

(2011) 09 DEL CK 0234

In the Delhi High Court

Case No : Writ Petition (C) No. 5035 of 2011

Shri Krishan

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 — Section 2, 3, 4, 4(4), 7

Citation : (2011) 183 DLT 535

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Suhail Dutt, Azhar Alam and Sandeep Goswami, for the Appellant; Harin P. Raval, ASG, Ravinder Agarwal, CGSC, Sachin Datta, CGSC, Harish N. Salve Chetan Gupta, for R-2, Trideep Pais, Suhasini Sen and Rahul Kriplani for R-3, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The petition impugns the appointment of the Respondent No. 3 Shri Mahesh Rangarajan as the Director of the Respondent No. 2 Nehru Memorial Museum and Library Society and further seeks a mandamus for selection/appointment of the Director of the Respondent No. 2 Society in accordance with the Rules of the Respondent No. 2 Society and after issuing an open advertisement and notifying the Employment Exchange regarding the vacancy. As on the date of filing of the writ petition, the Respondent No. 3 had not taken over charge of the post of Director (the term of earlier Director having not expired till then), the interim relief of restraining the Respondent No. 3 from assuming the post of Director was also claimed.

2. Notice of the petition and application for interim relief was issued. Pleadings have been completed and the hearing concluded on 8th August, 2011. Since the Respondent No. 3 was to assume charge of the post w.e.f. 9th August, 2011, while reserving judgment it was directed that the taking over of the charge by the Respondent No. 3 shall be subject to orders in this petition.

3. The Respondent No. 2 is a Society registered in or about the year 1966, under the Societies Registration Act, 1860 inter alia to take over the administration and management of the Nehru Memorial Museum and Library with all its assets and liabilities from the Ministry of Education, Government of India. As per the Rules & Regulations of the Respondent No. 2 Society, the property, movable and immovable of the Society and administration of its affairs vests in the Executive Council of the Society. The Rules and Regulations provide for the appointment by the Executive Council, with the prior approval of the Central Government, of a Director, to be the Principal Executive Officer of the Respondent No. 2 Society, responsible for the proper administration of the affairs of the Respondent No. 2 Society under the direction of the Executive Council.

4. It is not in dispute that the post of Director of the Respondent No. 2 Society is a selection post to be filled up by the method of direct recruitment with educational and other qualifications inter alia as under:

Essential:

(i) Eminent scholar with specialization in modern Indian history and ability to conduct and guide original research.

(ii) Published research work of high merit.

(iii) At least ten years" experience in a responsible position in Government Autonomous Organization or a University.

5. The methods of recruitment as per the Service Bye-Laws of the Respondent No. 2 Society are as under:

7. Methods of Recruitment

1. Recruitment to a post under the Society may be made;

i) by promotion;

ii) by direct recruitment;

iii) by transfer/deputation;iv) by re-employment of a retired employee of the Society or of any other organization or

v) on contract for a specified period

2.The Appointment Authority shall in each case determine the method by which vacancies shall be filled. In doing so, the Appointing Authority shall pay due regard to, and where necessary, comply with the provision of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959.

9.Direct Recruitment

Appointment to any post by direct recruitment may be made on the recommendations of a selection committee from amongst:

- i) candidates recommended by the Employment Exchange on requisition in respect of those categories of employees of which recruitment has to be made through the Employment Exchange, and/or
- ii) from amongst the candidates applying in response to an advertisement; and/or
- iii) from amongst persons selected through personal contact; and/or
- iv) from amongst candidates who have been recommended by such persons, or authorities from whom recommendation has been called for by the Director; and/or
- v) from amongst candidates employed in Government autonomous or statutory organizations, who apply in response to any circular.

6. It is the case of the Petitioner, that the Respondent No. 2 Society being an Autonomous Body under the control of Government of India, the appointments therein are further governed by the Office Memorandums/Instructions issued from time to time by the Department of Personnel and Training (DOPT), Government of India. Reliance in this regard is placed on:

A. Office Memorandum dated 25th October, 1994 which is as under:

NO:AB-14017/36/94-Estt. (RR)

Government of India

Ministry of Personnel, P.G. & Pensions

Department of Personnel & Training.

25-10-94

OFFICE MEMORANDUM

SUBJECT: Search Committee -Composition of

1. The undersigned is directed to say that for recruitment to certain scientific, technical and specialized posts, Search Committees are set up for locating persons with the requisite background, knowledge and experience. The primary object of the Search Committees is to be assist the Government for preparing a list of suitable persons to enable the right selection. Therefore, they have a vital role to play in the selection process.
2. There are guidelines laid down to regulate the operation of such Committees. There are however no instructions indicating the situations in which Search Committees should be appointed and what should be their composition.
3. This issue has been examined and it is considered desirable to issue instructions which will regulate the constitution and operation of Search Committees. Accordingly the following guidelines are hereby laid down for this purpose.

3.1 Situation in which a Search Committee may be constituted

(i) A Search Committee can be constituted only for posts which do not fall within UPSC's purview. For posts which fall within UPSC's purview, recruitment has to be on the basis of Commission's recommendations.

(ii) It is to be kept in mind that as a rule, appointments in Government are to be made on the basis of open advertisement. Therefore, proper advertisement of vacancies to be filled up by direct recruitment is an essential requirement. There may, however, be situations where advertisement itself may not result in adequate response for recruitment to similar posts which require specialized scientific/technical knowledge and experience. It is only in these situations that a Search Committee should normally be appointed to locate suitable persons with the desired qualifications and experience to augment the response to the advertisement. The Search Committees should be appointed only for sufficiently senior posts which require specialized scientific/technical knowledge and experience. It has been decided that Search Committees may be constituted where considered necessary only for posts of the level of Director (Rs. 4500-5700) and above. Recruitment to posts below this level may be only through open advertisement. It may also be noted that the constitution of Search Committee cannot be a substitute for advertisement of posts and its role is only to supplement the recruitment effort through advertisement.

3.2 Composition of Search Committees.

While constituting a Search Committee, the following guidelines should be followed:

- i. The Search Committee should normally consist of not more than five members including the chairman.
- ii. The Search Committee should be chaired by the concerned Secretary. However, where it has been constituted for a Secretary level post, a senior and distinguished academician may be invited to chair the Search Committee.
- iii. No person who is a recipient of grants/funding from the Ministry concerned or who is closely related to such a recipient should be invited to join the Search Committee.
- iv. The composition should be well-balanced. The Committee should invariably include persons of appropriate standing having acknowledged expertise in the relevant field of relevant specialization. At least half of such experts should be from outside the Department;
- v. Where officers of Government, Autonomous bodies, PSUs etc. are nominated as members, they should be at least one level above the post to which recruitment is being made;
- vi. It is noticed that in many cases the same experts are invited for year together. While it may not be possible to lay down a hard and fast rule as regards

the period for which an expert may be asked to participate in such Committees" the tendency to rely on the same experts for long period of time is to be avoided. Considering the rapid pace of advancement in research and obsolescence of technology, it is necessary to infuse fresh blood in such committees in order that they may locate personnel who are engaged in research in frontiers of the relevant field.

vii. In some cases, the rules themselves prescribe search cum selection Committee(s). Usually the rules also lay down that the Committee should comprise a certain number of outside experts to be nominated by the Secretary. In such cases, it should be ensured that the composition is strictly as per rules. While selecting members of such committees, the guidelines set out in the preceding paras should also be adhered to.

3.3 Approval of composition of the Search Committee by DOPT

(i) It has also been decided that the composition of Search Committee for posts of and above the SAG level (i.e. pay scale of Rs. 5900-6700/7300) should be decided with the prior approval of Department of Personnel and Training.

(ii) As regards other posts below SAG level, the composition of the Search Committee, wherever necessary may continue to be decided by the Ministries/ Departments themselves. However, it should be ensured that composition of such Committees is in conformity with the guidelines contained in para 3.2 above.

3.4 In future, all proposals sent to Establishment Officer for submission to A.C.C. for posts in the scale of Rs. 5900-7300/- should be accompanied by a certificate certifying that the composition of Search Committee has the approval of the Department of Personnel and Training. In all other cases it should be certified that the constitution of the Search Committee is in conformity with the existing guidelines.

3.5 Application

(i) These instructions will, however, apply to future recruitments and not to the cases where a Search Committee has already been constituted and has commenced its activities.

(ii) These instructions may also be applied, mutatis/mutandis to autonomous bodies, funded wholly or partly by Government, in respect of appointments which are required to be made by or with the approval of Government of India.

4. All Ministries/Department are also requested to forward to this Department a list of posts to which recruitment is made on the basis of a Search Committee. This list may be sent to this Department within a fortnight of the receipt of this O.M.

B. Office Memorandum dated 5December, 2003 which is as under:

No. AB.14017/56/2003-Estt.(RR)

Government of India

Ministry of Personnel, Public Grievances and Pensions,

Department of Personnel and Training

New Delhi

Dated: 5th December, 2003

OFFICE MEMORANDUM

Subject: Situations in which Search Committees can be formed: clarifications regarding.

1. In the recent past instances have come to the notice of this Department where Search Committees have been constituted by certain Administrative Ministries for the purpose of recruitment to various civilian posts in the Government, as well as in the autonomous/statutory organizations (where the appointments are made by the Government or with the approval of the Government), without the approval of this Department and also without following the essential procedure of recruitment i.e., on the basis of an open advertisement as stipulated vide this Department's OM No. AB-14017/36/94 - Estt.(RR) dated 25.10.1994. Consequently, instructions regarding composition of Search Committees and the situations in which they may be constituted are reiterated in the ensuing paragraphs for strict compliance by all concerned.

2. Essential pre-requisites for the formation of Search Committees. In accordance with the Guidelines of this Department, immediately after a post is created, the Recruitment Rules for the same should be framed if the post is likely to continue for one year or more. Needless to say, in the first instance, action to fill the post as per the provisions in the Recruitment Rules has to be initiated: the procedure of Search Committee cannot be a substitute for the normal recruitment process.

3. Situations in which Search Committees may be constituted

(i) The post involved does not fall under the purview of the UPSC;

(ii) Since, as a rule, appointments in Government are to be made on the basis of open advertisement, this requirement has to be followed in the first instance, without fail, and it is only in situations where advertisement may not result in adequate response, that a Search Committee should normally be constituted;

(iii) Constitution of Search Committee cannot be a substitute for advertisement of posts and its role is only to supplement the recruitment effort through advertisements;

(iv) Such Search Committees should be constituted only for sufficiently senior posts at the level of Director (in the scale of Rs. 14300-18300) or above, which require specialized scientific/technical knowledge and experience; and

(v) The composition of the Search Committee needs to be approved by the Department of Personnel and Training in each case, if the post proposed to be filled by this procedure is in the scale of Rs. 18400-22400 or above.

4. These instructions are clarificatory in nature and the provisions of DoPT's OM No. AB-14017/36/94-Estt.(RR) dated 25.10.1994 (copy attached) should be strictly followed by all Administrative Ministries/Departments.

5. Hindi version will follow.

C. Office Memorandum dated 30July, 2007 which is as under:

No.AB.14017/11/2004-Estt.(RR)

Government of India

Ministry of Personnel, Public Grievances and Pensions,

Department of Personnel and Training

New Delhi.

Dated 30th July, 2007

OFFICE MEMORANDUM

Subject: Setting up of Search committees/Search-cum-Selection Committees.

As the various administrative Ministries/Departments are aware, the circumstances under which Search Committees can be constituted and their composition etc. are presently regulated by the instructions issued under this Department's OM No. AB-14017/36/74-Estt.(RR) dated 25.10.1994, reiterated under a subsequent OM No. AB.14017/56/2003-Estt.(RR) dated 4.12.2003. These instructions are primarily applicable to posts in the Government but also apply mutatis mutandis in the case of posts in autonomous/statutory organizations. Separately, instructions have been issued by the EO's Division of this Department, on policy and procedure for appointments in autonomous institutions through the ACC which contain, inter alia, guidelines on constitution of Search-cum-Selection Committees for posts in such bodies, their constitution etc., the latest guidelines, in this regard, being those issued under OM No. 28/13/2006-EO (SM.II) dated 3.7.06.

2. It has come to the notice of this Department that the principles brought out in the instructions of this Department, as referred to above, have not been kept in view fully, while setting up Search Committees/Search-cum-Selection Committees, in some cases. There exist also some shortcomings on the composition of the Search-cum-Selection Committees for posts in autonomous organizations/institutions.

3. The matter has, therefore, been reviewed in its entirety and it has been decided that, henceforth, the principles, as set forth in the ensuing paragraphs,

shall be kept in view by all concerned while setting up Search Committees and Search-cum-Selection Committees (for posts in autonomous organizations).

4. Search Committees for post in Government. In accordance with the guidelines of this Department, immediately after a post is created, the Recruitment Rules for the same should be framed, if the post is likely to continue for one year or more. Action to fill up the post, as per the provisions in the Recruitment Rules, has to be initiated as the procedure of Search Committee cannot be a substitute for the normal recruitment process.

4.1 Situations in which Search Committees may be constituted, their composition etc.

- (i) The post involved should not fall under the purview of the UPSC;
- (ii) Since, as a rule, appointments in Government are to be made on the basis of open advertisement, this requirement has to be followed without fail, and it is only in situations where advertisement may not result in adequate response, that a Search Committee should normally be appointed;
- (iii) Constitution of Search Committees cannot be a substitute for advertisement of posts and their role is only to supplement the recruitment effort through advertisements;
- (iv) A minimum period of at least four weeks may be given to the candidates to respond to the circular/advertisement for appointment under this mechanism;
- (v) Search Committees should be constituted only for sufficiently senior posts at the level of Director (in the scale of Rs. 14300-18300) or above, which require specialized scientific/technical knowledge and experience;
- (vi) The composition of the Search Committee needs to be approved by the Department of Personnel and Training in each case, if the post proposed to be filled by this procedure is in the scale of Rs. 18400-22400 or above.
- (vii) The Committee should be chaired by the Secretary of the Ministry/ Department concerned. Where it is constituted for a Secretary-level post, a senior and distinguished academician may be invited to chair the Committee. The Committee should normally consist of not more than 5 members including the Chairman;
- (viii) Where officers of Government, Autonomous Bodies, PSUs etc. are nominated as Members, they should be at least one level above the post to which recruitment is being made;
- (ix) No person who is a recipient of grants/funding from the Ministry concerned or who is closely related to a recipient should be invited to join the Search Committee;
- (x) The composition of the Committee should be well balanced. It should invariably include persons of appropriate standing having acknowledged

expertise in the relevant field or specialization. At least half the number of such experts should be from outside the Department;

(xi) The tendency, repeatedly to rely on the same experts for several recruitments over long periods of time, is to be avoided. It is necessary to infuse fresh blood in such Committees in order to ensure that they identify the right personnel engaged in research in frontiers of the relevant field;

(xii) The panel recommended by the Committee will remain valid for one year. If no selection is made from the panel within a period of one year, a fresh Committee shall be constituted to prepare a fresh panel. Such a Committee may also consider the names of persons recommended in the earlier panel;

(xiii) In some cases, the Rules themselves prescribe Search Committee/ Search-cum-Selection Committee and in such cases, it should be ensured that the composition is strictly as per the Rules. Wherever it is necessary, amendments to the Rules may be carried out to ensure that the composition of the Committee is in conformity with these instructions.

5. Search-cum-Selection Committees for posts in autonomous/statutory bodies etc.

Though the principles applicable for posts in Government as in para 4 *ibid* would generally apply, the following principles would specifically apply to Search-cum-Selection Committees for posts in autonomous/statutory bodies, entities registered under the Societies Registration Act, etc:

(i) Each Ministry/Department shall constitute a Search-cum-Selection Committee with the concurrence of the DOPT, for (a) all appointments to the post of Chief Executives and (b) for all appointments carrying a pay scale of Rs. 18400-22400 and above.

(ii) Ministries/Departments will have the discretion to choose the Chairman of the Committee. They may, however, ensure that the person, so chosen, is distinguished and of sufficiently high standing commensurate with the level of the post for which selection is to be recommended by the Committee;

(iii) The Committee should normally consist of not more than 5 members including the Chairman and at least one outside expert of eminence. The Committee should also include the Chief Executive of the autonomous institution even if the scale of pay of the post of Chief Executive is same as of the post for which selection is being made unless the selection is for the post of the Chief Executive;

(iv) The panel recommended by the Committee will be valid for one year. If no selection is made from the panel within a period of one year, a fresh Committee shall be constituted to prepare a fresh panel. Such a Committee may also consider the names of persons recommended in the earlier panel;

(v) The panel recommended by the Committee will have to be accepted in too by

the Ministry/Department. Any deviation in the matter will require the prior approval of the ACC;

(vi) Extension in tenure of persons other than the Chief Executives shall also be considered by the Search-cum-Selection Committee and its recommendations shall be accepted by the Ministry/Department. Any proposal to reject the recommendations will require the approval of the ACC. Authority for approval of extension in tenure of Chief Executives will rest with the ACC;

(vii) All appointments, which are covered by specific statutes, are to be carried out on the basis of the statutory provisions. Wherever the statutes provide for appointment to a post with the approval of the Central Government, the appointment to the post of Chief Executives of the pay scale of Rs. 18400-22400 and above will be within the purview of ACC and the Search-cum-Selection Committee mechanism envisaged in these instructions will apply;

(viii) Appropriate Recruitment Rules/Regulations for the post involved shall be formulated by the administrative Ministry, wherever the relevant statutes do not incorporate the eligibility conditions. The norms and criteria for selection, shall, in any case, be finalized by the autonomous institution, with the concurrence of the Ministry concerned and the same shall be made widely known well in advance of the selection;

(ix) The vacancy shall be given wide publicity through open advertisement/circulation among various Ministries/Departments/State Governments/Autonomous bodies/Research Institutes etc., as also made available on the website of the Ministry/Department;

(x) A minimum period of at least four weeks may be given to the candidates to respond to the circular/advertisement for appointment under this mechanism.

6. All autonomous institutions, which are not set up under their own statutes, shall modify their Memoranda and Articles of Association, Bye-laws, etc. in order to incorporate fully these guidelines. The institutions shall report compliance to the DOPT through their administrative Ministry/Department along with copies of their revised Memoranda/ Articles of Association, Bye-laws etc. These institutions, thereafter, shall not be required to take approval of DOPT each time for the Search-cum-Selection Committee constituted by them. The institutions shall, however, send a copy of the Search-cum-Selection Committees constituted by them to the DOPT.

7. The above exercise may be completed by all institutions within a period of three months.

7. It is the case of the Petitioner, that the term of the then Director of the Respondent No. 2 Society was to expire on 9th August, 2011; that the Respondent No. 2 Society instead of notifying the Employment Exchange or issuing any advertisement in this regard, in or about February, 2011 appointed a Search Committee and on the recommendation of the Search Committee, on 8th

July, 2011 appointed the Respondent No. 3 as the Director, due to take charge on 9th August, 2011. The Petitioner claims that he learnt of the vacancy and the appointment of the Respondent No. 3 from news reports. The Petitioner claims to be eligible for the said post and has filed this petition contending that without giving an opportunity to all those desirous of applying for the said post and without following the mandatory procedure, the Respondent No. 3 has been illegally appointed.

8. The Respondent No. 2 Society in its counter affidavit has pleaded that recommendations were invited from 45 Universities/prominent individuals for recommending the incumbent for the post of Director; that the parent University of the Petitioner did not consider it worthy to recommend the Petitioner as a candidate; that the Search-cum-Selection Committee constituted for the said purpose has unanimously selected the Respondent No. 3 for the post of Director. It is further the case of the Respondent No. 2 Society that since the petition neither alleges any malice in fact in relation to the appointment nor does expressly state that the Respondent No. 3 does not fulfill the eligibility for appointment and/or is not qualified for appointment, there is no warrant for judicial review of the case. It is pleaded that the Respondent No. 3 has been appointed in an absolutely fair and transparent manner. With respect to the Service Bye-Laws (supra), it is stated that they confer discretion, whether or not to advertise for a post which is to be filled by direct recruitment and advertisement is by no means mandatory as alleged by the Petitioner. It is further the case of the Respondent No. 2 Society that though it had advertised in the past for the post of Director but the response to such advertisements was abysmal and the post always had to be filled through a combination of the methods provided in Service Bye-Law 9 (iii) and (iv) and never through applications received on advertisement. It is stated that in response to the advertisement in the year 2005 also, only three applications were received and all of which were found to be unsuitable. It is thus pleaded that the Search-cum-Selection Committee decided to adopt a combination of the methods provided in Service Bye-Law 9 (iii) and (iv). It is further pleaded that resort to Employment Exchange candidates is only one of the modes of direct recruitment and the Selection Committee was free to and resorted to the other method(s) available. Reliance is further placed on Section 4(4) of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 to contend that there is no obligation to fill any vacancy through the Employment Exchange only.

9. The Respondent No. 1 Union of India has in its counter affidavit pleaded that the Service Bye-Laws of the Respondent No. 2 Society have been approved by the Central Government and would thus prevail over any other Office Memorandum or Instructions issued. It is also pleaded that another writ petition being W.P.(C) No. 4624/2011 purportedly has been filed in public interest before the Division Bench of this Court and in which also, interim stay of appointment sought was not granted. It is pleaded that the Petitioner has no vested right to be appointed as a Director and the Respondent No. 3 is a person of high

eminence with a brilliant academic record and the approval of the Central Government to the appointment of the Respondent No. 3 was given vide letter dated 5th July, 2011 itself i.e. prior to the filing of the present petition. The maintainability of the writ petition against the Respondent No. 2 Society is also disputed. It is reiterated that Maharshi Dayanand University, Rohtak with which the Petitioner is presently employed, did not deem it appropriate to recommend the name of the Petitioner for the post, inspite of the Vice Chancellor of the said University having been intimated of the vacancy and asked to recommend the name of suitable candidates.

10. The Respondent No. 3 in his counter affidavit has stated that he fulfills the eligibility criteria for the post; was interviewed on 11th May, 2011 and issued the appointment letter dated 8th July, 2011 and pursuant to which he received permission for deputation on 26th July, 2011.

11. The senior counsel for the Petitioner has argued that the Service Bye-Laws of the Respondent No. 2 Society have to be read along with the Office Memorandums/Instructions aforesaid of the Department of Personnel and Training and which mandate open advertisement and which has admittedly not been done. Reliance is placed on State of Bihar Vs. Upendra Narayan Singh and Others, laying down that the equality clause enshrined in Article 16 mandates that every appointment to public posts or office should be made by open advertisement so as to enable all eligible persons to compete for selection on merit and that with the same objective the Employment Exchanges Act (supra) was enacted. It was further held that every public employer is duty bound to notify the vacancy to the Employment Exchange so as to enable it to sponsor the names of eligible candidates and also advertise the same in the newspapers having wide circulation, employment news bulletins, get announcement made on Radio and T.V. and consider all eligible candidates whose names may be forwarded by the Employment Exchange and/or who may apply pursuant to such advertisement.

12. The Ld. ASG appearing for the Respondent No. 1 Union of India has invited attention to the communication dated 25th May, 2011 sent by the Search Committee to Universities and other prominent individuals including to the Vice Chancellor of Maharshi Dayanand University, Rohtak where the Petitioner is employed, seeking suggestions of names of suitable candidates. Attention is also invited to the letter dated 9th March, 2011 of the Chairman of the Executive Council of the Respondent No. 2 Society to the Vice Chancellors of various Universities seeking suggestions of names of suitable candidates for the post of Director. He has further contended that the Service Bye-Law 9 (supra), by use of the expression "and/or" between various methods of direct recruitment has left the discretion in the Executive Council and the Executive Council having adopted one of the said methods, in the absence of any mala fides, this Court ought not in the exercise of power of judicial review, interfere with the appointment to the high office of Director. It is also contended that no PIL even is permissible in

service jurisprudence and the present petition filed, before the Respondent No. 3 had occupied the post, is not maintainable. It is further urged that no ground for interference in exercise of powers of judicial review is made out if the appointment is otherwise found to be in consonance with rules. It is contended that the Office Memorandums/Instructions are not applicable to the Respondent No. 2 Society. It is further contended that the Petitioner has no vested right to the post.

13. The senior counsel for the Respondent No. 2 Society has contended that the Petitioner neither has any right nor any legitimate expectation to be appointed; there is no suggestion even of any malice in the appointment of Respondent No. 3 or that the selection of the Respondent No. 3 was pre-determined; that none of the other nine persons whose names were recommended and in preference to whom the Respondent No. 3 has been selected have complained of any error in the procedure followed; that the appointment satisfies the indices of fairness; that the highly respected Dr. Karan Singh is the Chairman of the Executive Council of the Respondent No. 2 Society and the name of the Respondent No. 3 was recommended by eminent personalities as the historian Shri Ramachandra Guha, Mr. Andre Beteille and Shri Pratap Bhanu Mehta. It is further contended that the Office Memorandums/Instructions relied upon are not statutory.

14. The senior counsel for the Petitioner in rejoinder has contended that the communication purportedly sent to Maharshi Dayanand University, Rohtak is addressed to the earlier Vice Chancellor and not to the Vice Chancellor at the contemporaneous time.

15. The Ld. ASG and the senior counsel for the Respondent No. 2 Society have responded by contending that the communication was sent at the e-mail address of the University and thus being addressed in wrong name is immaterial.

16. The first question for determination is as to what is the procedure prescribed for appointment. Next, it is to be decided that if the prescribed procedure has not been followed, what is the effect thereof.

17. The argument of the Petitioner is, that the post could not have been filled without advertising the same in newspapers and without notifying the Employment Exchange; the same having admittedly not been done, the appointment is vitiated.

18. The appointment of the Respondent No. 3 has been done on recommendation of Selection Committee from amongst persons selected through personal contact or from amongst candidates who have been recommended by such persons or authorities from whom recommendation has been called for by the Chairman of the Executive Council.

19. Service Bye-Law 7.2 (supra) leaves the method in which the vacancies are to be filled up, to be determined by the Appointing Authority; however in doing so, the Appointing Authority is to have regard to and where necessary comply with

the provisions of the Employment Exchange Act. Service Bye-Law 9 uses the expressions "may" and "and/or". What falls for determination is,

i.) Whether it was necessary for the Executive Council of the Respondent No. 2 Society to notify the Employment Exchange;

ii.) Whether the word "may" in Service Bye-Law 9 is to be read as "shall";

iii.) Whether the expression "and/or" in Service Bye-Law 9 is to be read as requiring the Selection Committee to make recommendations from amongst the candidates falling in all the categories mentioned therein or the Selection Committee is empowered to choose any one of the categories from amongst whom to make the recommendations; and,

iv.) What is the impact if any of the Office Memorandums/Instructions aforesaid of the Department of Personnel and Training, Government of India on the Service Bye-Laws of the Respondent No. 2 Society.

20. Service Bye-Law 7.2 requires regard to and compliance with the provisions of the Employment Exchanges Act. Service Bye-Law 9(i) again refers to recommendees of the Employment Exchange as one of the categories from which the Selection Committee may recommend. Though the expression "and/or" in Service Bye-Law 9 is indicative of it being left to the discretion of the Selection Committee to make the recommendations for appointment either from all the categories mentioned therein or from any of them (one of which is recommendees of Employment Exchange) but a harmonious reading of Bye-Laws 7.2 and 9 shows that the Selection Committee could not have ignored the recommendees of the Employment Exchange, regard where to and compliance of provisions whereof if necessary has been made compulsory under Service Bye-Law 7.2.

21. The Employment Exchanges Act was enacted to provide for compulsory notification of vacancies to Employment Exchanges and Section 4 thereof mandates the employer in any establishment in public sector to, before filling up any vacancy or any employment, notify the same to the Employment Exchanges. Section 3 of the Act exempts applicability thereof to certain vacancies. However, the same does not apply to the post under consideration in this petition. Section 7 of the Act makes failure to so notify the vacancy punishable with fine. Service Bye-Law 7.2, by requiring due regard to be given to the provisions of Employment Exchanges Act, requires the Respondent No. 2 Society to comply therewith even if not mandatory. However, in the face of Respondent No. 2 Society being admittedly an autonomous Body under the control of the Government of India, would also fall within the expression "establishment in public sector" used in Section 4 of the Employment Exchanges Act and as defined in Section 2(f) thereof, making it necessary (within the meaning of Service Bye-Law 7.2) for Respondent No. 2 Society to comply with the provisions of the said Act.

22. Though a two Judge Bench of the Supreme Court in *Union of India (UOI) and Others Vs. N. Hargopal and Others*, had held that non-notifying the Employment Exchange where so required to be notified will not vitiate the appointment so made but the said view was differed from by a three Judge Bench in the subsequent decision in *Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others*, and which has been the consistent view since then. In *Arun Kumar Nayak Vs. Union of India (UOI) and Others*, it was held that intimation to the Employment Exchange about the vacancy, where required and consideration of the candidates sponsored through the Employment Exchange is mandatory. It was further held that in addition and consistent with principles of fair play, justice and equal opportunity it is also necessary to call for the names by publication in the newspapers having wide circulation, announcements on radio, television and employment news bulletins and consider all the candidates who have applied; this is necessary to afford equal opportunity to all the eligible candidates in the matter of employment. The Apex Court further held that the rationale behind such direction is also consistent with the sound public policy that wider the opportunity of the notice of vacancy by wider publicity, the better candidates with better qualifications are attracted, so that adequate choices are made available and the best candidates would be selected and appointed to sub serve the public interest better.

23. The Apex Court in *Upendra Narayan Singh (supra)* also observed on consideration of the ratio of the earlier judgements that the object of Section 4 of the Employment Exchanges Act is to enable the Employment Exchanges to sponsor the name of the eligible candidates and advertise the same in newspapers having wide circulation, employment news bulletin, get announcements made on radio, television and consideration of all eligible candidates who may apply in pursuance to various modes of advertisement by the Employment Exchanges.

24. Thus, I conclude that under the Service Bye-Laws it was necessary for the Respondent No. 2 Society to, before making appointment to the post of Director, to comply with the provisions of the Employment Exchanges Act, i.e. to notify the Employment Exchange and consider the recommendees of the Employment Exchange for appointment.

25. Though in view of the aforesaid conclusion, need is not felt to consider the impact of the Office Memorandums/Instructions aforesaid of the DOPT but it is not deemed expedient to leave the said question unanswered. Need is however not felt to discuss the Office Memorandums dated 25th October, 1994 and 5th December, 2003 supra since the Office Memorandum dated 30th July, 2007 states that the matter had been reviewed in entirety and lays down afresh the principles to be followed in the matter of appointments to posts in Government and in autonomous Bodies. It is not in dispute that the principles prescribed therein as applicable to autonomous Bodies apply to the Respondent No. 2 Society.

26. Even though the principles for autonomous Bodies do not expressly provide for open advertisement as in the case of principles laid down for posts in Government but do state that the principles applicable for posts in Government would "generally apply" to filling up of posts in autonomous Bodies also. Clause 5(ix) in the Office Memorandum dated 30th July, 2007 though while prescribing wide publicity through open advertisement/circulation among various Ministries/ Departments/State Governments/Autonomous Bodies/Research Institutes as also through website of the Ministry/Department, uses the symbol "/" which indicates that either of the said options can be opted but in the light of the law aforesaid, has to be construed as prescribing use of all the said modes. Rather during the hearing it was enquired from the ASG whether the post was advertised on the website of the concerned Ministry. The answer was in the negative. The crucial words in Clause 5(ix) are "wide publicity". If one or few of the several options prescribed do not satisfy the test of wide publicity, it cannot be said that Clause 5(ix) has been complied with.

27. The Apex Court recently in *State of Orissa and Another Vs. Mamata Mohanty*, has reiterated the settled legal proposition that no person can be appointed without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from Employment Exchange or putting a note on the notice board, that will not meet the requirement of Articles 14 and 16 of the Constitution. For a valid and legal appointment, mandatory compliance with the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merits.

28. Another interesting principle of construction/interpretation may be considered. Service Bye-Law 9 as aforesaid uses the expression "and/or" and as observed above, vests absolute discretion in the Executive Council/Selection Committee so interpreting the said Bye-Law, the Executive Council/Selection Committee can very well opt for only circulating the post in Government autonomous or statutory organizations, listed last in the said Service Bye-Law. I have wondered whether the selection process can be limited to such an extent. The Apex Court in *Gujarat Housing Board Engineers Association and Another Vs. State of Gujarat and Others*, interpreted the use of the word "or" between various options as laying down priority with the option listed first having precedence over that following. It was held that to construe otherwise would mean that the Bye-Law provides no guidelines as to which of the options is to be adopted. It was further held that, that interpretation should be placed which avoids arbitrariness and conferment of uncanalised power. Service Bye-Law 9 of the Respondent No. 2 Society read in this fashion would require the Executive Council / Selection Committee to give precedence to the Employment Exchange over advertisement and to advertisement over personal contact and so on. Seen in this light also, the procedure followed cannot be approved of.

29. In the face of the law aforesaid and the Office Memorandum dated 30th July,

2007, the expressions "may" and "and/or" in Service Bye-Law 9 supra have to be read as "shall" and "and" respectively and the same has to be interpreted as requiring the Selection Committee to call for recommendations and applications through all the modes prescribed in the said Bye-Law and to make recommendation for appointment after considering all the said persons. I am also of the view that the need and occasion for issuing the Office Memorandums/ Instructions aforesaid arose only for the reason of an ambivalent situation prevailing in this regard owing to a plethora of Rules, Regulations, Bye-Laws some of which are of antiquate origin. Primacy thus has to be given to the Office Memorandum over the Service Bye-Law.

30. Howsoever bona fide the reasons which prevailed with the Appointing Authority and the Selection/Search Committee in the present case to not publish open advertisement may be, the procedure followed, was in violation of the procedure prescribed for appointment. The procedure followed cannot be said to be such which could have informed all prospective applicants of the vacancy or given them an opportunity to be considered therefor. The communications stated to be sent by e-mail by the Chairman of the Executive Council of the Respondent No. 2 Society and by the Selection Committee to the various Universities and/or to other prominent individuals, cannot be a substitute for open advertisement. The said e-mails even if delivered to the concerned personnel in the University and seen by them, still left it to them to inform or not to inform the prospective/ desirous applicants of the vacancy. It is not the case that the Vice Chancellors of the Universities to whom the said communications were sent were required to or did display the said communications on the notice boards of the Universities so as to inform the faculty therein of the vacancy. Attention of the counsels was invited to the recent appointments to the post of Chairperson of Debt Recovery Appellate Tribunal and in which regard W.P.(C) No. 2417/2011 titled Ram Mohan Sharma v. UOI came to be filed. It was similarly found that though intimation of the vacancy had been sent to the Registrars of the various High Courts but without any obligation on the Registrars of the High Courts to display the same to the prospective candidates. The procedure followed was found to be not giving any option to all the persons eligible for appointment an opportunity of being considered therefor. Interim stay of the appointment process underway was granted. The Appointing Authority subsequently agreed to consider for appointment the Petitioners therein who had thus been precluded from applying for the post.

31. Moreover, calling upon the Vice Chancellors of the Universities and other Institutes to send the recommendations amounts to the Appointing Authority/ Selection Committee delegating the selection to the said Vice Chancellors. The Vice Chancellors were not authorized to select or reject the candidates for consideration and the Selection Committee by seeking the recommendations of the Vice Chancellors certainly left the choice which the Appointing Authority/ Selection Committee was to exercise, to the said Vice Chancellors and which is not permissible in law.

32. Thus the present is not a case of the action of the Respondent No. 2 Society being as per its Service Bye-Law though it could have adopted better mode of wide publication and/or of having not followed the best practice qua which the Apex Court in *Reliance Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others*, has held no judicial review to be available but a case of non-compliance of the Rules prescribed for making the appointment.

33. Once this Court finds that the requisite procedure for appointment has not been followed, the settled rule of administrative law is that an Executive Authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Justice Frankfurter in *Viteralli v. Saton* 359 U.S. 535 where the learned Judge said:

"An executive agency must be rigorously held to the standards by which it professes its action to be judged.... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

The Apex Court has accepted the aforesaid rule as valid and applicable in India in *Dr. Amarjit Singh Ahluwalia Vs. The State of Punjab and Others*, and in *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, .* The said principles were reiterated in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, .* It was held that this rule, though supportable also as emanation from Article 14, does not rest merely on that Article; it has an independent existence apart from Article 14.

It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority.

34. The Supreme Court in *K. Shekar Vs. V. Indiramma and Others, ,* inspite of noting that National Institute of Mental Health and Neuro Sciences (NIMHANS) with the appointment process wherein it was concerned, was an Institution of repute held that there can be "no islands of insubordination to the rule of law" and actions of Institutions, however highly reputed, are not immune from judicial scrutiny. It was indeed held that to preserve the high reputation, there is a greater need to avoid even the semblance of arbitrariness or extraneous considerations colouring the Institution's actions.

35. Jurisprudentially, personal contact as a mode of appointment cannot be accepted. The same depends upon the perspective of an individual who has not been vested with the responsibility of appointment. The Appointing Authority cannot rely upon another to determine whether to recommend or not to

recommend the name of any person for consideration by the Appointing Authority. Recruitment solely by personal contact is likely to restrict the choice of applicants and is likely to constitute discrimination. If the arrangements made for the purpose of determining who should be offered employment involves application of requirement or condition that the applicant should be personally recommended by another, it may have adverse impact on particular persons and will infringe the equality clause.

36. This Court is therefore constrained to interfere in the appointment process but with the clarification that merely because this Court has interfered, does not tantamount to this Court having attributed any mala fide or impropriety to the procedure adopted by the Executive Council of the Respondent No. 2 Society or to the Selection/Search Committee or to the suitability/eligibility of the Respondent No. 3 for the said post. The senior counsel for the Respondent No. 2 Society also has fairly stated that the best practice may have been to advertise the post. Once the same is admitted to be the best practice, I fail to comprehend the hesitation in accepting the same. The attitude of the Respondent No. 2 Society of wanting to proceed with the appointment inspite of the best practice having not been followed is an attitude of "chalta hai" plaguing the country. Unless the Court interferes at the cost of pain, the attitude is likely to continue in the appointments to other posts also. The Supreme Court also in *A.S. Mittal and Another Vs. State of U.P. and Others*, though in the context of medical negligence, noticed the disturbing feature of prevalence of an air of cynical irreverence towards values that has unfortunately developed and to the mood of complacency with the continuing deterioration of standards. It was held that the remedy lies in a ruthless adherence to the virtue of method.

37. Similarly, it is not for this Court to judge whether the Petitioner is suitable or not or whether the Respondent No. 3 is better than the Petitioner, as was suggested during the hearing. This Court being satisfied that the Petitioner has not had an opportunity to be considered for the post, the Court cannot give any other answer to the Petitioner but to allow to him an opportunity to be so considered.

38. However as aforesaid, this Court does not desire the impact of this order to create a vacuum or affect the functioning of the Respondent No. 2 Society in any manner whatsoever. It is thus clarified that notwithstanding the appointment of the Respondent No. 3 being set aside, the Respondent No. 3 will continue to function and discharge his duties as the Director till the completion of the procedure for fresh appointment and the Respondent No. 3 shall also be considered in the said appointment and it shall be open to the Appointing Authority if satisfied that the Respondent No. 3 is the best available candidate for the post, to continue with the appointment of the Respondent No. 3 without any break whatsoever.

39. Before parting with the case, I may notice that though the Petitioner in the petition has also contended that the Respondent No. 3 does not fulfill the

qualifications and the constitution of the Selection Committee was not in terms of office memorandums/instructions aforesaid but neither has the senior counsel for the Petitioner addressed any arguments on the said aspect nor do I find any merit in the same.

40. The petition is therefore allowed. The procedure adopted by the Respondent No. 2 Society in the matter of appointment of the Respondent No. 3 is held to be in violation of the prescribed procedure and the law. Consequently, the appointment of the Respondent No. 3 to the post of Director of the Respondent No. 2 Society is set aside and quashed and the Respondent No. 2 Society is directed to as expeditiously as possible and latest within a period of three months from today make fresh appointment. However as aforesaid, the Respondent No. 3 shall till then continue to function and discharge his duties as the Director and shall also be considered by the Appointing Authority while making the fresh appointment and there will be no bar to the selection of the Respondent No. 3 if found to be the best suited candidate.

No order as to costs.