

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

**CWP No.25765 of 2012
Reserved on: 14.03.2016
Decided on : 30.03.2016**

Dr. Sarabjeet Singh

... Petitioner

Versus

State of Punjab and others

... Respondents

(2)

CWP No.25754 of 2012

Dr. Nammita Singh

... Petitioner

Versus

State of Punjab and others

... Respondents

(3)

CWP No.25782 of 2012

Dr. Amarjit Singh

... Petitioner

Versus

State of Punjab and others

... Respondents

(4)

CWP No.12003 of 2012

Dr. Anuradha Saini

... Petitioner

Versus

State of Punjab and others

... Respondents

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA

Present: Mr. G.S. Attariwala, Advocate
for the petitioner (s).

Mr. Rajiv Atma Ram, Sr. Advocate with
Mr. Abhishek Arora, Advocate for respondent No.5
in CWP No.25782 of 2012.

Mr. Vivek Sharma, Advocate for respondent No.5
in CWP No.25765 of 2012.

Ms. Alka Chatrath, Advocate for respondent No.6 &
for petitioner in CWP No.12003 of 2012.

Mr. H.S. Sethi, Addl. AG, Punjab.

Mr. Vinay Puri, Advocate for
Mr. D.K. Bhatti, Advocate for respondent No.7.

G.S. Sandhawalia, J.

The present order shall dispose of **CWP Nos.25765, 25754, 25782 and 12003 of 2012**, as common question of fact and law are involved.

In **CWP No.25765 of 2012 'Dr. Sarabjeet Singh Vs. State of Punjab and others'**, the petitioner challenges the appointment of respondents No.5 to 7 to the post of Medical Officers (Dental) against the Backward Class Category and, accordingly, issuance of a writ of certiorari is prayed for. Resultantly, a writ of mandamus is also prayed directing the respondents to appoint the petitioner against the said post being next in order of merit.

In **CWP No.25754 of 2012 'Dr. Namita Singh Vs. State of Punjab and others'** challenge is to the appointment of

respondent No.5 Dr. Barinder Pal on the same grounds that the said respondent was not eligible on the cut-off-date.

Similarly, in **CWP No.25782 of 2012 'Dr. Amarjit Singh Vs. State of Punjab and others'** the petitioner seeks the benefit of appointment in the Backward Class Ex-servicemen Category by quashing appointment of respondent No.5, namely, Dr. Subprinder Kaur.

Respondent No.6 in CWP No.25765 of 2012 Dr. Anuradha Saini is petitioner in **CWP No.12003 of 2012** in which she seeks appointment to the said post at the time of re-counselling held on 07.06.2012 against the reserved post of Backward Class Category, on the ground that she belongs to the Saini caste and the notification dated 20.02.2009 (Annexure P-8) had been issued by the State of Punjab. In the said writ petitioner vide interim order dated 14.06.2012, it has been ordered that one post of Medical Officer (Dental) shall not be filled up.

The primary contention which is raised by Mr. G.S. Attariwala, Advocate, counsel for the petitioners in the cases is that as per the cut-off-date prescribed, the respondent No.5 Dr. Barinder Pal and respondent No.5 Dr. Subprinder Kaur in **CWP Nos.25782 and 25754 of 2012** did not fulfill the requisite educational qualifications. Therefore, the provisional appointment letters issued in their favour by virtue of interim orders passed by

this Court in litigation filed by them was not justified. Regarding Dr. Anuradha Saini-respondent No.6 who is also petitioner in **CWP No.12003 of 2012**, it is submitted that since Saini caste was not notified as a backward class and the earlier notification was held in abeyance (Annexure P-9), she is not liable to be appointed and the writ petition filed by her is liable to be dismissed.

The facts are being taken from **CWP No.25765 of 2012** titled as '**Dr. Sarabjeet Singh Vs. State of Punjab and others**'.

Vide public notice dated 26.07.2011 (Annexure P-3), applications were invited for the filling up of various posts in the Health Department. In the Backward Class Category for Medical Officers (Dental) there were 20 vacancies (11 backlog + 9) and for Backward Class (ESM) there were two vacancies. The cut-off-date was 19.08.2011 and the Backward Class certificate had to be in accordance with the instructions of the Department of Welfare Punjab and the certificate for the Ex-Servicemen had to be issued from the concerned department. The relevant terms and conditions of the said public notice read as under:-

3	Medical Officer (Dental)	15600-39100 + 5400 G.P	1. Bachelor of Dental Surgery (B.D.S. Degree) from a recognized University or institution or any equivalent degree recognized by the Dental Council of India and 2.Should be registered in part 'A' of the register of the State Dental Council i.e. Punjab Dental Council.	114 General-52 SC (M&B)-10 SC (R&O)-11 <u>BC-20 (11 Backlog +9)</u> PH-3 Gen. (ESM)-8 SC (ESM) (M&B)-2 SC (ESM) (R&O)-2 <u>BC (ESM)-2</u> Gen. (Sports)-2 SC (Sports) (M&B)-1 Freedom Fighter-1
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Eligible applicants may personally submit online applications starting from 27.07.2011 to 19.08.2011 upto 5.00 p.m. in the prescribed online format available at <http://recruitment.cdacmohali.in>.

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Terms & Conditions:

- Educational qualification must be from a recognized University/Board as per details mentioned against each post.

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- Only those candidates who have passed Punjabi Subject in Matriculation or above are eligible to apply.
- Reservation will be as per applicable rules and Punjab Government Policy Guidelines. Number of posts given in the advt. for reserved category is provisional.
- The SC/BC Category certificate should be in accordance with the instructions of the Department of Welfare Punjab and the certificate for the Ex-Servicemen, Freedom fighters and Sports persons categories should be in accordance with the instruction of the Concerned Department as per the following details:

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SC/BC	1.	Certificate as per the instruction of the concerned department
Ex-Servicemen	1.	Lineal Descendant certificate duly issued by the concerned District Ex-Servicemen Welfare Officer.

- The qualification of candidates should be prior to the last date of filling the applications.”

A provisional list was drawn up by the State on the basis of the written examination in which respondent No.5 Dr. Barinder Pal figured at Sr. No.173 having secured 53.20 marks. He being registered with the State Dental Council after the cut-off-date on 07.12.2011 had an objection noted against him in the

provisional merit list, as not eligible. Respondent No.6 figured at Sr. No.176 having secured 53.20 marks, whereas, the petitioner- Dr. Sarabjeet Singh figured at Sr. No.186 having secured 50.35 marks and the petitioner- Dr. Namita Singh in CWP No.25754 of 2012 figured at Sr. No.187 having secured 50.35. Similarly petitioner Dr. Amarjit Singh in CWP No.25782 of 2012 figured at Sr. No.233 having secured 47.50 marks, whereas, respondent No.5 Dr. Subprinder Kaur figured at Sr. No.232 having secured 53.20 marks, but again had been registered with the State Dental Council on 09.11.2011 after the cut-off-date and had an objection noted against her name, as not eligible.

The said respondents on account of the objections raised regarding, filed **CWP No.16360 of 2012 'Barinder Pal and another Vs. State of Punjab and another'** which was ordered to be heard with **CWP No.5048 of 2012** and interim order dated 24.08.2012 (Annexure R-1) was passed in the same terms. In the said case it was ordered to be heard with, the issue as per interim order dated 21.03.2012 was whether the person who has been registered with the Punjab Dental Council between the date of advertisement and the date of consideration and the person who had passed Punjabi examination were to be considered to be eligible.

Keeping in view the judgment passed in '**Dr. Parul**

Dham Vs. State of Punjab and others' 2011 (2) PLR 149, the petitioners were directed to be considered provisionally for appointment in case they met the parameters mentioned above.

The order dated 21.03.2012 reads as under:

“Counsel for the petitioners relies upon the judgment of this Court reported as Dr. Parul Dham Vs. State of Punjab and others 2011 (2) PLR 149 wherein similar to the case of the petitioners herein persons who had been registered with the Punjab Dental Council between the date of advertisement and the date of their consideration and the persons who had passed Punjabi examination during the same interregnum were consider to be eligible.

Notice of motion.

On the asking of the Court, Mr. Suvir Sehgal, Addl. AG, Punjab accepts notice and seeks time to file reply. Counsel for the petitioners undertakes to handover two copies of the writ petition to counsl for the respondents during the course of the day.

*Meanwhile, the petitioner **be considered provisionally** for appointment in case they meet the parameters mentioned above.*

Adjourned to 18.04.2012.”

In pursuance of the abovesaid orders, the provisional appointment letters were issued on 07.09.2012 (Annexure R-II). In the said letter Clause-16 was incorporated that the appointment letter was subject to the decision of the pending case. The same clause reads as under:-

“16. This appointment letter is issued to you provisionally subject to the decision of the pending Court Case.”

Subsequently, the writ petitions were disposed of on 29.05.2013 as having been rendered infructuous, on account of the appointment letter dated 07.09.2012 issued on the strength

communication dated 29.05.2013 received from Deputy Director (Dental) by the Advocate General Punjab. However, direction was issued for grant of notional fixation of monetary benefit w.e.f. initial appointment of candidates who have been selected alongwith the petitioner. The petitioner filed a application for review of the said order, which was dismissed as withdrawn with liberty to challenge the appointment letters of the private respondents vide order dated 26.07.2013. The same reads as under:-

"Counsel for the applicant, after arguing for some time, prays for withdrawal of the present review application with liberty to challenge the appointment letters, which were issued to the petitioners by the State. Dismissed as withdrawn with liberty as prayed for."

The State also filed review application No.154 of 2014, which was dismissed on 09.07.2014 on the ground of delay.

The State of Punjab preferred **Letters Patent Appeal Nos. 540 of 2014 and 414 of 2015** against the order of the Single Judge dated 29.05.2013. The said LPAs were disposed of as infructuous on 05.05.2015 by noting that the appointment orders mentioned in letter dated 29.05.2013 were on provisional basis.

The petitioner herein was also an applicant before the Division Bench and had brought to the notice of the Court that they had filed separate writ petitions which were still pending. Resultantly, following order dated 05.05.2015 was passed:-

[5] On our asking, the above mentioned letter dated 29.05.2013 of the Deputy Director (Dental), addressed to the Advocate General, Punjab, has been placed on record. The aforesaid letter categorically recites the details of appointment letters issued to each writ-petitioners. There can thus be no doubt that the State counsel rightly made the statement before learned Single Judge and the writ petitions were also correctly disposed of as having become infructuous.

[6] It is equally undeniable that the appointment letters mentioned in the letter dated 29.05.2013 were issued on provisional basis or that the writ-petitioners are working as Medical Officers (Dental) pursuant to such appointments.

[7] State of Punjab having taken a decision on its own to offer appointment to the selected candidates though on provisional basis, cannot now turned around and challenge the order of the learned Single Judge. No order adversely affecting the appellant-State has been passed by learned Single Judge.

[8] At this stage, Mr.G.S.Attariwala, learned counsel representing the applicants who has sought their impleadment as party-respondents in these appeals, submits and rightly so that these applicants have challenged the selection of writ petitioners (private-respondents herein) through a bunch of writ petitions which are still pending before a learned Single Judge and the decision of State Government to offer provisional appointment to the selected candidates ought not to affect such challenge to the selection(s). **There can be no doubt that the applicants are entitled to pursue their remedy unaffected of the order passed by learned Single Judge whereby writ-petitions of selected candidates have been rendered infructuous.**

[9] In this view of the matter, we dispose of these appeals as infructuous though with a clarification that any candidate aggrieved by the selection of writ-petitioners may independently pursue his/her writ petition challenging such selection, without being affected by the order dated 29.5.2013 passed by learned Single Judge or the order passed in these appeals.

[10] Ordered accordingly.

Counsel for the petitioner has accordingly submitted

that in view of the liberty granted by the Division Bench and the fact that the respondents did not have the qualifications as per the cut-off-date, it was open to them to seek setting aside of the appointments which were provisional in nature and the order dated 29.05.2013 would not come in the way, on account of the liberty granted by the Division Bench. Reliance has been accordingly placed upon the judgment of the Apex Court in '**Alka Ojha Vs. Rajasthan Public Service Commission and another' 2011 (9) SCC 438** and '**Bedanga Talukdar Vs. Saifudaullah Khan and others' 2012 AIR SC (Civil) 1340** to submit that the selection process had to be conducted strictly in accordance with the stipulated procedure and advertisements and, therefore, the appointments could not be sustainable.

It is submitted that there is no dispute that certificates are beyond the cut-off-date and the registration with the State Dental Council being after 19.08.2011, the respondents Dr. Barinder Pal and Dr. Subprinder Kaur were ineligible for appointments. Similarly, it is submitted that the petitioner in CWP No.12003 of 2012 was not a reserved candidate being a Saini and as per notification dated 29.02.2009 the earlier notification had been held in abeyance. In such circumstances, she was not liable to be considered in the category of backward class and her writ petition was liable to be dismissed.

Mr. Rajiv Atma Ram, Senior Advocate and Mr. Vivek Sharma, Advocate appearing for the private respondent Nos.5 on the other hand submitted that the appointment was a regular appointment and had been upheld by this Court. As per the statutory rules in question namely the Punjab Civil Medical (State Service Class-I) Rules, 1972, the qualification on the date of appointment had to be seen and they possessed the same on the said date. Reliance was also placed upon a judgment of the Division Bench in ***Parul Dham's case (supra)*** to submit that the State had taken a policy decision that candidates between the last date of advertisement and by the date of consideration would be eligible to apply. It was further submitted that there was no concealment on the part of the petitioner and in view of the law laid down by the Apex Court in ***'Ram Sarup Vs. State of Haryana and others' 1979 (1) SCC 168***, the respondents appointment were liable to be protected. Similarly reference was also made to the Division Bench judgment in ***'Dr. Anil Kumar Vij and another Vs. State of Punjab and others' 1992 (4) SLR 538*** to submit that the appointments were only irregular, but thereafter protection had been granted and appointment should not be quashed.

The State in its reply has also supported the case of the petitioners by holding that respondent No.5 Dr. Barinder Pal had not passed and neither completed his internship before the cut-off-

date i.e. 19.08.2011 and was registered with the Punjab Dental Council only on 07.12.2011. The Selection Committee has rejected his candidature as he had not completed his internship. Resultantly, he had filed the CWP No.16360 of 2012 and he was appointed under the wrong interpretation of the order of the Court. Similarly, it has been averred that Dr. Subprinder Kaur also had completed her internship on 08.11.2011 and registered with the Punjab Dental Council on 09.11.2011. She has approached this Court in CWP No.5717 of 2012 and by virtue of interim order dated 28.03.2012, she has also been provisionally appointed under the wrong interpretation of the order of the Court. An inquiry had been entrusted to fix the responsibility against the lapses made in this regard to take appropriate steps against the erring officials. Regarding Dr. Anuradha Saini, the plea taken was that she was not appointed on account of the fact that Saini caste was not included in the Backward Class Category, in the light of the instructions of the Department of Welfare, Government of Punjab, subsequently.

The issue now to be decided is whether the appointment of Dr. Barinder Pal and Dr. Subprinder Kaur are liable to be upheld and whether the petitioners are liable to be granted appointments qua them. The factum of their ineligibility on the cut-off-date on 19.08.2011 is not a subject matter of dispute. On

account of the provisional list being prepared and objections being raised regarding their entitlement of appointment on account of not having the Punjabi degree in matriculation and late registration with the State Dental Council, they had approached this Court apprehending denial. Interim orders dated 21.03.2012 and 28.03.2012 had been granted in their favour. Even, as per the said orders, the petitioners were to be considered provisionally for appointment, in case they met the parameters. There was no such direction that appointment letters were to be issued to them. The said officials as noticed above from the reply of the State issued appointment letters, which are now subject matter of departmental proceedings also. The said respondents are, thus, beneficiaries of the irregularities of the wrong implementation of the orders of the Court.

The sacrosanctity of the cut-off-date has been time and again reiterated by the Apex Court in the process of recruitments and admissions etc. It has been held that the date for acquiring of qualification will be the last date for filing the application and not the date of selection and wherein the Selection Committee had taken into consideration the requisite qualifications as on the date of selection, the same were held liable to be quashed. Reference can be made to the judgment of the Apex Court in '**Rekha Chaturvedi Vs. University of Rajasthan 1993 (Supp. 3) SCC**

168. The relevant paragraph reads as under:-

“10. The contention that the required qualifications of the candidates should be examined with reference to the date of selection and not with reference to the last date for making applications has only to be stated to be rejected. The date of selection is invariably uncertain. In the absence of knowledge of such date the candidates who apply for the posts would be unable to state whether they are qualified for the posts in question or not, if they are yet to acquire the qualifications. Unless the advertisement mentions a fixed date with reference to which the qualifications are to be judged, whether the said date is of selection or otherwise, it would not be possible for the candidates who do not possess the requisite qualifications in praesenti even to make applications for the posts. The uncertainty of the date may also lead to a contrary consequence, viz., even those candidates who do not have the qualifications in praesenti and are likely to acquire them at an uncertain future date, may apply for the posts thus swelling the number of applications. But a still worse consequence may follow, in that it may leave open a scope for malpractices. The date of selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily. Hence, in the absence of a fixed date indicated in the advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications. We have, therefore, no hesitation in holding that when the selection Committee in the present case, as argued by Shri Manoj Swarup, took into consideration the requisite qualifications as on the date of selection rather than on the last date of preferring applications, it acted with patent illegality, and on this ground itself the selections in question are liable to be quashed. Reference in this connection may also be made to two recent decisions of this Court in A.P. Public Service Commission, Hyderabad & Anr. v. B. Sarat Chandra & Ors. (1990) 2

SCC 669, and District Collector & Chairman,
Vizianagaram (Social Welfare Residential School Society)
Vidanagaran & Anr. v. M. Tripura Sundari Devi (1990) 3
SCC 655.”

A similar issue arose in the case of '**Ashok Kumar Sharma Vs. Chander Shekhar' 1997 (4) SCC 18** in which a Three-Judge Bench of the Apex Court held that the person acquires the prescribed qualification subsequent to the date cannot be considered at all. The application ought to have been rejected from the inception itself and the advertisement bound the authorities and they cannot act contrary to it. The relevant observations read as under:-

“6. The Review petitions came up for final hearing on March 3, 1997. We heard the learned counsel for the review petitioners, for the State of Jammu and Kashmir and for the 33 respondent So far as the first issue referred to in our order dated 1st September, 1995 is concerned, we are of the respectful opinion that majority judgment (rendered by the Dr. T.K. Thommen and V. Ramaswami, JJ) is unsustainable in law. The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not

acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their application ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority Judgement. This is also the proposition affirmed in Rekha Chaturvedi (Smt.) v. University of Rajasthan and others, 1993 (2) SCT 279 (SC): JT 1993 (1) SC 220: 1993 Suppl. (3) S.C.C 168. The reasoning in majority opinion that by allowing the 33 respondents to appear for the interview, the Recruiting Authority was able to get the best talent available and that such course was in furtherance of public interest is, with respect, an impermissible justification. It is, in our considered opinion, a clear error of law and an error apparent on the face of the record. In our opinion, R.M. Sahai, J. (and the Division Bench of the High Court) was right in holding that the 33 respondents could not have been allowed to appear for interview.

Similarly, in **'Bhupinderpal Singh & others Vs. State of Punjab 2000 (5) SCC 262** too the said view was reiterated and the decision taken by the High Court was upheld. The relevant observations read as under:-

“ 12. All the appeals and the writ petitions have been taken up for hearing analogously. The only question arising for decision in this case is by reference to which date the eligibility of the several candidates is to be judged and the consequences flowing from failure to satisfy the eligibility test in the facts & circumstances of the case.

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14. In view of several decisions of this Court relied on by the High Court and referred to herein above, it was expected of the State Government notifying the vacancies to have clearly laid down and stated the cut off date by reference to which the applicants were required to satisfy their eligibility. This was not done. It was pointed out on behalf of the several appellants/petitioners before this Court that the practice

prevalent in Punjab has been to determine the eligibility by reference to the date of interview and there are innumerable cases wherein such candidates have been seeking employment as were not eligible on the date of making the applications or the last date appointed for receipt of the applications but were in the process of acquiring eligibility qualifications and did acquire the same by the time they were called for and appeared at the interview. Several such persons have been appointed but no one has challenged their appointments and they have continued to be in public employment. Such a loose practice, though prevalent, cannot be allowed to be continued and must be treated to have been put to an end. The reason is apparent. The applications made by such candidates as were not qualified but were in the process of acquiring eligibility qualifications would be difficult to be scrutinised and subjected to the process of approval or elimination and would only result in creating confusion and uncertainty. Many would be such applicants who would be called to face interview but shall have to be returned blank if they failed to acquire requisite eligibility qualifications by the time of interview. In our opinion the authorities of the State should be tied down to the principles governing the cut off date for testing the eligibility qualifications on the principles deducible from decided cases of this Court and stated herein above which have now to be treated as the settled service jurisprudence.”

A similar view has also been followed in the case of ***Alka Ojha (supra)***.

The issue of protection of such illegal appointments made, which is the defence of the private respondents and the usurpation of the posts by an ineligible candidate was held to be impermissible in '***Rakesh Kumar Sharma Vs. Government (NCT of Delhi)*** (2013) 11 SCC 58. The relevant observations read as

under:-

“22. It also needs to be noted that like the present appellant there could be large number of candidates who were not eligible as per the requirement of rules/advertisement since they did not possess the required eligibility on the last date of submission of the application forms. Granting any benefit to the appellant would be violative of the doctrine of equality, a backbone of the fundamental rights under our Constitution. A large number of such candidates may not have applied considering themselves to be ineligible adhering to the statutory rules and the terms of the advertisement.

*23. There is no obligation on the court to protect an illegal appointment. Extraordinary power of the court should be used only in an appropriate case to advance the cause of **justice and not to defeat the rights of others or create arbitrariness. Usurpation of a post by an ineligible candidate in any circumstance is impermissible.** The process of verification and notice of termination in the instant case followed within a very short proximity of the appointment and was not delayed at all so as to even remotely give rise to an expectancy of continuance.”*

The argument of the learned senior counsel for the private respondent by relying upon that a policy decision had been taken that candidates between the last date of advertisement and the date of consideration would be eligible to apply, in view of the settled principles of law is, thus, liable to be rejected. Perusal of judgment in ***Dr. Parul Dham (supra)*** would go on to show firstly that advertisement was dated 02.05.2010 and not 26.07.2011. Secondly, it was pertaining to the passing of the matriculation with Punjabi. Regarding the registration with the Punjab Dental Council, it has noticed that the State has agreed to accept the

registration, if made during the interregnum period and to consider such candidates as eligible. Accordingly, the Court never decided the said issue, in view of the concession given by the State. The relevant observations read as under:-

“5. The first issue i.e. with regard to registration is involved in CWP Nos. 16462 and 17675 of 2010. At the hearing, learned Additional Advocate General, Punjab, Ms. Dayal, has made a statement that the State has now agreed to accept the registration with the Punjab Dental Council if made during the interregnum and to consider such candidates as eligible. The petitioner in CWP No. 16462 of 2010 who is otherwise eligible for appointment, has, in fact, registered herself with the Punjab Dental Council during the pendency of the present proceedings and, therefore, would be eligible to be appointed in terms of the stand taken by the State before the Court. The said issue i.e. of registration insofar as the petitioner in CWP No. 16462 of 2010, therefore, need not be dealt with any further. Insofar as the petitioner in CWP No. 17675 of 2010 is concerned, we have noticed that the petitioner is not represented in Court. In fact, throughout the length of the hearing, the petitioner in the said writ petition had gone unrepresented. Therefore, we do not consider it necessary to adjudicate upon the said issue at the instance of the unrepresented petitioner in CWP No. 17675 of 2010.

Thus, the said judgments would be no help to the private respondent, as it is settled principle that where concession has been given, the same cannot be treated as a precedent.

Similarly, the judgment in the case of **Ram Sarup (supra)** would be no help, since that case pertained to an order of reversion of the employee to the post of a Statistical Officer on the ground that he did not possess one of the minimum qualifications required under the rules. It was in such circumstances, it was held

that there was an irregularity and the experience gained by the employee in the working of labour laws must be regarded as sufficient to constitute the fulfilment of the requirement of the 5 years' experience. It was not a case where third parties rights were involved and where there was a usurpation of the post and somebody's right had been taken away on account of the provisional appointment letter being wrongly issued.

Similar is the position in the case of **Dr. Anil Kumar Vij (supra)**, whereby the appointment of respondent No.4 was sought to be challenged on account of not possessing the requisite experience of 3 years, which was the requirement of the rules as well as of the advertisement. It was noticed that the petitioners had competed for the said selection and that they had not got the requisite experience at the time of drawing up of the merit list and had not been selected. They had fought and lost the contest and, thereafter, were seeking to challenge and contest the private respondent. Accordingly, keeping in view the abovesaid facts, the setting aside of the said appointment was refrained by the Division Bench.

Therefore, keeping in view the view taken by the Apex Court in the case of **Rakesh Kumar Sharma (supra)**, this Court is of the view that the provisional appointment of Dr. Barinder Pal and Dr. Subprinder Kaur cannot be protected and is liable to be

quashed.

Another issue which arises for consideration as per the settled principles of law is that no action of the Court will harm anyone as per the maxim "*actus curiae neminem gravabit*" which has been laid down by the Apex Court in **South Eastern Coal Fields Limited Vs. State of M.P. 2003(8) SCC 648**. While elaborating on the principle of the maxim, it was observed that if there is any injury has been caused to any person by the act of the Court, the same has to be undone. The relevant portion reads as under:-

"That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same

position in which they would have been had the Court not intervened by its interim order when at the end of the proceedings the Court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the Court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced.”

The present case as noticed, on account of provisional consideration, the private respondents have given provisional appointment at the cost of the petitioners who are next in the line of consideration and are liable to be appointed on account of the ineligibility of the said respondents. Thus, the principles laid down by the Apex Court in the case of **South Eastern Coal Fields Limited (supra)** would be applicable to the facts and circumstances of the present case.

Regarding the right of the Dr. Anuradha Saini petitioner in CWP No.12003 of 2012, the stand of the State is clear that she had not come for re-counselling on 07.06.2012. 16 candidates from backward class had been called and she was one of the absentees and her case was, accordingly, rejected. On that basis, she had appeared before this Court and got an interim order that one post would not be filled up. The stand of the State is crystal clear that her appointment cannot be considered in view of the fact that the basis of the reservation was on the strength of the notification dated 29.02.2009 (Annexure P-8) which was held in abeyance vide the subsequent decision dated 27.02.2009 (Annexure P-9) prior to the cut-off-date.

Counsel for the petitioner was not able to show that the said petitioner is entitled for appointment in the reserved category in the absence of any appropriate certificate which is to be issued in accordance with the instruction of the Department of Welfare as per the requirement of the advertisement and therefore no benefit can be granted.

Resultantly, CWP No.25765, 25754 and 25782 of 2012 are allowed and the provisional appointments letters dated 07.09.2012 issued to Dr. Barinder Pal and Dr. Subprinder Kaur are accordingly quashed. CWP No.12003 of 2012 filed by Dr. Anuradha Saini is dismissed and the petitioners are directed to be

considered for appointment to the post of Medical Officer (Dental) against two posts of Backward Class Category and against one post of Backward Class (ESM) Category. The necessary exercise be completed within two months from the receipt of the certified copy of this order. It is further directed that the petitioners shall be entitled for all the notional benefits for the purpose of seniority from the date of initial appointment of candidates who were part of the original selection, since they were wrongly denied the appointment.

MARCH 30, 2016

Naveen

**(G.S. SANDHAWALIA)
JUDGE**