
(2003) 03 GAU CK 0014
In the Gauhati High Court
Case No : Writ Petition (C) No. 5252 of 2002

N.K. Kalita (Dr.)

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 28-03-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2003) 3 GLT 322

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : A.K. Bhattacharyya, P.C. Borpujari, B.K. Singh, K.K. Bhattacharyya, R.B. Deb, A.K. Choudhury, R.P. Hazarika and A. Bhuyan, for the Appellant; G.A. Assam, B.K. Sharma, S. Dutta and Choudhury, for the Respondent

Judgement

D. Biswas, J.—The Petitioner is working as Chief Consultant in the Bhubanswar Borooah Cancer Institute, hereinafter referred to as the "BBCI". He had joined the BBCI as Senior Assistant Radiotherapist in the year 1983. Eventually, he was promoted to the post of Chief Consultant on consideration of the meritorious services rendered by him. In this petition, he has sought for appropriate directions for appointment to the post of Director, BBCI, from the select list prepared and recommended by the Search Committee, and also for directions calling upon the Respondents not to initiate selection process afresh in pursuance of the subsequent advertisement dated 31.7.2002. The Court by the order dated 23.8.2002 issued rule and passed the following interim order:

With regard to the interim prayer, it is made clear that the authority may proceed with the matter in terms of the advertisement and even the Petitioner may also apply for the post. But, no appointment shall be made to the post of Director, Dr. B. Barooah Cancer Institute, Guwahati-16 without prejudice to the right of the Petitioner in this particular writ application. The authority may come forward for modification, variation, alteration of this order after receipt of instruction.

2. The Respondent No. 2, Commissioner and Secretary to the Govt. of Assam in

the Family Welfare Department issued an advertisement on 2.9.2000 inviting applications for the post of Director, BBCI which fell vacant on retirement of Dr. GG Ahmed. The Petitioner applied for the post and submitted his application in the standard form with all requisite particulars. The Petitioner was interviewed by the Search Committee constituted by the government on 5.3.2001 along with two other candidates. The fourth candidate was interviewed on 2.5.2002. The Management Council in its meeting dated 3.5.2002 considered the recommendations of the Search Committee, but the proceedings thereof were not made public. The Petitioner, who had fared well, was expecting selection and appointment. Eventually, he was informed that the Management Council did not recommend any candidate empanelled by the Search Committee as none of them was found suitable to hold the post of Director. The impugned advertisement inviting applications for the post of Director was issued on 31.7.2002. By that time, the Petitioner also came to know that he had topped the list of selected candidates prepared by the Search Committee. By the letter dated 11.7.2002 the Superintendent (Administration), BBCI informed the Petitioner that the Management Council did not recommend any of the persons selected by the Search Committee as they found none of them suitable to hold the post. However, the Petitioner came to know from reliable source that the Management Council rejected the selection of the Petitioner in the meeting held on 3.5.2002 on the ground that there was a vigilance enquiry against him in 1993 and this was not placed before the Search Committee at the time of selection. According to the Petitioner, there was no vigilance enquiry against him at any point of time and his promotion to the post of Chief Consultant in the year 1997 nullifies the plea of vigilance enquiry. According to the Petitioner, he is duly qualified to hold the post of Director having varied experience in the medical profession. Blaming the Respondent No. 2 of hatching a conspiracy against him, this petition has been filed for appropriate directions for his appointment.

3. The Respondent No. 4 in his affidavit, controverted the averments made in the writ petition. According to the Respondent No. 1, the impugned advertisement dated 31.7.2002 and the initial advertisement dated 2.7.2000 were issued for appointment of Director on contract and tenure basis. No. indefeasible right has accrued to the Petitioner for his appointment as Director for the reason that he had appeared in the earlier selection process. The Petitioner is not eligible to get a Writ of Mandamus for his appointment on contractual service which has no nexus with direct recruitment or promotion. According to the answering Respondent, the process of selection has already been completed in pursuance of the impugned advertisement and, in the interest of the public in general and for the patients in particular, the post of Director has to be filled-up by a competent person. In para 5 of the affidavit, it is submitted that on receipt of a complaint forwarded by the Govt. of Mizoram, the then Director of the Institute served show cause notice dated 7.4.93 on the writ Petitioner. The reply given by the writ Petitioner in his letter dated 15.4.93 was not found to be satisfactory and, as such, the Director by the letter dated

17.5.93 (Annexure-5) warned the Petitioner to be careful in future. The official records reveal that the Petitioner had admitted his guilt and prayed for mercy in the matter. Besides, it is contended that the vigilance enquiry of 1993 was not brought to the notice of the Search Committee and that the Search Committee conducted the selection contrary to the guidelines formulated by the Management Council for which the Management Council decided not to accept the recommendations. Accordingly, the Management Council resolved that the process of selection be started denovo and fresh advertisement be issued. The Board of Directors in its meeting held on 28.5.2002 also approved the resolution of the Management Council. It was in this context, the impugned advertisement dated 31.7.2002 was published in search of a suitable candidate to man the post of Director.

4. I have heard Mr. AK Bhattacharyya, learned senior counsel for the Petitioner and Mr. BK Sharma, learned senior counsel for, the Respondents as well as the learned State counsel.

5. We may at the very outset refer to the impugned decision of the Management Council in rejecting the select list adopted in its meeting held on 3rd May, 2002 which reads as follows:

The Management Council has noted that during 1993 there was a vigilance inquiry against Dr. N.K. Kalita and that this fact should have been brought before the Search Committee at the appropriate time, but this had not been done. Secondly, the Management Council has also noted that Dr. P.K. Choudhury who was placed at No. 2 in the recommendations of the Search Committee does not possess the basic qualifications required for the post of Director. In view of this the Management Council rejects the recommendations of the Search Committee constituted vide notification No. HLB. 100/93/ PLI/120 dtd. 8.2.2000 and HLB. 100/93/PLI/126 dt. 17.5.2000 by the State Government of Assam.

The Management Council resolves that the full process for the selection of Director, BBCI be started de-novo very urgently. Both an advertisement be issued and Management should seek nominations from various institutions and organisations. A draft requirement for the post of Director as approved by Management Council is given at Annexure-1. A regular interview by a Search Committee consisting of the following should take place.

6. The above decision of the Management Council was placed before the Board of Directors in the meeting held on 28.5.2002. The Board of Directors considered the recommendations of the Management Council, accepted the same and decided to go for fresh selection process. The decision of the Board of Directors relevant to the issued at hand is quoted below:

2. The second item of the agenda was related to selection of the Director of BBCI. The Board of Directors took note of all the recommendations of the Management Council and agreed to its recommendations. The Management Council did not find any body interviewed or heard by Search Committee to be

suitable for the post of Director. The Chairman felt that the lack of a regular Director has been a matter of serious concern. He directed that the post of Director should be filled up at the earliest. He further stated that the persons who should head this Institute should be an eminent, professional with administrative experience. He further expressed that the head of the institution should be an Oncologist and in case they are unable to find an Oncologist suitable for the post then we may have to settle with best option available. He urged that members to express their views in the matter.

Dr. Kakodkar, Chairman, Atomic Energy Commission suggested that the Committee suggested by the Management Council should be a Search-cum-Selection Committee and besides calling applications through advertisement this committee should also take action to search for suitable candidates. He suggested the approach should be flexible and the salary should be negotiable. He pointed out that a person of adequate seniority with a few years service experience may look upon this job as an opportunity to head a specialized institution and would be able to command the respect of staff and doctors working in the hospitals. He further stated that middle level eminent Oncologist may view this as an opportunity to rise to a higher level after having served as Director. In view of this, he suggested that the approach should be flexible.

Secretary, Health, Govt. of India Sri Nair stated that the Institute has so far been engaged primarily in patient care and there is an urgent need to bring in the element of research for which a professionally suitable oncologist would be the best choice. He however felt that the Director of the Institute should also be having the experience in Hospital Administration as the present situation indicates that there is need to tighten up this part of the institution.

The Hon'ble Minister of Health, Assam, Dr. B. Barman stated that there are very high expectations by the people of the State and he preferred that a person of this region is selected as the Director. He however agreed to the views of the Chairman that the person should be any eminent Oncologist with good background of Hospital Administration. The Chairman requested Dr. Kakodkar of Atomic Energy Commission to suggest any other alternative, Dr. Kakodkar stated that it may be beneficial to take a person on a deputation for a period of 3 years who can run this Institute and then return to his parent organization. He further offered to search for such a suitable person who can be made a Director of the Institute.

Conclusion - After detailed discussion the Board resolved that the proposed Search-cum-Selection Committee should be given a time frame of 3 months to be able to come up with the selection of the Director. It further resolved that both the process of calling applications through advertisement and by writing to various institutions should be take up. It also resolved that the advertisement, which is to be brought out, should be such as to allow a flexible approach in the selection.

7. It would appear that the Management Council did not act upon the select list and recommend the writ Petitioner for appointment who had topped list on the ground that there was a vigilance enquiry against the writ Petitioner and this was not placed before the Search Committee at the appropriate time. The Board of Directors after taking into consideration the suggestion given by Sri Kakodkar, Chairman, Atomic Energy Commission decided to advertise the post afresh for selection of a suitable candidate of eminence with good background of hospital administration.

8. The decision of the Management Council rejecting the select list for non-consideration of the vigilance enquiry by the Search Committee was accepted by the Board of Directors. Therefore, the controversy with regard to appointment of the writ Petitioner as Director, BBCI centers around the alleged vigilance enquiry. This necessitates scrutiny of the documents annexed with the affidavit-in-opposition and the documents produced by the Respondents to verify the nature of the vigilance enquiry and its impact on the candidature of the writ Petitioner.

9. In para 5 of the affidavit-in-opposition, the Director averred as follows:

....

The Deponent states that on receipt of the said complaint, the Director of the Institute served as show cause notice dated 7.4.93 on the writ Petitioner asking him to submit his reply against the allegation. The writ Petitioner submitted his reply to the said show cause notice on 15.4.93 which was not found to be satisfactory so as to prove his innocence to the allegations. It is further stated that the letter dated 17.5.93 (Annexure-5, to the writ petition) issued by the Director to the writ Petitioner was a warning to be careful in future, although much deterrent action was warranted against the writ Petitioner. By no stretch of imagination the said letter could be constructed to have been issued being satisfied that there was no basis of the complaint. The records of the Institute reveal that the Petitioner had admitted his guilt and prayed for mercy in the matter. The Annexure-5 letter dated 17.5.93 annexed to the writ petition bears the testimony of the same. By the said letter the Petitioner was asked to take necessary corrective measures so that there was not scope for any complaint in future -

The above statement has been made by the Director on oath with reference to the documents annexed as Annexures-A, B and C to the affidavit-in-opposition. In para 10 of the reply submitted by the writ Petitioner it is pleaded that the statement in para 5 of the affidavit-in-opposition is wholly wrong and is a clever attempt to distort the facts. According to the writ Petitioner, the documents were subsequent manipulations to malign him and to justify the illegal rejection of his candidature.

10. Annexure-A is the letter dated 18th March, 1993 written by the Joint Secretary to the Govt. of Mizoram, Health and Family Welfare Department to the Director of BBCI wherewith a complaint lodged with the Minister-in-charge,

Health, Govt. of Mizoram by one R. Zoramthanga was forwarded. The said complaint (Annexure-B) as translated is quoted hereinbelow:

Sir,

I beg to request you to kindly listen to our plea and to take action as found necessary.

B. Barooah Cancer Institute, Guwahati is a vital cancer institute for the people of northeast India, particularly for the people of Mizoram as it is one of the few places where we have been taking treatment. Almost all the Govt. employees suffering from cancer are referred by the authority (Health Department).

Although most of the doctors and staff working in the institute are kind and caring, we are beginning to face immense problems due to few varacious staff. These problems in detailed are as follows.

Staff in the X-ray Department and Laboratory and ENT Specialist Dr. N.K. Kalita (Sr. Asstt. Radiotherapist) of Radiation Department, which is the most important department are in the habit of demanding money on every occasion. Especially the way how Dr. N.K. Kalita get things done is very dirty. Patients who have completed investigation and are recommended by the doctor concern to undergo Radio-Therapy have to do it through this doctor. He usually fixed the date requiring the patient to wait for 10-30 days in Guwahati, sometimes advising them to go home till the date in due. He would then say "we can discuss this at the outside or any other convenient place." Again, he would leave us with giving us an option of either paying him between Rs. 2000/- - 3500/-for immediate treatment or wait for the date fixed by him. Many cancer patients choosed to wait and suffered than to comply with his dirty practice. Some of them are compelled to narrate their story to the head of Institution resulting in the reversion of date or early treatment. Some of them paid the amount as demanded as it is a matter of life and death. I have verbally told the Superintendent about this who told me never to given him money ("Never give him money").

It is going to be very sad and heart breaking if we gcon like this. Some of us are poor people who have to sell one"s own property in order to get treatment and some are totally depending on the Govt. coffer.

We request you to find a way of putting an end to this dirty Mal-practice.

Thanking you,

Yours faithfully, Sd/- (R. ZORAMTHANGA) mizoram::Aizwal

11. It would appear that in the said complaint specific allegations were made against the writ Petitioner of demanding and taking graft. The notesheet (Annexure-C) in a single piece of paper reveals that the writ Petitioner was asked to submit his explanation, and show cause notice was issued to him.

(a) The show cause notice dated 7.4.93 available in the office file shows that writ Petitioner was asked to submit explanation within seven days on the allegation of accepting money from patients. In receipt thereto the Petitioner by the letter dated 15.4.93 submitted as follows:

with reference of above letter (which I received on 8.4.93) I humbly say that the allegation referred to in the aforesaid order is wholly unfounded and untrue.

In this connection I would most humbly request you to note that requests for out of turn advancement of Ratio Therapy dates are quite common. When any of such requests is found to be not capable of being accommodated on grounds of medical emergency or accommodability in the Radio-Therapy machines, and that too on the patients desired date, threats of various kinds including reprisal by means of action through high governmental quarters come.

That Sir, I have never done any irregularity of the kind referred to in your aforesaid letter dated 7.4.93.

Under these circumstances I most respectfully pray that further action on the allegation may not kindly be pursued.

(b) Thereafter, another notice dated 17.4.03 was served upon the Petitioner which reads as follows:

Please refer to your letter dated 15.4.93 in reply to our letter No. BBCI/CON-59/364/63 dated 7.4.93. I request you to give specific reply to the following specific charges made in the complaint received from the Govt. of Mizoram.

1. That you unusually fix the date for Radiotherapy in such a manner that the patients have to wait for 10-30 days in Guwahati.
2. That some time you advice the patient to go home till the date is due and then you say that "We can discuss this at the outside or at any other convenient place.
3. That you give the patients an option of either paying you between Rs. 2000/- to Rs.3500/- for immediate treatment or wait for the date fixed by you.

You are to submit your reply within 7(seven) days from the receipt of this letter.

(c) On 26.4.93, the Petitioner submitted his reply as follows:

With reference to your letter cited above (which I received on 19.4.93) I beg to submit my reply as follows:

1. No fixed date is given. However a provisional date is given serially and the date of commencement of Radiotherapy may vary from the provisional date on account of the factors mentioned below, and the patients are generally explained about the provisional nature of the date given.

(a) Availability or non availability of space in the Radiotherapy machines to accommodate patients.

(b) Back-log resulting from not infrequent breakdown of the Radiotherapy units or other unforeseen circumstances like strike etc.

(c) Places in the provisional list remaining unclaimed by patients whose names appear in the list of provisional date.

2. This is wholly untrue and unfounded.

3. This is wholly untrue and unfounded.

In view of the facts and circumstances set forth herein above I most respectfully submit that no further proceedings are warranted on me.

(d) It would appear that the writ Petitioner never admitted that he had accepted the allegation made against him in any of the replies submitted by him. The letter dated 17.5.1993 addressed to the writ Petitioner by the Director reads as follows:

Reference your letter dated 15.4.93 and our discussions of date, please take all necessary corrective measures so that there is no scope for any complaint against any employee working in Radiotherapy Department.

(e) From the above, letter dated 17.5.93, it appears that on 15.4.93 there was a discussion between the Director and the writ Petitioner and in pursuance thereof, the Director wrote the letter dated 17.5.93 requesting the writ Petitioner to take all necessary corrective measures so that there is no scope for any complaint against any employee working in the Radiotherapy Department. This letter cannot be interpreted to show that the writ Petitioner was indicted for any illegal activity. The note sheet also do not show that there was any discussion between the Director and the writ Petitioner on 15.4.93.

(f) There is no document on record except the note sheet to show that any decision was arrived at by the Director about the involvement of the writ Petitioner in illegal activities, as mentioned in the complaint petition. However, the office note maintained (on a single sheet of paper) is quoted below in its entirety which will show that on 17.5.1993 the Director made an endorsement that the writ Petitioner met him and confessed that he had taken money but only Rs. 500/-.

Complaint against Dr. N. Kalita

5.4.93 Seen today given to me by Registrar, B.

Sd/-

6.4.93 Meeting with Supt. Dr. Choudhury and i/c Tech. Dr. Medhi

Decided to ask for explanation

7.4.93 Show cause notice issued to Dr. Kalita,

Sd/-

17.4.93 Meeting with Addl. Chief Secy. Mr. Rao, who advised to ask for specific changes. Notice issued accordingly.

Sd/-

17.5.93 Dr. Kalita came and confessed that he did take money but only Rs. 500/- and kept.

He further asked that since it was his first offence he should be pardoned and promised not to do such things in future.

Action taken accordingly.

Sd/-

(g) This note dated 17.5.93 is contrary to the letters written by the writ Petitioner denying the charges leveled against him. There is no material on record to show that the writ Petitioner ever admitted his guilt. The note dated 17.5.93 appears to be contrary to the stand taken by the writ Petitioner in his reply to the show cause notices quoted above. It, therefore, becomes difficult to arrive at a positive conclusion. The documents produce in the office file at best show that there was a complaint against the writ Petitioner and show cause notices were issued in pursuance thereof and the writ Petitioner submitted his replies denying the charges.

12. Sitting in a writ jurisdiction, it is not reasonably practicable to record any positive decision with regard to the existence of complaint and subsequent developments as indicated in the affidavit. But the fact remains, as is evident from the Annexures-A, B and C, that a complaint was forwarded by the Government of Mizoram to the Director of BBCI questioning the integrity of the writ Petitioner. There is no dispute that the Search Committee while making recommendations was not apprised of the aforesaid complaint, alleged admission of guilt and tender of pardon. The resolution of the Managing Council also does not reflect that the documents relating to vigilance enquiry were addressed in the members present.

13. Mr. Bhattacharyya, learned senior counsel for the Petitioner argued at length to show that the documents - Annexures-A, B and C are subsequent manipulations to defeat the prospect of the writ Petitioner from being appointed as the Director. According to him, the Petitioner is a victim of conspiracy hatched by the Director and other persons. Mr. Bhattacharyya further pointed out that the writ Petitioner joined the BBCI as Senior Assistant Radiotherapist in 1983 and because of his proficiency and extraordinary meritorious service, he rose to the position of Chief Consultant. The letters of appreciation and certificates issued by different institutions and even by the Director of BBCI clearly indicate that the writ Petitioner is qualified and experienced enough to hold the post of Director. Despite that the Management Council as well as the Board of Directors decided to reject the select list on mere doubt of Integrity based on non-existent vigilance enquiry. Mr. Bhattacharyya, learned senior counsel relied upon a

number of decisions of the Supreme Court in order to bring home the point that the rejection of the select list was arbitrary, illegal and, therefore, unsustainable in law.

14. Mr. BK. Sharma, learned Sr. counsel Ipr for the Respondents, submitted that the Petitioner has no right to appointment sine it is a direct appointment on contract. Besides, Mr. Sharma pointed that the complaint received from the Government of Mizoram in itself was a matter of significance, and the complaint along with other documents are enough for rejection of the candidature of the Petitioner. According to him, the promotion given to the writ Petitioner subsequent to the receipt of the complaint and admission of guilt cannot obliterate the past conduct altogether. Relying upon a number of judgments of the Supreme Court, Mr. Sharma argued that the writ Petitioner has no enforceable right to appointment.

15. In Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, the Supreme Court relying upon the decision in (1950) 1 All ER 76, Pilling v. Abergeke Urban Dist., Council held as follows:

....

8. We are in agreement with this view. It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstances. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience and as things go, these may well be said to run into one another.

9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the "public interest" to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power.

16. The above decision of the Supreme Court make it clear that an administrative decision/order which is based on reasons of fact not in existence must be held to be infected with abuse of power. In so far the existence of vigilance enquiry and report are concerned, it would appear from the available documents that the enquiry initiated against the Petitioner was not brought to any logical end. The matter rested at the stage of issuance of show cause notice and reply. It may be because of the development reflected in the note dated 17.5.1993. The subsequent complaint by one Rajiv Ahmed (Annexure-II) lodged after institution of the case does not seem to have been addressed by the Respondent authority and no enquiry appears to have been initiated in pursuance thereof. On this backdrop, the note dated 17.5.93 (Annexure-C) to the effect that the writ

Petitioner came and confessed that he did take money, but only Rs. 500/- becomes a suspect. But this does not obliterate the complaint and the notices issued. As stated earlier, no positive finding can be recorded by this Court in exercise of writ jurisdiction with regard to the enquiry initiated in 1993 and involvement of the writ Petitioner. The Management Council before rejecting, the recommendations of the Search Committee should have either caused further enquiry into the matter or refer the matter to the Search Committee for reconsideration. The Board of Directors in their resolution for re-advertisement taken in the meeting dated 28.5.2002 did not broach upon the allegation of corruption against the writ Petitioner and decided to re-advertise the post holding that the Management Council did not find anybody interviewed or heard by the Search Committee to be suitable for the post of Director. The Management Council obviously relied upon the enquiry made in 1993 though it was not discussed in details. The Management Council, as the resolution suggest, did not try to find out the nature of the complaint and the action taken and the extent of the involvement of the writ Petitioner, if any. The entire process of rejection by the Management Council and ratification thereof by the Board of Directors appear to have been without adequate application of mind though it cannot be said that it was based wholly on non-existent fact. The Management Council may disagree with the recommendation of the Search Committee, but for reasons after application of mind. (Reference: Neelima Misra, Appellant v. Harinder Kaur Paintal and Ors. Respondents (1990) 2 SCC 746).

17. Mr. AK Bhattacharyya, learned senior counsel for the Petitioner also relied upon the decision in *Osmania University represented by its Registrar, Hyderabad, A.P. Vs. Abdul Rayees Khan and Another*, and *Dr. Kumar Bar Das Vs. Utkal University and Others*, in order to show the sanctity of the recommendations of the Expert Committee. In *A.P. Aggarwal Vs. Govt. of N.C.T. of Delhi and Another*, the Supreme Court held that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. The case before the Supreme Court was that the Appellant therein was in the reserve list for appointment as Member of the Sales Tax Appellate Tribunal and the Government instead of appointing the Appellant as the Member chose to cause fresh advertisement to be issued calling for fresh applications. The Supreme Court directed the Government to appoint the Appellant as no attempt was made before the Supreme Court to show that the Appellant was not fit to occupy the post and no valid reason was given for ignoring the Appellant and launching fresh process of selection. We may quote hereinbelow the observation of the Supreme Court in para 11 and 12 of the judgment.

....

11. In our opinion, this is a case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore it is coupled with a duty to shun arbitrariness in its exercise and to

promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. Even if it is to be said that the instructions contained in the office memorandum dated 14-5-1987 are discretionary and not mandatory, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also satisfy the mandatory requirement of the statute. It is not therefore open to the Government to ignore the panel which was already approved and accepted by it and resort to a fresh selection process without giving any proper reason for resorting, to the same. It is not the case of the Government at any state that the Appellant is not fit to occupy the post. No attempt was made before the Tribunal or before this Court to place any valid reason for ignoring the Appellant and launching a fresh process of selection.

12. It is well settled that every State action, in order to survive must be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us (vide *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*,

18. The ratio available in the above judgment cannot be straightway applied in the instant case because the decision of the Management Council cannot be said to be wholly based on non-existent fact. The integrity of the writ Petitioner was questioned and there was some sort of enquiry. There is room for doubt with the final outcome of the enquiry and reflected in the note dated 17.5.93. It was a matter of direct appointment on contract. The integrity of the writ Petitioner was in question. In such a situation, the ratio in *A.P. Agarwal (Supra)* cannot be straight way followed in the instant case.

19. Mr. BK Sharma, learned senior counsel for the Respondents tried to justify the propriety and correctness of the decision relying upon a number of judgments of the Apex Court. The decision in *Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College*, was cited to show that the Petitioner has no statutory right to appointment and, as such, mandamus cannot be issued. Mr. Sharma relied upon the decision in *Banchhanidhi Rath Vs. The State of Orissa and Others*, wherein the Supreme Court held that appointment on contract cannot be enforced by an application under Article 226 of the Constitution.

20. The decision in *U.P. Bhumi Sudhar Nigam Ltd., Appellant v. Shiv Naralu Gupta, Respondent* 1995 (1) SLJ 9 has been referred to in order to show that even if a vacancy is available and the employer bonafide declines to make an appointment, the candidate on the select list has no right whatsoever to claim appointment. In the case at hand before the Supreme Court the post was abolished. In that context the Supreme Court declined to grant any relief to the Appellant.

21. Again in *Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another*, the Supreme Court held as follows:

17. Coming to the third question, which is more important from the point of

consideration of High Court's power for issuance of mandamus, it appears that the constitution empowers the High Court to issue writs, directions or orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights conferred by Part III and for any other purpose under Article 226 of the Constitution of India. It is, therefore, essentially, a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression "for any other purpose". The power of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, it must be exercised along recognised lines and subject to certain self imposed limitations. The expression "for any other purpose" in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Court must exercise the same with certain restraints and within some parameters. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition. (Kalyan Singh v. State of U.P. AIR 1962 SC 1183). The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law.

22. The decision in Dr. H. Mukherjee Vs. Union of India and Others, shows that the selection by the UPSC was only recommendatory and it was open to the Government either to accept the recommendation or to depart therefrom for valid reasons. In State of Bihar and others Vs. The Secretariat Assistant Successful Examinees Union 1986 and others, the Supreme Court held as follows:

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 Vs. Union of India, and S. Venkitachalam Iyer Vs. S. Rama Iyer,

23. The Supreme Court in Dr. P.K. Jaiswal Vs. Ms. Debi Mukherjee and others, held as follows:

5. ...It is obvious from the ratio of these two decisions to which our attention was pointedly drawn that if the Commission issues an advertisement at the behest of the Government and pursuant thereto calls a candidate for interview, the candidate has a right to be considered for selection but not a right to be selected or to appointment to the post in question....

24. The decisions referred to above clearly show that no writ of mandamus is available in the matter of appointment. Besides, a candidate seeking appointment has a right to be considered for selection, but no right to appointment to the post in question. In the instant case, the Petitioner was an applicant in pursuance of an advertisement issued on 2.9.2000. The appointment was specified to be for a period of three years which otherwise means an appointment on contract. Obviously, the Petitioner though selected and placed at the top of the list was not vested with any right to appointment on contract. Discretion is always there with the appointing authority in such a case to take a decision whether to appoint or not. The Management Council as well as the Board of Directors having been apprised of the allegation against the writ petition refrained from appointing him as Director of the Institute. This Court naturally would be hesitant to issue writ for appointment unless it is shown conclusively that the decision to reject the select list was wholly based on non-existent fact. The Petitioner is, therefore, not entitled to a Writ of Mandamus for his appointment. But the fact remains that the Management Council did not address the question of integrity in details and took the impugned decision without application of mind to the documents relating to enquiry in 1993. The matter, therefore, has to be reconsidered by the Management Council with due application of mind to the question of enquiry in the year 1993.

25. Hence, the petition is disposed of with the direction that the Management Council shall assemble again, reconsider the matter in the manner indicated above and take a decision afresh within a period of one month from today. Till then, no appointment shall be made in pursuance of the subsequent advertisement.

No costs.