

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK**

O.A No.524 of 2018

**Present : Hon'ble Mr. Gokul Chandra Pati, Member(A)
Hon'ble Mr. Swarup Kumar Mishra, Member(J)**

Dr.Ramachandra Barik, aged about 45 years, S/o kanhu Charan Barik, At-Flat 4C SSV Enclave, Gandamunda, Bhubaneswar, Dist. – Khurda.

.....Applicant

VERSUS

1. Union of India, represented through Secretary, Ministry of health & Family Welfare Department, New Delhi – 110011.
2. Governing Body of AIIMS, Bhubaneswar, represented through the Secretary, Health & Family Welfare Department, Bhubaneswar – 751001.
3. Director, AIIMS, Bhubaneswar, At/PO-Bhubaneswar, Dist. – Khurda – 751019.
4. Dr.Gitanjali Batmanabane, at present working as Director, AIIMS, Bhubaneswar, At/PO-Bhubaneswar, Dist. – Khurda – 751019.
5. Dr. Ajith Ananthakrishna Pillai, Associate Professor, At-JIPMER, Department of Cardiology, JIPMER, Puducherry, e-mail:ajithanantha@gmail.com

.....Respondents.

For the applicant : Mr.A.K.Mohapatra, counsel

For the respondents : Mr.S.B.Das, counsel

Heard & reserved on: 11.3.2019

Order on : 27.3.2019

O R D E R

PER MR. GOKUL CHANDRA PATI, MEMBER(A)

By way of filing this OA, the applicant seeks the following reliefs:-

“That in view of the facts mentioned above the applicant therefore prays that the Hon'ble Tribunal may kindly be pleased to direct the respondents to give appointment to the applicant as Additional Professor Cardiology in AIIMS, Bhubaneswar from dt. 20.2.2018 with all consequential service benefits by due compliance to approval of Governing Body, AIIMS, Bhubaneswar dt. 5.12.2017 like other wait list faculties in other departments of AIIMS, Bhubaneswar approved for appointment on dt. 5.12.2017. The orders dt. 13.12.2018 vide Annexure A/8 issued by the respondents should be quashed/set aside with appropriate direction and any other order as deem fit be passed.”

2. The applicant while working as the Associate Professor in Cardiology in All India Institute of Medical Science, Bhubaneswar (in short AIIMS), had applied for the post of Additional Professor in Cardiology, which was advertised

on 7.3.2017. Dr. Pillai, the respondent No. 5, was selected for the post and the applicant was included in the merit list as a waitlisted candidate by the selection committee which was approved by the AIIMS Governing Body. Dr. Pillai, being the no.1 candidate in the merit list was issued the appointment letter vide letter dated 20.12.2017 but he failed to join within the time of 60 days stipulated in the order dated 20.12.2017 i.e. by 19.2.2018. The applicant's grievance is that after Dr. Pillai failed to join by 19.2.2018, his appointment should have been cancelled for non-compliance of the terms of the order dated 20.12.2017 and the applicant should have been given the offer of appointment as he is the candidate on the waiting list next to Dr. Pillai in the merit list which was duly approved by the authorities.

3. When the respondents failed to take any decision on the applicant's representation, the applicant had filed an OA No. 343/2018 which was disposed of with a direction to the respondents to consider the representation dated 30.6.2018. Thereafter, the respondent no.1 passed the order dated 13.12.2018 (Annexure-R/5 to the counter) rejecting the representation of the applicant. On the same day, i.e. on 13.12.2018, letter to Dr. Pillai was issued allowing him time till 27.12.2018 to join in the post (Annexure-R/1). Being aggrieved, the applicant has filed this OA.

4. The grounds projected by the applicant in support of the OA are the following:-

(i) The applicant was the wait listed candidate for the post as per the approval of the Governing Body and respondent No.4 (present Direction, AIIMS) being a member of the selection committee had given less marks to the applicant than the outside experts for which the applicant could be placed as a wait listed candidate in the merit list.

(ii) Since the applicant had raised objections earlier as HOD in the Department of Cardiology, the respondent No.4 acted with personal grudge with malafide intention towards the applicant.

(iii) The selected candidate Dr. Pillai did not join even after lapse of two months allowed in the appointment order dated 20.7.2017. Hence the appointment should have been treated as cancelled and the applicant should have been given the offer of appointment. Not giving him the offer of appointment is a discrimination against the applicant, which is contrary to the decisions of Hon'ble Supreme Court. The applicant cannot be debarred from the public appointment for the post for which he is duly selected.

(iv) Although other wait listed candidates in other departments have been issued appointment order, the applicant's case was not considered for appointment.

(v) The action of the respondents is violative of Article 14, 16 & 21 of the Constitution since the applicant has been debarred from the appointment.

(vi) The order dated 13.12.2018 was created by the respondent No.1.3 and 4 with malafide intention during pendency of the litigation.

5. When the OA was considered by the Tribunal on 18.12.2018 on prayer of the learned counsel for the applicant, for the interim prayer, the order was passed by the Tribunal directing the respondents to maintain the status quo in respect of filling up the post in question.

6. The respondents have filed Counter opposing the OA stating that the respondent No.5 who was selected for the post of Additional Professor, Cardiology, has accepted the offer of appointment and sought extension of joining period and the same has been allowed till 26.12.2018 with the approval of the competent authority vide the letter dated 13.12.2018 (Annexure-R/1). The proposal for extension of joining period for more than six months in respect of three candidates was sent to the respondent No.1 vide letter dated 31.10.2018 (Annexure-R/2) and it was informed that the proposal be put up to the newly appointed President of the AIIMS, Bhubaneswar. Accordingly, the proposal to extend the joining period of the respondent no.5 was extended till 26.12.2018 with approval of the President. Copies of the correspondence between the respondent no.5 and the respondent no.3 have been furnished in the Counter. It is stated in the Counter that the performance of the applicant in the past was not satisfactory for which he was issued a letter seeking his explanation for unprofessional conduct (para 7 of the Counter filed on 8.2.2019).

6. The Rejoinder was filed by the applicant on 20.2.2019 stating that the respondent no.4 cannot represent the respondent no.1 who should be directed to file counter separately. It is stated in the Rejoinder that the records pertaining to the selection for the post in question, has not been produced by the respondents who have also failed to produce a copy of the offer of appointment to the respondent no.5 vide letter dated 27.12.2017 and it has been done knowingly to mislead the Tribunal. The respondent no.4 has acted adversely against the applicant out of personal grudge and has issued false and baseless memos to the applicant who was also removed from the post of Head of Department for Cardiology Department of AIIMS. The applicant and the respondent no.5 were selected by the standing selection committee for the post and after the respondent no. 5 did not join the post within the stipulated time, the appointment order should have been issued to the applicant.

7. We have heard learned counsels for both the parties and perused the pleadings on record. Admittedly, the applicant was selected for the post of Additional Professor, Cardiology as a waitlisted candidate. He is aggrieved since instead of offering the appointment to him after the number one candidate i.e.

Dr. Pillai (respondent no.5) failed to join within the time stipulated in the appointment order dated 20.12.2017 and the representation of the applicant to appoint him was rejected vide order dated 13.12.2018 (Annexure R/5) and further extension of joining time till 26.12.2018 was allowed to the respondent No.5 vide letter dated 13.12.2018. The applicant alleges mala fide on the part of the respondent No.4 in denying his right for the post after failure of respondent No.5 to join the post within the time stipulated in the appointment letter dated 20.12.2017.

8. The counsels for both the sides have filed written notes of arguments after hearing, broadly reiterating their respective stands. The written notes on behalf of the applicant emphasises the point that the order dated 13.12.2018 extending the time for the respondent No.5 to join the post is non-est in the eye of law in the light of the judgment of Hon'ble Apex Court in the case of **Union of India vs. Ashok Kumar Agarwal**, 2013(16) SCC page-147. In the cited case, the dispute related to the validity of an order passed by the authorities regarding suspension of an officer and such order was found to have been issued without complying the order of the Tribunal besides being against the rules and the guidelines of the Government. The ratio of this judgment is not applicable to the present OA, which is factually distinguishable. There is no averment in the OA that the order dated 13.12.2018 violated any rules or guidelines of Government or any order passed by the Tribunal. The case of the applicant is that the order dated 13.12.2018 was issued in spite of the failure of the respondent No.5 to join within the time stipulated in the appointment order issued in December, 2017. The respondents have averred that the respondent No.5 had accepted the appointment but requested for extension of his joining time, which was duly considered and the decision of the competent authority was intimated vide order dated 13.12.2018.

9. In the written argument of the applicant it is also stated that since no order of extension of joining was issued to the respondent No.5 within one month time stipulated in the appointment letter and the applicant was not issued the appointment as per the approved merit list where the applicant is wait-listed, the applicant was discriminated. It is stated by the respondents in their counter that the respondent no.5 accepted the offer and requested for extension of joining time of six months as per the copy of the letter enclosed at Annexure-R/9 to the counter filed by the respondents. This request has been examined and the extension to joining time was allowed vide order dated 13.12.2018. Although the order for extension was not issued within one month, but it cannot be said to be discriminatory since from the records, no motive can be assigned to the respondents for not taking the decision in this

regard within one month from the date of issue of appointment letter to the respondent No.5. No rule or regulation or guidelines of Government has been produced by the applicant in support of the contention that the extension of joining time will have to be communicated within the time stipulated in the appointment order. Hence, it cannot be said that the decision of the authorities to allow the request for extension of joining time to the respondent No.5 was a discrimination against the applicant or it was an arbitrary or illegal action.

10. The applicant's counsel in his written note has cited the case of **Bhupendranath Hazarika -vs- State of Assam [AIR 2013 SC 234]** at para 48 and 53 of the judgment. In this case the observation of their Lordships was regarding the role of State as a model employer to act fairly giving due regard to the rules. In the present OA the respondent No.5, a more meritorious candidate, has requested for joining time and the authorities have duly considered the request. It has not been demonstrated before us that the authorities have violated the rules or guidelines by considering the request for extension of joining time. Hence, the principle laid down by the Hon'ble Apex Court in this judgment has not been violated by the respondents in this OA. In the second case of **Ravi Yashwant Bhoir vs The Collector, District Raigad & Ors. [AIR 2012 SC 1339]**, para 37 of the judgment is on malice in law relating to the action taken by the respondent authorities without lawful excuse in disregard to the rights of others. In this case as stated above, it has not been proved that the action of the authorities is against the provisions of rules.

11. The other citation of learned counsel for the applicant related to the case of **Dr. Pyare Lal Bhargava -vs- State of Rajasthan [1979 (3) SLR 706]** decided by Hon'ble Punjab & Haryana High Court. In that case the petitioner was a waitlisted candidate and the two candidates above him did not join against the vacancy and it is not mentioned if they requested for extension of joining time. In the present OA, the candidate placed at Sl. No.1 above the present applicant has sought for extension of time. The present applicant has challenged the decision of the respondents to allow extension of time to the candidate. Therefore, the cited case is factually different from the present OA, for which the ratio of the judgment will not be applicable to the present OA. The judgments in other cases cited in the written notes submitted by the learned counsel for the applicant are similarly inapplicable to the present OA.

12. The relevant issues for decision in this case are (i) whether the applicant gets a right to be appointed for the post after the respondent No. 5 did not join within the time stipulated in the appointment order and (ii) whether the official respondents were justified in approving extension of joining period of the respondent No.5 permitting him to join by 26.12.2018 vide the order dated 13.12.2018 (Annexure-R/1 to the counter).

13. We take note of the judgment of Hon'ble Apex Court on the issue of the right of a candidate who is in the merit list finalized for recruitment in the case of **All India SC & ST Employees' Assn. v. A. Arthur Jeen**, reported in (2001) 6 SCC 380, in paragraph 10, which reads as under:

"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**. Para 7 of the said judgment reads thus:

"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. Subash Chander Marwaha**, **Neelima Shangla v. State of Haryana** or **Jatinder Kumar v. State of Punjab**."

14. In the case of **Punjab State Electricity Board and Others v. Malkiat Singh**, reported in (2005) 9 SCC 22, it was held by Hon'ble Apex Court as under:-

"4. Having considered the respective submissions made by the learned counsel for the parties, we are of the view that the High Court committed an error in proceeding on the basis that the respondent had got a vested right for appointment and that could not have been taken away by the subsequent change in the policy. It is settled law that mere inclusion of name of a candidate in the select list does not confer on such candidate any vested right to get an order of appointment. This position is made clear in para 7 of the Constitution Bench judgment of this Court in **Shankarsan Dash v. Union of India** which reads: (SCC pp. 50-51)

"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....."

15. Regarding the right of a candidate selected for a post, Hon'ble Apex Court in the case of **Rakhi Ray v. High Court of Delhi**, reported in (2010) 2 SCC 637, has laid down the following :-

"A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not

amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In the instant case, once 13 notified vacancies were filled up, the selection process came to an end, thus there could be no scope of any further appointment."

16. Similarly, in the case of [State of Bihar and Ors. v. The Secretariat Assistant Successful and Examinees Union, 1986 & Ors. reported in AIR 1994 SC 736](#), it was held by Hon'ble Apex Court as under:-

"10. It is now well settled that a person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment, and by itself does not amount to selection or create a vested right to be appointed unless relevant service rule says to the contrary. (See [Shankarsan Dash v. Union of India- and Sabita Prasad and Ors. v. State of Bihar and Ors.- 1992 \(3\) Scale 361](#))."

17. From the ratio of the judgments discussed above, a candidate does not have any indefeasible right of appointment or does not acquire any right of appointment because of the fact that he is included in the merit list, unless such right is conferred under the service rules. In this case the applicant has not produced any rules in support of his claim to be appointed after the selected candidate (respondent No.5) failed to join within the time stipulated in his appointment order without considering his request for extension of joining time. The applicant has alleged mala fide on the part of the respondent No.4 who had earlier taken some action against the applicant for his conduct as stated in the OA and Counter. We have perused the file pertaining to the selection of the post in question at the time of hearing. We did not find any instance of mala fide or arbitrary action on the part of the official respondents in respect of the applicant as far as selection for the post of Additional Professor, Cardiology is concerned. It is found that the extension of joining time for the respondent No.5 was allowed by the official respondents after referring the matter to the respondent No.1 and after the request for extension of joining time was received from the respondent No.5. This contention was also mentioned by the respondent No.1 in the impugned order dated 13.12.2018 (Annexure A/8) by which the applicant's representation was rejected. There is nothing on record to show that the process was vitiated and that the action taken by the official respondents in the matter can be termed as mala fide or arbitrary. It cannot be said that extension of time allowed to the respondent No.5 on his request to join the post is against the rules/regulations or guidelines of the Government or such exercise of power by the respondents is mala fide or has resulted in discrimination of the applicant. Hence, averments of the applicant to that effect are not based on facts on record.

18. As per the settled law, the applicant does not acquire any right in respect of the post for which he has been selected as a wait-listed candidate as long as the case of the candidate with higher merit is under consideration of the authorities. Further, consideration for extension of joining time of such a candidate with higher merit than the applicant cannot be termed as arbitrary or discriminatory. We are unable to agree with the argument placed on behalf of the applicant that due to approval of the AIIMS Governing Body to the selection, the applicant has the right to be appointed in the post without considering the respondent No.5's request for extension of time. In absence of any specific service rules or guidelines to the contrary, allowing extension of joining time to the respondent No.5, who is undisputedly more meritorious, is the prerogative of the respondents and such decision cannot be considered to be illegal or arbitrary. No rule or regulation or guideline has been furnished by the applicant in support of his contentions.

19. In the facts and circumstances as discussed above, we are unable to grant any relief to the applicant in this OA or interfere in the matter. However, taking note of the fact that the selection for the post of the Additional Professor, Cardiology was finalized in the year December, 2017 and the recruitment process for filling up the vacancy is yet to be completed, although more than one year has elapsed since December, 2017, we direct the official respondents to take necessary action to complete the recruitment process for the said post as per the provisions of law within eight weeks from the date of receipt of a copy of this order. The interim order dated 19.12.2018 stands vacated accordingly.

20. The OA is disposed of as above with no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath