

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Civil Writ Petition No.22939 of 2011

Date of decision: 15.1.2015

Chander Shekhar and others

..... Petitioners

Versus

State of Punjab and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Vikram Bali, Advocate,
for the petitioners.

Mr.Rajiv Prashad, Addl. AG, Punjab.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.(Oral)

The petitioners applied for the posts of ETT Teachers under an advertisement issued in 2007. The criteria of selection came under challenge in **Sudesh Rani v. State of Punjab**; 2010 (3) SCT 1. The Division Bench of this Court upheld the criteria and award of 5 additional marks for rural area candidates who had passed 10th and 10+2 from rural schools. The decision in *Sudesh Rani's case* came to be referred to a Full Bench which was answered in **Abhishek Rishi v. State of Punjab and others**; 2013 (3) RCR (Civil) 239. The Full Bench took the view that award of 5 marks for rural area candidates is violative of article 16(3) of the Constitution where

State has no power to legislate and only Parliament can make law prescribing with respect to a class or classes of employment or appointment to an office under the Government of a State or any local authority within the State to provide any requirement as to the residence within that State prior to such employment or appointment. Article 35(a) (i) of the Constitution provides that Parliament shall have, and the Legislature of the State shall not have, power to make laws with respect to any matter provided in article 16(3) of the Constitution. The Full Bench took the view that 5 additional marks to the candidates who have passed 10th and 10+2 standard examination from the schools situated in the rural area is *ultra vires* the Constitution. The rule under consideration was struck down. As a result, *Sudesh Rani's case* was declared not to be good law.

As a result of the judgment order of the Full Bench, the posts which remained unfilled due to the selection coming under litigation in *Sudesh Rani's case*, was rendered infructuous and the recruitment exercise would have to be re-done after bringing the criterion in conformity with the law declared.

In the meantime, another important decision of the Division Bench of this Court came to be pronounced with respect to JBT/ETT cadre in **Neelam Rani v. State of Punjab**; 2010 (1) SCT 588 in which the service rule maintaining separate cadres of men and women and seniority lists in the Education Department in the school cadre provided in the Punjab State Education Class III (School Cadre) Service Rules, 1978 came under judicial review. The question before the Division Bench was whether separate cadre for men and women is discriminatory and violative of article 16(2) of the

Constitution. The second question posed by the Division Bench for answer was whether such a cadre which include women as well to avoid vice of discrimination prohibited under article 16 of the Constitution of India. While declaring gender based seniority lists as unconstitutional, the Division Bench in *Neelam Rani's* case directed while declaring the law, that the principles laid down in the judgment shall be applied prospectively. All the previous appointments shall not be re-opened or can be said to be invalid on the basis of law declared by the judgment, but for the future, the appointments shall be made on the basis of merit in the manner discussed in the judgment. The decision in *Neelam Rani's case* was pronounced on 10th January, 2010.

The petitioners thereafter approached this Court in the present petition seeking a direction to the respondent-State to consider and appoint them against the vacant posts of JBT/ETT teachers which were advertised on 5th September, 2007 as per separate male and female vacancies as per the old merit list. The consequential prayer was for setting aside notice dated 29th November, 2011 nullifying the remaining selection as combined merit list of male and female teachers was under preparation in terms of *Neelam Rani's* case.

Learned counsel Mr.Vikram Bali has vehemently argued that the petitioners right to appointment should relate back to the date of the advertisement and merely because selection is not an indefeasible right to appointment, that impediment should not stand in the way since it is well settled that rights acquired in a selection process through competition and the eligibility conditions prescribed stand crystallized on the date of the

advertisement and the as per the prescribed rules governing recruitment. He canvasses his principle ground of challenge as reflected in paragraph 6-D of the petition which highlights the merits of the petitioners achieved in the selection process-2007 and if the appointment is not offered to the petitioners, there would be a devaluation of merit. His argument is put down in writing is as under : -

“D. That the petitioner no.1 has 55.67 marks according to the selection criteria. The petitioner no.2 has 57.80 marks according to the selection criteria and his registration no. is 1519. Petitioner no.3 had 52.610 later revised to 51.610 marks in merit. In case selection is done separate male and female list wise as per the advertisement and rules then petitioners will get appointed against vacant posts. In combined merit with females the petitioners will not be able to get appointment against vacant posts.”

Much that the Court might have interfered on the numerical strength of merit achieved by the petitioners had the lists been drawn separately. But the position is completely altered by the authoritative decision in *Neelam Rani's* case which interdicts gender inequality and for the best reasons to bring the rule within constitutional limitations. Only the appointments already made stand saved to avoid chaos but that does not leave any scope for declaration of rights of the petitioners for the first time in the changed legal position by a Court decree and that too with retrospective effect, i.e. from the date of the advertisement. Such an argument is not tenable and is rejected. The petitioners have no actionable claim to seek appointment in a recruitment process which has been rendered infructuous and become a dead ball.

It may be that the Court can create fictions and accordingly, all consequences would have to be imagined as part of the fiction but in this case, it is not possible to create a fiction by creating rights which stand extinguished on the merger of the seniority lists between male and female candidates and the consequential effect it has had on the balance of the selection process left without accrued or vested rights enuring to the petitioners.

It is another matter that the entire selection process was nullified by the Full Bench in *Abhishek Rishi's* case and, therefore, the entire selection has come under the cloud of the Full Bench judgment, but in this case we need not go that far as the rights of the petitioners can be determined on the basis of the Division Bench decision in *Neelam Rani's case* which leaves no room for any fiction to be created by court order in favour of the petitioners and at their instance.

The reliance of Mr.Bali on the decision in CWP No.1581 of 2012 decided on 20.9.2012 in *Gurpreet Singh and others v. State of Punjab and others* can be of no help to him even if it relates to the 2007 selection but confines its examination to a public notice issued by the State of Punjab in the process of appointment of ETT teachers published on 29th November, 2011 whereby counselling process had been announced for 13th December, 2011 permitting all such candidates to appear in the said counselling who had remained absent during 4 previous rounds of counselling process conducted between the period from 2007 to 2010. The process may be continuing one but even then, the order passed by this Court can be of no avail to the petitioners as it is not their case that they could not avail

opportunity of counselling. If none was offered, none could be in view of *Neelam Rani's* case.

Mr.Rajiv Prashad, appearing for the State of Punjab informs the Court that the competent authority, i.e., DPI (Elementary Education), Punjab vide order dated 29th July, 2013 has cancelled the counselling process of 13th December, 2011 and 20th December, 2011 removing the basis of the decision of the learned Single Judge of this Court in *Gurpreet Singh's* case.

For these reasons, I do not find any ground to interfere in this matter and would dismiss the petition but without any order as to costs.

(RAJIV NARAIN RAINA)
JUDGE

January 15, 2015
Paritosh Kumar