

**IN THE HIGH COURT OF PUNJAB AND HARYANAAT
CHANDIGARH**

**CWP No.10298 of 2011
Date of decision:13.5.2016**

Iqbal Singh ... Petitioner

Versus

The State of Punjab & Anr. ... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Rajiv Atma Ram, Sr. Advocate, with
Mr. Ranjit Singh Kalra, Advocate,
for the petitioner.

Mr. Inqulab Nagpal, A.A.G., 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)

On April 3, 2012, a coordinate Bench passed the following
interim order:-

“Even today time is sought by the learned
Assistant Advocate General to file reply. On the
last date of hearing, following order was passed
keeping one post vacant:-

“Learned DAG seeks one more
opportunity to file reply to the CM.
Considering that this is a matter where
the petitioner is seeking an interim
order, learned DAG is directed to file
reply on or before the next date of
hearing.

Adjourned to 03.04.2012.”

Since no reply is filed, this Court is
constrained to pass interim order directing that

one post of Medical Officer (Dental) be kept vacant.

Adjourned to 4.5.2012.”

2. Reply by way of counter affidavit of the Director Health & Family Welfare-respondent No.1 is at sea. It could not be vaguer in obfuscating facts required of the affidavit. It offers hardly any assistance to the court on the points in issue. On December 8, 2014, liberty was granted to the petitioner to file an affidavit which would indicate that fresh advertisement has been issued for filling the post of Medical Officers, Dental. The affidavit has been filed on which the counsel for the respondents sought time to seek instructions from the department.

3. At lengthy hearing on March 29, 2016, this Court passed the following order:-

“Respondent State is put to notice on Annexure P-8 at Pg. 53 of the paper-book, a communication from the Directorate, Health & Family Welfare, Punjab, addressed to the Advocate General, Punjab, Chandigarh, dated 22/23.09.2010, which shows that running account started from Roster Point 349 for the 34 advertised posts of which SC (B&M) at Sr. No.(2) showing 4 posts of Medical Officers (Dental).

It is the case of Mr. Atma Ram that as against 4 posts shown in Annexure P-8, 3 posts have been filled as per merit and the petitioner's name is next below the 3rd candidate. The result of the selection is at Annexure P-5, which places the petitioner at merit position 4 of SC(B&M). Mr. Atma Ram ventures to urge that if the Roster Points are to be

calculated as a running account from 349 even then 10 vacancies/posts would fall to the share of SC out of which 50% would go to SC(B&M).

Mr. Atma Ram also placed reliance on a decision rendered by this Court in Naresh Kumari vs. State of Punjab & another 2015 (2) SCT 121 to submit that it is not in every case that mere selection would not give right to appointment. He also relies on the decision of the Supreme Court in State of Jammu Kashmir Vs. Sat Pal, (2013) 11 SCC 737.

In order to clarify this position, the State would file an additional affidavit with an advance copy to the counsel opposite.”

4. The State has not filed an additional affidavit and Mr. Inqulab Nagpal has been faced with an embarrassing situation created by by the State in seeking further time to file the same. The writ is pending since 2011. Any further adjournment would not be justified. Since the issues involved have been culled out after hearing both the sides in the making of the above order, the dealing hand Mr. Sujinder Singh, Clerk, in the O/o Director, Health & Family Welfare, Punjab, who has come to Court to assist Mr. Nagpal is equally at sea and knows nothing of the case and can render no assistance to Mr. Nagpal. The position maintained in the interim order dated march 29, 2016 is *ex facie* speaking on facts and figures mentioned therein together with the case law relied on by the petitioner is of this Court and the Supreme Court. The question is one on mere calculation of vacancies with the running roster if in hand would conclusively reveal how the points were filled and vacancies occupied.

The petitioner is poised at the cusp of the selection/appointment being next below the 3rd candidate in the quota of SC (M&B) in the recruitment process for appointment of Medical Officers (Dental). The assertion that the roster account starts at running point 349 has not been rebutted and on the other hand, the facts stand confirmed in Annex P-8 at Pg. 53 of the paper- book; which document had led to passing of the interim order dated March 29, 2016. Annex P-8 is a letter addressed to the Advocate General, Punjab, Chandigarh, from the Directorate, Health & Family Welfare, Punjab, Chandigarh, mentioning categorically that the advertisement was issued in recruitment process of posts of Medical Officers (Dental). At the stage complained, roster points start from 349 for filling up 34 posts in the ratio and proportion mentioned in the said document. The category of SC (M&B) falls at Sr. No.(2) and shows 4 vacancies/posts. At the last page of document at Pg. 56 in the column of other vacancy:- there were four posts of SC(M&B) [the category of the petitioner] and three Medical Officers (Dental) have been appointed. One post remains unfilled. In any case, it has been treated to be unfilled because there is an interim as reproduced above not to fill one post meanwhile. Besides this, Mr. Rajiv Atma Ram, learned Senior counsel points out that 214 subsequent vacancies have been notified on May 2, 2010, out of which 10 posts are reserved for SC (M/B). The advertisement is at Annexure P-1. This would mean that vacancies existed on the date of filing of the petition. The right of wait listed candidate against unfilled vacancy or vacancy left by non-joining has been elaborately explained in para. 5 of the Supreme Court judgment in State of Jammu Kashmir v. Sat

Pal, (2013) 11 SCC 737.

5. On the same issue, this Court in Naresh Kumari v. State of Punjab & anr., 2015(2) SCT 121, explained the position after noticing the judgment of the Supreme Court observing as follows:-

“7. The Division Bench of this Court in intra court appeal in *Gajraj Singh's* case (supra) have expressed the following view:-

“It is well settled that once a post has not been consumed and a meritorious candidate in the merit list is available then the vacancy could be filled in by inviting next person in merit. The direction issued by the learned Single Judge are consistent with the principles of equality laid down in Articles 14 and 16(1) of the Constitution. The post of Lecturer in Hindi has to be offered to the most meritorious candidate who may be next in the merit after Vinod Kumar under the exserviceman category. Therefore, no exception is provided to interfere in the view taken by the learned Single Judge. The appeal is wholly without merit and does not warrant admission. Accordingly, the appeal fails and the same is dismissed.”

10. The reliance placed on these judgments by Mr. Mann are inappropriate in deciding the issue raised in this case where the recruitment process has not come to an end inasmuch as three vacancies in the SC (R&O) category remain

unfilled and for the wrong reason are being stonewalled. If they remain unfilled then the matter has to be examined in the light of the principles laid down by the Supreme Court in *Asha Kaul (Mrs.) & Another vs. State of Jammu & Kashmir*, (1993) 2 SCC 573 where it opined that Courts must look into the reasons why posts have remained unfilled as were duly advertised and select list drawn of the successful candidates. If the reasons for non-filling a vacant post in a direct recruitment process are found justified then the Court may refuse to interfere in the matter. It is not far to see cases where Courts may deny relief. For instance, after the selection process a cadre review has taken place and some posts are abolished and are found not necessary to be manned for carrying out the administration of the Department which can easily go on in the numerical strength of those already appointed as per merit. There can be reasons of financial stringency or austerity measures adopted as are consistent with the efficiency of administration and which burden the State treasury may not support in footing salary bills etc. for the posts held back for future reference or revision. It also can be where a glaring mistake has been committed while counting existing and anticipated vacancies at the time of initiating the recruitment process which were miscalculated by an oversight or by an improper feedback on vacancies by the functionaries of the State who were charged with such duty. However, these reasons are

evidently not exhaustive and are only supplied by way of illustration for a better understanding of the several dimensions of the case might have and if a direction were issued to the respondents as claimed by the petitioner then what may be the consequences and the fallout. None of these serious roadblocks are present in this case since the only defence against non-filling of vacant posts is that no person lower in merit has been appointed. This ground is not found sufficient or plausible reason not to fill up the advertised posts undisputedly calculated after proper counting of existing vacancies or anticipated vacancies likely to arise during but before the selection process becomes a dead ball.

11. This leaves the Court to examine the reason given in the impugned order and whether that is sufficient to sustain it. Indisputably, the three vacant posts were advertised in 2009. A selection process was initiated. The merit was prepared as per criteria in which the last selected candidate in R&O category secured 50.2632 while the petitioner was close at heel with 50.1429 merit points. It is not that her name never figured in the select list except in the last one which is the impugned part of the selection process. The impugned order admits candidly that the three posts remain vacant on account of non-joining of certain candidates. If that is so, then the reason ascribed to deny the claim is neither germane nor relevant to the issue of keeping back three posts and still lying unfilled only to re-advertise them in a subsequent

recruitment process by applying the principle of carry forward of vacancies. But the carry forward principle is not applicable in the presence of suitable, available and qualified candidates claiming reserve roster points meant for SC (R&O) as per their merit achieved in direct recruitment. Relief has been denied only for the reason that no candidate with lower merit than the petitioner has been appointed. This may be a good argument in case all the advertised posts were filled, then the petitioner would have had no right to appointment. It appears that the Director Public Instructions (Secondary Education), Punjab, Ajitgarh has picked on a flimsy reason to deny appointment while searching for reasons or a legal principle to reject the claim. It is not the case of the respondent State that the petitioner does not make the grade on merit on the prescribed criteria. It is not pleaded that she has failed the examination/test/selection process according to the criteria prescribed and therefore has no case. It is also not said in the impugned order that waiting lists are not prepared. When there is no denial that the petitioner has not made it on merit then the reason that no candidate having less merit than her has been appointed is to beg the question of the petitioner's right to consideration for appointment. It may well be settled legal position that a mere selection does not give a candidate an indefeasible right to appointment but that principle does not hold good in this case where three candidates failed

to join the posts offered to them which as a consequence remain vacant. It is equally clear that the State cannot deny appointment to a person duly selected without a justifiable cause. It is an equally well embedded proposition of law that if the reasons contained in an administrative order are found illegal, arbitrary, unreasonable and unconstitutional the order must fall in its entirety and cannot be sustained by supplying reasons just as a superior court of law can do while testing a judicial order of a court below in its appellate power.”

6. The directions issued in para. 14 read as follows:-

“14. For the foregoing reasons this petition is allowed. The impugned order dated September 09, 2013 is set aside by issuing a writ of certiorari. A mandamus is issued to the respondent-State to consider the claim of the petitioner for appointment as Vocational Mistress (Computer Science) in the category of Scheduled Caste (R&O) against one of the three vacancies lying unfilled without applying the impugned reason that only because persons lower in merit have not been appointed the petitioner has no right of consideration for appointment. The respondents are directed to consider the claim of the petitioner within 30 days on receipt of a certified copy of this order keeping in view the observations made by this Court in this order.”

7. In sum and substance, this matter appears to be covered by the aforesaid decisions and the legal proposition relied upon by me in

Naresh Kumari's case(supra).

8. As a result of the preceding discussion, this petition is allowed. A writ of mandamus is issued to the respondents to consider appointing the petitioner against the post kept reserved by interim order dated April 3, 2012 after completing the necessary formalities. In the event of appointment offered as Medical Officer (Dental), the petitioner would take his seniority as per inter se merit position with his batch mates as determined by the selecting authority. He shall be entitled to annual increments notionally from the date batch mates were appointed to bring pay at par with them. However, monetary benefits will accrue from the date of this order.

(RAJIV NARAIN RAINA)
JUDGE

13.5.2016
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