inclusion of any of the names in the select list, same could not have given any right. Therefore, mere sending of name by the employment exchange could not have and in fact has not conferred any right. The writ applications were thoroughly misconceived, and the court misdirected itself as to the nature of relief to be granted."

25. In ***All India SC & ST Employees Association & Anr. Vs. A.***

Arthur Jeen & Ors, 2001 (6) SCC 380, it has been held that inclusion in the panel of selected candidates does not confer any indefeasible right even against existing vacancies as State is under no obligation to fill up or not to fill up any of the vacancies.

26. In the light of above and from perusal of the record, we find that against four sanctioned posts, one OBC candidate and three general candidates were selected whereas the applicants had been placed in the panel. A panel is to be exhausted only if the selected candidates do not join but for want of any clause in the advertisement that the vacancies advertised could be varied or any statutory rule to indicate that future vacancies are likely to be filled up from the same selection process, applicants have acquired no indefeasible right to be



appointed against those posts as these posts have been subsequently advertised against which applicants had not staked their claim.

27. Reliance of the applicant on **Prem Singh's** case (Supra) is misconceived as therein though the advertised posts were 62, the Board made appointments on 138 posts barring the posts, which had created on retirement and death during the selection process, the appointment on other posts had been invalidated. This decision rather goes against the applicant.

28. **Arthur Jeans' case** (supra) is also distinguishable as therein the department itself has extended the zone of panel by including additional vacancies without informing. In such a case, non-advertisement of the additional vacancies was not found to be illegal and the Tribunal's decision to quash the selection process was set aside. This ratio would be of no help to the applicant.

29. In **Virender S. Hooda's** case (supra) as the circular issued by the Haryana Govt. was in existence, in this backdrop, the ratio of the said case would not apply to the present case.

30. In the decision in **Vijay Kumar Sharma's** case (Supra) as there was no discrimination between life of panel for general category which was extended but not for OBC category, the issue was rested on discrimination under Articles 14 and 16 of the Constitution of India which would not apply to the present case.

31. By invoking the act of balancing, we find that non-payment of notice pay was not legally tenable. Moreover, the

applicants who are fully qualified and had already worked for seven months on the post of Lab Attendant but had not applied in pursuance of the second notification advertised for 11 posts and keeping in law that the scrutiny is still on, no selection process had yet been initiated, on equitable consideration and in the interest of justice for the reasons recorded above, we dispose of the present original application with a direction to the respondents to pay the applicant the pay and allowances in lieu of notice period within one month from the date of receipt of a copy of this order. It is made clear that if the applicants apply for the Lab Attendant in response to the subsequent advertisement issued in July, 2003 for 11 posts, within two weeks from the date of receipt of a copy of this order, their applications would be accepted by the respondents and they would be allowed to participate in the selection. We also make it clear that the Selection Committee, while considering their cases, would act independently without prejudice to the present litigation by the applicants. No costs.

(S.K. Malhotra)
Member (A)

/na/

(Shanker Raju)
Member (J)

13/12/04