

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

**CWP No.22673 of 2013 (O&M)
Decided on : 12.04.2016**

Reema Bansal

... Petitioner

Versus

State of Punjab and others

... Respondents

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

Present: Mr. Deepak Gupta, Advocate for the petitioner (s).

Mr. Avinit Avasthi, AAG, Punjab.

Mr. K.R. Dhawan, Advocate
for respondent No.5.

Mr. Rajiv Pratap Atma Ram, Sr. Advocate with
Mr. Abhishek Arora, Advocate, for respondent No.7.

G.S. Sandhawalia, J.

The petitioner seeks the quashing of the merit list of the General Category for the post of Medical Officer (Dental) on the basis of which appointment letters were issued to respondents No.3 to 7 dated 07.09.2012 (Annexure P-9). Further prayer has been made for issuance of a writ of mandamus for appointment of the petitioner on account of vacancies available for the respondents.

The case of the petitioner is that vide public notice dated 26.07.2011 (Annexure P-1), applications were invited for the filling up of various posts in the Health Department. There were

114 posts for the Medical Officer (Dental), out of which 52 were of the General Category. 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 BC-20 (11 Backlog +9) PH-3 Gen. (ESM)-8 SC (ESM) (M&B)-2 SC (ESM) (R&O)-2 BC (ESM)-2 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 20.08.2011 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.
- Age limit: Between 18 and 37 years as on 1st Jan., 2011 (1/1/2011). Age relaxation as per the rules of Punjab Government.

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- Knowledge of Punjabi Language: No person shall be appointed to any post in any service by Direct appointment unless he has passed matriculation examination with Punjabi as one of the compulsory or elective subject or any other equivalent examination in Punjabi language at time of submission of application, which may be specified by the Govt. from time to time. Provided further that where a ward of Defence Service Personnel, which is a bona fide resident of Punjab

State, is appointed by direct appointment, he shall have to pass an examination of Punjab language equivalent to Matriculation Standard or he shall have to qualify a test conducted by the Language Wing of the Department of Education of Punjab Govt. within a period of two years from the date of his appointment.

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

The petitioner applied and gave the written examination and was declared successful. Respondents No.3 to 7 were not eligible as they did not possess qualification of Punjabi upto Matriculation standard on the cut-off-date. Apart from that respondents No.5 to 7 were only registered with the Punjab Dental Council on 01.12.2011, 06.12.2011 and 24.10.2011, respectively, after the cut-off-date as per advertisement. After counselling on 05.06.2012 to 09.06.2012, the name of the respondents No.3 to 7 did not find mention in the list and, whereas, the petitioner's name was found at Sr. No.3 of the wait list (Annexure P-3).

Respondents No.3 to 7 had approached this Court in CWP No.5048, 5049, 5254, 5413, 5717 and 16360 of 2012 and got interim orders that they will be considered for provisional appointment, in case they meet the parameters. Copy of one order dated 21.03.2012 is reproduced as below:-

“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 Punjab 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.”

Accordingly, the said respondents were issued appointment letters.

In pursuance of the abovesaid orders, the provisional appointment letters were issued on 07.09.2012. 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. Some of the affected candidates 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 same reads as under:-

“[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.”

Accordingly, the appointments are challenged on the ground that the said respondents did not have the requisite qualifications by the cut-off-date; on two aspects regarding knowledge in Punjabi language and the registration with the State Dental Council.

The State in its written statement took the plea that the petitioner was at Sr. No.3 of the wait list and, therefore, she was not appointed, since the 52 posts in the General category have been filled up. Respondents No.3 to 7 were given appointment

letters, in view of the interim orders passed in the writ petitions filed by them, which were disposed of as infructuous on 29.05.2013. The review application was disposed of vide order dated 26.07.2013 and the LPAs had also been dismissed vide order dated 05.05.2015. It was further submitted that they have been appointed provisionally in compliance of the interim orders and there were candidates above the petitioner in the merit list.

Respondent No.5-Kirti Arora in her reply took the plea that the clause of Punjabi was in consonance with the rules and, therefore, the writ petition had been filed to challenge the decision of the respondents to declare her eligible. It was, however, admitted that the said respondent was registered with the Punjab Dental Council on 01.12.2011, but before counselling. Reliance has been placed upon the judgment of the Division Bench in '**Dr. Parul Dham Vs. State of Punjab and others' 2011 (2) PLR 149**, to contend that the State had agreed to accept the registration with the Punjab Dental Council, if made during the pendency of the writ petition and thus relaxed the condition of regarding the passing of Punjabi upto the Matriculation level within six months of getting the appointment letter. Vide the subsequent application filed thereafter, it has been averred that initially the petitioner was registered with the Karnataka State Dental Council on 07.12.2004 (Annexure R5/1) and thereafter, on 29.11.2011 (Annexure R5/2) had requested for transfer of registration from the said State

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Council to the Punjab State Dental Council and surrendered the registration certificate.

Respondent No.6 in the written statement took the plea that he was more meritorious being at Sr. No.26 and the last General category candidate was at Sr. No.52 and the petitioner still would not be able to make out her case for appointment. The said respondent had served 2 years and, therefore, his appointment should not be disturbed.

Respondent No.7 in the written statement took the plea that the said respondent was born in Hamirpur (H.P.) and had done her schooling and college from Himachal Pradesh. She had finished her BDS Course in the year 2004 and the degree was awarded in the same year. Registration certificate with the State Dental Council was of 30.09.2004 (Annexure R-7/1). Thereafter, she got married to Shri Vijay Kumar resident of village Khanpur, District Hoshiarpur, Punjab. The residence certificate was attached as Annexure R-7/2. The registration had thereafter been transferred to the Punjab Dental Council on 24.10.2011 (Annexure R-7/7). Reliance was accordingly placed upon the fact that she stood registered with a State Dental Council. Reliance has been placed upon the Punjab Civil Medical (State Service Class-I) Rules, 1972 (for short '1972 Rules') as amended, to submit that as per Rule 7 (3), the petitioner was registered with a duly constituted medical council prior to the cut-off-date and, therefore, was very

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much eligible. Similarly, the petitioner had acquired the knowledge of Punjabi upto Matriculation standard as per Rule 7 (5) having passed Punjabi on 05.12.2011 (Annexure R-7/8). Reliance was placed upon a judgment of this Court in ***CWP No.14383 of 2013 'Baljit Kaur and others Vs. State of Punjab and others'*** (Annexure R-7/3) to contend that where Punjabi has not been taught in schools, the test could be qualified before the date of appointment. It is further submitted that there is no concealment on the part of the respondent. The said respondent was at Sr. No.28 and there were 86 candidates lower in merit between her and the petitioner and there were two candidates in the wait list higher in merit.

Short affidavit was also filed by respondent No.7 that respondent No.6 Dr. Surjit Singh and respondent No.3 Dr. Pankaj Swami have resigned the job of the Medical Officer (Dental).

Counsel for the State has also instructions to say that another persons service in the General category has been terminated due to the absence from duty.

As per the provisional merit list, respondents No.5, 6 & 7, admittedly did not have the requisite registration with the Punjab Dental Council as on the cut off date and, therefore, were not eligible to apply in view of the fact that they had become eligible only after the cut-off-date. The law on this issue is clear and reference can be made to the judgments 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. The sacrosanctity of the cut-off date has been time and again reiterated by the Apex Court in the process of recruitment and admissions etc. It has been held that the date of acquiring the qualification will be the last date for filing the application and not the date of selection. Reference can be made to the judgment of the Apex Court in ***'Rekha Chaturvedi Vs. University of Rajasthan 1993 (Supp. 3) SCC 168, 'Ashok Kumar Sharma Vs. Chander Shekhar' 1997 (4) SCC 18 and 'Bhupinderpal Singh & others Vs. State of Punjab 2000 (5) SCC 262.***

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.”*

As per the settled principles of law, 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 petitioner who is next in the line of consideration and was 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.

Respondent No.5 figures at Sr.No.16 in the merit list and respondent Nos. 6 and 7 figured at Sr. No.26 and 28, respectively. All the three have been registered with the Punjab State Dental Council after the cut-off-date. If, they were not eligible, in view of the settled law, they will necessarily have to give way to the petitioner who is at Sr. No.3 in the wait list and would have been entitled, in case they had not been granted the provisional appointment letters. The said letter is also not a final letter of appointment, in view of the fact that the learned Single Judge has given liberty to the petitioners to challenge the appointment letters, in accordance with law. Similarly the Division Bench had also given the same liberty, as reproduced above.

The cases of respondents No.5 & 7, however, are liable for protection of their appointment on account of the fact that as per Rule 7 of the 1972 Rules, the registration shall be permissible with the Punjab Medical Council or with any other duly constituted

Medical Council in India. The relevant rule reads as under:-

“7. Educational and other qualifications.- No person shall be appointed to the service by direct recruitment, unless he possesses the following educational qualifications and experience:-

(1) M.B.B.S;

(2) Post-graduate (qualification) in any speciality, recognized by the Medical Council of India;

(3) registered with the Punjab Medical Council or with any other duly constituted Medical Council in India;

(4) Five years experience in Medical Profession (including experience in public health, family planning and administrative/supervisory post in a medical or public health institution); out of which at least three years experience should be after obtaining post-graduate qualifications; and

(5) knowledge of Punjabi language upto Matriculation standard candidates who do not possess this qualification shall have to acquire this qualification within six months of their joining service failing with their service shall be terminated.”

The facts have been noticed in detail. Respondent No.5 has, now, brought on record her registration with the State Dental Council of Karnataka on 07.12.2004, well before the cut-off date of 20.08.2011 and thereafter, got registered with the Punjab State Dental Council on 01.12.2011. Similarly, respondent No.7 also was registered with the State Dental Council of Himachal Pradesh well before the cut-off-date on 30.09.2004 and had got it transferred to the State of Punjab on 24.10.2011 (Annexure R-7/7). Both of them have done their matriculation in the subject of Punjabi in October, 2011 and December, 2011, respectively and therefore, are entitled to the benefit of the observations of the

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Division Bench made in ***Dr. Parul Dham's case (supra)***. Respondents No.3 & 6, admittedly, have resigned and respondent No.4 having not joined, the petitioner, who was at Sr.No.3 in the wait-list, would necessarily be entitled for appointment. However, as respondents No.5, 6 & 7 got the benefit of the interim orders and got provisional appointment, depriving the petitioner of valid consideration.

Counsel for the State submitted that candidates at Sr.No.55 to 59, who were over and above the petitioner, were entitled for appointment and that they had also been deprived of the seats on account of the provisional admission taken by the private respondents.

However, counsel for the petitioner rightly relied upon the judgment in CWP-22953-2012 titled *Dr. Varun Nayyar & others Vs. State of Punjab & others*, decided on 20.12.2013, whereby the above-said persons, who were having merit above the petitioner, were given the benefit of appointment against another set of 5 persons whose extension orders had been quashed by this Court. The said persons had not joined, in pursuance of the appointment letters and were keen to finish their Post-Graduate studies and had been granted the benefit of extension to join, which was set aside and the said persons were, accordingly, adjusted and therefore, have been appointed on their own right and would not stand in the way of the petitioner.

The only hurdle which, thus, survives is that the petitioner is at Sr.No.3 in the wait-list and therefore, other candidates at Sr.Nos.1 & 2 were to be given offer, firstly, as per the contention of the State Counsel. However, this Court does not feel that the said persons have to be granted any such benefit. It is not disputed that the petitioner has been pursuing her right since the last more than 2 years and had filed the writ petition in October, 2013. The said persons have not come forth and therefore, having not agitated for their legal rights, cannot be held entitled for getting the benefit, at this stage, even though they might be higher in merit. Accordingly, the objection raised by the State Counsel, on this account also, is not justified.

Accordingly, the present writ petition is allowed. The State shall consider the case of the petitioner for appointment, within a period of 2 months from the date of the receipt of the certified copy of this order. She shall also be entitled for notional benefits for the purpose of seniority from the date of initial appointment of the candidates who were part of the original selection, since there was no fault on her part.

APRIL 12th, 2016
Naveen/sailesh

(G.S. SANDHAWALIA)
JUDGE