

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

Date of decision: 02.03.2016

CWP No.20393 of 2015

Shilpa Gupta

...Petitioner

Vs.

State of Punjab & others

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Anshuman Chopra, Advocate,
for the petitioner.

Mr. Harkesh Manuja, Addl. AG, Punjab.

Ms. Shruti Singh, IAS, Special Secretary (Home), Punjab.

RAJIV NARAIN RAINA, J.

The Punjab Public Service Commission (for short 'the Commission') on requisition sent by the State Government advertized 80 posts of Assistant District Attorneys in the State of Punjab. A general category candidate, the petitioner was placed at Sr. No.56 of the merit list prepared by the Commission. Letters of appointment were issued on 29th September, 2014 to 78 candidates competing in various categories. They were asked to join within 15 days. Out of 78 selected candidates, 29 candidates did not accept the offers of appointment. This position was the settled position on 13th March, 2015. Information received by the petitioner through Right to Information Act, 2005 revealed that candidates up to Sr.No.52 of the general select list had been called by employment offers, while 5 candidates failed to join the posts. Out of these 5 candidates, 2 candidates had refused offers in writing while the process of appointment of 3 candidates was going on. The information received

confirms that out of 38 posts meant for General category, only 34 posts were filled. The petitioner has not been offered appointment. Feeling aggrieved, he made a representation on 29th July, 2015 to the respondents to consider his case for appointment against unfilled vacancies.

2. On notice, the State has filed its reply and contests the petition. It is not disputed that out of 38 General category vacancies, 24 candidates were issued letters of appointment, who have joined service. For the second time, offers of appointment were made to 29 candidates out of which, 14 were of General category. Out of these 14 candidates, 11 candidates of General category were given appointment. Two candidates namely Deepak Mehta and Sandeep Ohri refused to join the service. The candidature of one Ankur Gupta, who had accepted offer of appointment, was cancelled for failure to appear before the medical board.

3. To examine the issue involved, the question to be determined is whether the vacant posts could be filled from the select list prepared in the same recruitment process or not, the State Government avers that it sought clarification from the Commission regarding activation of the merit list from next below the last candidate offered appointment to consider the names of 3 General category candidates for remaining 3 vacant posts and one in Scheduled Caste category and the advice was awaited. It is admitted that a fresh recruitment process has started. 80 new posts of Assistant District Attorneys have been advertised. However, 3 vacant posts of General category regarding which advice was sought were not included in these posts advertised. Further action, it is stated in the written statement, shall be taken on receipt of advice from the Commission, which is still awaited. In case, it is decided to fill up the remaining 3 seats of General category, offer of appointment shall be given to the petitioner also. The written statement rests at that.

On 15th December, 2015, this Court passed the following order:

“CM No.15881 of 2015

For the reasons mentioned in the application, the same is allowed and the case is taken up today itself.

Main Case

Contentends that three posts of ADA remain unfilled in the general category and the petitioner is high enough in merit in the waiting list to be offered employment. This is also the position explained in para.9 of the written statement filed by the State of Punjab dated 20.10.2015. The ball is in the court of the Punjab Public Service Commission whose advice has been sought whether the three posts should be filled. The Government can from the wait list re-assure itself that it remains the appointing authority of ADAs and requires no advice from any third agency including the Punjab Public Service Commission which has done its job by forwarding its recommendations to the Government. It is trite law that the Government is not bound by the recommendations of the Public Service Commission but must have the greatest respect attached to its word being a Constitutional body. The departure being only in cases where it is justified before the Court, even then the decision should be taken by the Government itself instead of waiting for the advice of the Commission.

In the light of this order, the Government would re-consider its statement in para.9 and inform the Court as to the status of the petitioner and whether she can be appointed as an Additional District Attorney as per her merit.

Adjourned to 22.12.2015.

To be shown in the urgent list.

Mr. Manuja may seek instructions in writing from the Government.

A copy of this order be given to Mr. Manuja attested by the Bench Secretary.

The case is de-tagged as the issue is different and be listed separately.”

4. On the next date, the learned Law Officer for the Punjab State sought an adjournment. That is how the matter came up on 17th February, 2016, when this Court passed the following further interim order:

“In continuation of the interim order dated 15.12.2015 it is directed that the Special Secretary, Home, would appear in this Court on the next date of hearing to apprise the Court of the decision taken in the light of the prayers made in the petition and the observations made in the interim order dated 15.12.2015.

In case, the Government is of opinion that the prayer of the petitioner deserves to be accepted paving the way for appointment then it would obviously not be necessary for the officer to appear in Court.

List on 02.03.2016.

To be shown in the urgent list.”

5. In response, Ms. Shruti Singh, IAS, Special Secretary (Home), Punjab has appeared in Court. She has been heard on facts and Mr. Manuja on the applicable law.

6. Ms. Shruti Singh states that it appears too late now to offer appointment to the petitioner, when the process of fresh recruitment is being conducted by the Commission. However, the petitioner’s rights have to be determined existing on the date of filing of the present petition i.e. 21st

September, 2015. If the petitioner has a vested and accrued right to appointment as per merit determined by the Commission against unfilled vacancies resulting from non-joining of candidates from General category, for any reason whatsoever, then full effect may have to be given to his rights protected by Articles 14 & 16 of the Constitution. Then declaration and appropriate directions would follow in favour of the waiting petitioner. There is no dispute that the petitioner makes it to the zone of available vacancies in General category as admitted in the written statement since the State awaits advice of the Commission which is not forthcoming. There is even an assurance that on receipt of advice from the Commission, the petitioner will be offered appointment in case the advice is in the affirmative.

7. Ms. Singh says that it is part of government procedure in deference to the Punjab Public Service Commission, Patiala, which is a constitutional body which cannot be bypassed. However, as she says this, she does not pay due attention and regard to the prerogative of the State which it exercises being the appointing authority. It is not the business of the Punjab Public Service Commission to form any opinion on this matter as its role is restricted to making recommendations to the Government as per merit determined by it. Though the recommendations of the Commission are to be respected, but they remain only recommendations for the Government which is the appointing authority that bears the costs of employment. The State cannot abdicate its obligation and duty to consider the petitioner's case at the level of the Government and leave it to the Commission only to waste time. The decision has to be taken by the Government alone and it for that purpose that this Court had troubled the Special Secretary (Home), Punjab to appear in Court so that she could make a statement in case it was required.

8. The fresh initiative for making further recruitment of 80 vacancies of Assistant District Attorneys has nothing to do with the rights of the petitioner coming from the previous selection. If a vacancy remains unfilled and a person is placed in the position like the petitioner, which is at hand and within the range of advertised vacancies in his category of competition, then appointment must necessarily follow and cannot be withheld without reason. For this proposition, reference can be made to the Supreme Court ruling in **State of Jammu & Kashmir Vs. Sat Pal**, (2013) 11 SCC 737. In Sat Pal's case, the facts were that Sat Pal was next below in merit to one Trilok Nath in the select list of direct recruitment to the advertised posts of Junior Engineer [Civil] Grade- II. They were both Scheduled Caste reserved category candidates. The admitted position was that Trilok Nath was offered appointment, but declined to accept the offer and did not join service. Sat Pal laid claim on the vacant post as next in waiting before the High Court of Jammu & Kashmir at Jammu. The High Court issued notice and called upon the State Government to file pleadings which were not filed and the right to file objections was closed by order dated 5th April, 2010. The Supreme Court noticed that it should have been natural for the High Court to infer that the assertions made by the respondent before it were truthful and acceptable for a final determination of the controversy. Despite the aforesaid, the High Court disposed of the writ petition at the admission stage with a direction to the State to consider appointment keeping in mind the communication dated 5th May, 2008 issued by the Chief Engineer, R&B Department, Jammu, affirming that Trilok Nath had declined to join. A period of two months was fixed to take a final decision. The Department rejected the claim on two grounds. Firstly, the waiting list issued in respect of the recruitment had outlived its validity way back in May 2008 and appointment cannot be offered accordingly. Secondly, the vacancies cannot be filled at a belated stage. Aggrieved by the rejection

order dated 23rd August, 2011, Sat Pal instead of assailing the same by way of a fresh writ petition filed a Contempt Petition. The Contempt Petition was disposed of on 29th October, 2011 by passing the following order:

“The claim of the petitioner for his appointment as Junior Engineer (Civil), Grade II arose during the validity of select list/wait list. The duty was cast on the competent authority, who was seized of the select list/wait list to fill up the vacancies from the wait list, but it failed to perform its duty. It is not the fault of the petitioner that his claim for appointment was not considered during the validity of select list/wait list. The fault is committed by the authority and the petitioner cannot be penalised for the same. The claim of the petitioner on merits deserved to be allowed for being appointed on the post of Junior Engineer (Civil), Grade II when select list/wait list was in operation. Same having not been done despite request having been made, his right of consideration for being appointed would thus survive though such claim was considered by the Government after the expiry of the validity period of select list/wait list.”

9. Feeling aggrieved by the directions issued in the contempt petition, the State of J&K carried an intra court appeal, assailing the order passed in the petition on the ground that directions were not permissible in exercise of contempt jurisdiction. The High Court dismissed the appeal as not maintainable. Both the orders were assailed before the Supreme Court by the State of J & K. In para.9 the Supreme Court observed in caustic words, the crux of the controversy:

“9. The controversy in hand is yet another illustration of the denial of a legitimate claim,

of an innocent citizen. Rather than appreciating the claim raised by the respondent before the High Court through SWP No.1156 of 2009, to which the appellants failed to even file their response, the same was ordered to be closed by an order dated 05.04.2010. Thereupon the appellants have chosen to pursue a course, which would sideline the main controversy. The course adopted would neither serve their own purpose, nor the purpose of the respondent Sat Pal."

10. The Supreme Court held that a waiting list would start operating when offers of appointment had been issued to those emerging on the top of the list. The existence of a waiting list allows room to the appointing authority to fill up vacancies which arise during the subsistence of the waiting list. A waiting list commences after vacancies are filled and a post becomes available. The Supreme Court found that in the controversy the aforesaid situation for operating the waiting list had not arisen, because one post was actually never filled. Even if it is assumed that all the posts were filled up and Trilok Nath was offered appointment, even then the validity of the waiting list had to be determined with reference to 22nd April, 2008 when it was offered to Trilok Nath. Even the State did not dispute that the waiting list was valid till May 2008. If Trilok Nath was found eligible for appointment against the vacancy in question out of the same waiting list, Sat Pal would be equally eligible for appointment against the said vacancy. This would be the unquestionable legal position.

11. This binding judgment covers the case in hand which eminently deserves to be allowed. The petitioner has amply demonstrated a right to appointment against the unfilled vacancy caused by non-joining of successful candidate on the next below rule within the advertised vacancies in his

category. The stand in the written statement protects the petitioner who must not be made to wait for the advice of the Commission which has no role to play. The State Government misdirected itself by throwing the ball in the wrong court and abdicating its authority by prevarication.

12. For the foregoing reasons, this petition is allowed. A writ of mandamus is issued to the State to consider offering appointment to the petitioner as per merit determined by the Commission within the General category against one of the unfilled vacancies is going a begging. Let the exercise be done within 30 days from the date of receipt of certified copy of this order. In the event of appointment, the necessary formalities such as character verification, background check and medical fitness should be completed without delay. The petitioner obviously will take his seniority as per merit determined by the Commission in the same recruitment process from the date batch mates were appointed. Thereafter, the conditions of service will be governed by the provisions of the Punjab Prosecution and Litigation (Group 'B') Service Rules, 2010.

02.03.2016
Vimal

[RAJIV NARAIN RAINA]
JUDGE