

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

WRIT PETITION (L) NO. 1064 OF 2017

PETITIONERS :- Apurba Kumar and others

...**VERSUS**...

RESPONDENTS :- The Institute of Banking Personnel Selection
and Others

Mr.A.K.Bharadwaj, a/w Akshay Petkar, Mr.Devashish Godbole & Amol Kumeria For petitioners.

Mr.Aniv Argiwala, a/w Mr. D. Deshpande For Respondent Nos.1, 2 & 4.

Mr.Aseem Nafade, a/w Arsh Misra i/b M.V.Kini & Co. For Respondent No.6.

Mr. Lancy D'Souza, a/w Mr.V.M.Parkar, For Respondent Nos.3.

CORAM : SHANTANU S. KEMKAR &
NITIN W. SAMBRE, JJ.

RESERVED ON : 20.06.2018.

PRONOUNCED ON : 05.10.2018

JUDGMENT [Per Nitin W. Sambre, J.]

Heard respective counsel at length. By consent, taken out for final disposal at the admission stage.

2. Pursuant to selection process for the post of Probationary Officers/Management Trainees for the year 2016-2017, the petitioners' selection as wait list/reserve list candidates and right of the petitioners to claim appointment is the subject matter of the present petition.

3. According to the petitioners, the respondent No.1 is an Autonomous Body, who is entrusted with the duty to conduct recruitment process for the post of Probationary Officers/Management Trainees for the respondents-participating organizations. It is the claim of the petitioners that the respondent No.1 published an advertisement dated 06/07/2015 for the recruitment of Probationary Officers/Management Trainees in lieu of the requirement of candidates registered by the respondents-participating organizations for the year 2016-2017. In view of the advertisement dated 06/07/2015, the on-line examinations were conducted on 31/10/2015 and the provisional allotment was made on 01/04/2016. According to the petitioners, in the notice dated 01/04/2016, clause No.10 about provisional allotment

provides for 10% of the vacancies reserved under each category as wait listed/reserve candidates. The petitioners then submit that if the participating organizations i.e. respondents provide vacancies during April, 2016 to March, 2017, the provisional allotment was to be carried out of the candidates from the reserve list to the said reserve members of the organization. All these petitioners claimed to be the candidates who are listed in the reserve list/wait list.

4. According to the petitioners, though there exist vacancies with the respondents-participating organizations, the respondents-participating organizations instead of filling up the posts by requisitioning candidature of petitioners who are wait listed candidates have tried to notify the said vacancies for the next year i.e. 2017-2018 and as such the interest of the petitioners are jeopardized. Amongst other, grounds raised in the petition by the petitioners are they having been selected after qualifying the recruitment process including the exams and interviews, legitimate right is created in their favour to seek appointment on the vacant post. According to them, the act on the part of the respondents amounts to denial of such legitimate rights of the petitioners to get appointment order as guaranteed under Articles 16 of the Constitution of India. According to the petitioners, once the list of

the candidates who are put on the reserve list was having life till 31/03/2017, it is an illegality on the part of the respondents in not giving appointment to the petitioners against the existing vacancies. As such, the petitioners, relying upon certain decisions have sought to canvass that appropriate directions needs to be issued to the respondents to grant them appointment on the post which are lying vacant with the respondents-participating organizations for the year 2016-2017. The petitioners have also placed on record the statistics demonstrating the vacancies which were existing with the respondents-participating organizations in the year 2016-2017 so as to demonstrate the alleged intentional act on the part of the respondents in not granting appointment in their favour.

5. *Per contra* the learned counsel for the respondent No.1 submits that the Division Bench of this Court has already held that it is not State within the meaning of Article 12 of the Constitution of India, as such the petition is not maintainable. Apart from above, according to the respondent No.1, there are no statutory rights vested in favour of the petitioners to claim directions against the respondent No.1 to issue appointment orders to the wait listed candidates. The respondents then claimed that the scheme of recruitment contemplates that the

recruitment process to be undertaken separately for each financial year and to select qualified and meritorious candidates. According to the respondents, even though the vacancies are notified, still the filling of the posts depends on the availability of the business with the respondents-participating organizations. According to them, there is no absolute right vested in the petitioners to seek appointment even if there are vacancies and would draw support from the judgment of the Hon'ble Supreme Court in the matter of **Raj Rishi Mehra and others v. State of Punjab and another**, reported in (2013) 12 SCC 243.

6. Considered rival submissions.

7. Some of the admitted facts of which this Court needs to take note of is, the petitioners participated in the selection process for the post of Probationary Officers/Management Trainees for the year 2016-2017. The very advertisement provides for on-line examination process which speaks of the filling up of the post during the financial year 2016-2017 based on the business needs of the respondents-participating organizations. It is also required to be noted that the guidelines in the said advertisement provide for the automatic expiry of the validity of the select list/wait list after 31/03/2017.

8. Clause-F i.e. Provisional Allotment of the advertisement provides that there is no absolute right in favour of the candidate who claims right of appointment as per the advertisement and the clearing of the examination by the concerned candidate will not constitute offer for employment. It further provides for reserve list to the extent of 10% of the vacancies under each category is required to be maintained. However, the same does not guarantee the provisional allotment/recruitment by the participating organization(s)/other financial organizations. It also provides that the reserve list will automatically expire on 31/03/2017.

9. Apart from above, the notice issued by the respondent No.1 particularly the condition No.10 therein as is reproduced on page-117 of the petition in categorical terms deals with the rights of the candidates on reserve list and same does not speak of guarantee or assurance of allotment/recruitment by the respondents-participating organizations from the reserve/wait list candidates.

10. In the backdrop of aforesaid observations, if the law laid down by the Hon'ble Supreme Court in the matter of **Raj Rishi Mehra and others v. State of Punjab and another** (*supra*) is appreciated, the

Hon'ble Supreme Court in paragraphs Nos.1, 12, 15 and 16 has observed thus:-

“1. Whether the petitioners, whose names were included in the select list prepared for recruitment to Punjab Civil Service (Judicial Branch), are entitled to be appointed against the posts which became available due to the resignation of two of the appointees and the unfilled posts of reserved categories is the question which arises for consideration in these petitions filed under Article 32 of the Constitution.

12. Ms. Indu Malhotra, learned senior counsel appearing for the High Court argued that the petitioners are not entitled to be appointed against the vacant posts merely because their names were included in the waiting list. She submitted that the posts vacated by Shri Rakesh Kumar and Ms. Shikha Thakur will be deemed to have available in the next recruitment year and the same cannot be filled by appointing the candidates from the waiting list. Ms Malhotra argued that the exercise undertaken in the year 2007-2008 for filling up the unfilled reserved posts cannot be treated as a precedent for ordaining the High Court to include the names of the petitioners in the Register to facilitate their appointment against such posts. Learned Senior Counsel submitted that this Court should not issue a mandamus for filling up the posts which became available due to resignation of Shri Rakesh Kumar and Ms Shikha Thakur and the posts which were dereserved by the State Government because the Commission has already issued fresh advertisement.

15. The question whether the candidates whose names are included in the waiting list are entitled to be appointed against the unfilled posts as of right is no longer *res integra* and must be answered in negative in view of the judgments of this Court in *Union of India v. Ishwar Singh Khatri*¹, *Gujarat State Dy. Executive Engineers' Association v. State of Gujarat*², *State of Bihar v. Secretariat Assistant Successful Examinees Union 1986*³, *Prem Singh v. Haryana SEB*⁴, *Ashok Kumar v. Banking Service Recruitment Board*⁵, *Surinder Singh v. State of Punjab*⁶, *Madan Lal v. State of J&K*⁷, *Kamlesh Kumar Sharma v. Yogesh Kumar Gupta*⁸, *State of J&K v. Sanjeev Kumar*⁹, *State of U.P. v. Rajkumar Sharma*¹⁰, *Ram Avtar Patwari v. State of Haryana*¹¹ and *Rakhi Ray v. High Court of Delhi*¹².

16. In *Surinder Singh* case⁶, this Court observed as under: (SCC P.494, para 14)

"14. ... '9. A waiting list prepared in an examination conducted by the Commission does not furnish a source

- 1 1992 Supp (3) SCC 84 : 1992 SCC (L&S) 999 : (1992) 21 ATC 851
- 2 1994 Supp (2) SCC 591 : 1994 SCC (L&S) 1159: (1994) 28 ATC 78
- 3 (1994) 1 SCC 126 : 1994 SCC (L&S) 274 : (1994) 26 ATC 500
- 4 (1996) 4 SCC 319 : 1996 SCC (L&S) 934
- 5 (1996) 1 SCC 283 : 1996 SCC (L&S) 298 : (1996) 32 ATC 235
- 6 (1997) 8 SCC 488 : 1998 SCC (L&S) 65
- 7 (1995) 3 SCC 486 : 1995 SCC (L&S) 712 : (1995) 29 ATC 603
- 8 (1998) 3 SCC 45 : 1998 SCC (L&S) 720
- 9 (2005) 4 SCC 148 : 2005 SCC (L&S) 447
- 10 (2006) 3 SCC 330 : 2006 SCC (L&S) 565
- 11 (2007) 10 SCC 94 : (2008) 1 SCC (L&S) 15
- 12 (2010) 2 SCC 637 : (2010) 1 SCC (L&S) 652

of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service.' (*Gujarat State Dy. Executive Engineer's Assn. case*², SCC p. 599, para 9)"

2 *Gujarat State Dy. Executive Engineer's Assn. v. State of Gujarat*, 1994 Supp (2) SCC 591 : 1994 SCC (L&S) 1159: (1994) 28 ATC 78."

12. As such, the claim of the respondents that the validity of select/wait list will be for a period of one year and the same will be valid up to 31/03/2017 is very much justified. If the reserve/select list is given effect to in perpetuity i.e. till it is exhausted, the Hon'ble Supreme Court is of the opinion that the respondents may not be required to hold the recruitment process till the said list is exhausted and same will jeopardize the interest of such candidates who are qualified as fresh candidates.

13. The Hon'ble Supreme Court in the matter of **Sankarsan Dash v. Union of India**, reported **1991 SC 1612** has observed that an action to consider an issue as to whether the inclusion of the name of the candidates in the merit list whether confer any right to be selected and appointed if there exist vacancies remained unfilled after process of selection is finally closed. The Hon'ble Supreme Court in paras-7, 8, 9 and 10 has observed thus:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and

on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha*, (1974) 1 SCR 165: (AIR 1973 SC 2216), *Miss Neelima Shangla v. State of Haryana*, (1986) 4 SCC 268 : (AIR 1987 SC 169), or *Jitendra Kumar v. State of Punjab*, (1985) 1 SCR 899 : (AIR 1984 SC 1850).

8. In *State of Haryana v. Subhash Chander Marwaha*, (AIR 1973 SC 2215) (*supra*) 15 vacancies of Subordinate Judges were advertised, and out of the selection list only 7, who had secured more than 55% marks, were appointed, although under the relevant rules the eligibility condition required only 45% marks. Since the High Court had recommended earlier to the Punjab Government that only the candidates securing 55% marks or more should be appointed as Subordinate Judges, the other candidates included in the select list were not appointed. They filed a writ petition before the High Court claiming a right

of being appointed on the ground that vacancies existed and they were qualified and were found suitable. The writ application was allowed. While reversing the decision of the High Court, it was observed by this Court that it was open to the Government to decide how many appointments should be made and although the High Court had appreciated the position correctly, it had “somehow persuaded itself to spell out a right in the candidates because in fact there were 15 vacancies”. It was expressly ruled that the existence of vacancies does not give a legal right to a selected candidate. Similarly, the claim of some of the candidates selected for appointment, who were petitioners in *Jitendra Kumar v. State of Punjab*, (AIR 1984 SC 1850), was turned down holding that it was open to the Government to decide how many appointments would be made. The plea of arbitrariness was rejected in view of the facts of the case and it was held that the candidates did not acquire any right merely by applying for selection or even after selection. It is true that the claim of the petitioner in the case of *Miss Neelima Shangla v. State of Haryana*, (AIR 1987 SC 169) was allowed by this Court but, not on the ground that she had acquired any right by her selection and existence of vacancies. The fact was that the matter had been referred to the Public Service Commission which sent to the Government only the names of 17 candidates belonging to the general category on the assumption that only 17 posts were to be filled up. The Government accordingly made only 17 appointments and stated before the Court that they were unable to select and appoint more candidates as the Commission

had not recommended any other candidate. In this background it was observed that it is, of course, open to the Government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates; and there must be a conscious application of mind by the Government and the High Court before the number of persons selected for appointment is restricted. The fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment. None of these decisions, therefore, supports the appellant.

9. Mr. Goswami appearing in support of the appeal has contended that in view of the relevant statutory rules, the authorities were under a duty to continue with the process of filling up all the vacancies until none remained vacant. Reference was made to R. 4 of the Indian Police Service (Cadre) Rules, 1954, Rr. 3, 4, 6 and 7 of the Indian Police Service (Recruitment) Rules, 1954 and Rr., 2(1) (a), 2(1)(c), 8 and 13 of the Indian Police Service (Appointment by Competitive Examination) Regulations, 1965. We do not think any of these rules comes to the aid of the appellant. Rule 3 of the Cadre Rules directs constitution of separate cadres for States or group of States, and R. 4 empowers the Central Government to determine the strength in consultation with the State Governments. The strength has to be re-examined at intervals of 3 years. Rule 3 of Recruitment Rules deals with the constitution of the Service, and

R. 4 the method of recruitment. Rules 6 and 7 give further details in this regard. The learned counsel could not point out any provision indicating that all the notified vacancies have to be filled up. Similar is the position with respect to the Competitive Examination Regulations. Regulation 2(1)(a) defines available vacancies as vacancies determined by the Central Government to be filled on the results of the examination described in Regulation 2(1)(a). Regulation 8 prescribes that the candidates would be considered for appointment to the available vacancies subject to provisions 9 to 12 and Regulation 13 clarifies the position that a candidate does not get any right to appointment by mere inclusion of his name in the list. The final selection is subject to satisfactory report on the character, antecedent and suitability of the candidates. We, therefore, reject the claim that the appellant had acquired a right to be appointed against the vacancy arising later on the basis of any of the rules.

10. The main contention on behalf of the appellant has been, however, that the authorities in keeping the vacancies arising later unfilled acted arbitrarily. Mr. Goswami referred to several documents annexed to the special leave petition and affidavits filed on behalf of the parties and contended that although appointments of many candidates in the other services were made in the later vacancies, the vacancy in the Indian Police Service which subsequently became available to the appellant was refused without any just cause, resulting in illegal discrimination. This was emphatically denied on behalf of the

respondent. Since the matter did not appear to be free from ambiguity on the basis of the affidavits before us, we decided to examine the factual aspects more thoroughly by examining the other available materials on the records of the Union of India, and accordingly the learned counsel for the respondent got the relevant departmental files called. Two further affidavits were also filed along with photostat copies of a large number of documents, which we examined at some length with the aid of the learned advocates for both sides. From the materials produced before us it is fully established that there has not been any arbitrariness whatsoever on the part of the respondent in filling up the vacancies in question or the other vacancies referred to by the learned counsel for the appellant. The process of final selection had to be closed at some stage as was actually done. A decision in this regard was accordingly taken and the process for further allotment to any vacancy arising later was closed. Mr. Goswami relied upon certain appointments actually made subsequent to this stage and urged that by those dates the further vacancies in the Indian Police Service had arisen to which the appellant and the other successful candidates should have been adjusted. We do not find any merit in this contention. It is not material if in pursuance of a decision already taken before closing the process of final selection, the formal appointments were concluded later. What is relevant is to see as to when the process of final selection was closed. Mere completing the formalities cannot be of any help to the appellant. We do not consider it necessary to mention all the details in this connection

available from the large number of documents which we closely examined during the hearing at considerable length and do not have any hesitation in rejecting the argument of the learned counsel in this regard based on the factual aspect.”

As such, it is significantly clear from the aforesaid observations that the selection of candidates in the merit list, like that of present petitioners who are wait listed candidates do not acquire any right to the post. Selection is merely an intent to the invitation to the qualified candidates to apply for recruitment.

In the case in hand, the mitigating circumstances under which the respondents-participating organizations can deny issuance of the appointment orders to the candidates like the petitioners pursuant to the clauses as are mentioned in the recruitment procedure discussed in forgoing paras. Amongst other, the reduction in the business activity of the respondents-participating organizations, the non-creation of absolute right in favour of the petitioners pursuant to the recruitment rules, etc.

The Hon'ble Supreme Court has observed to the extent that the respondents-participating organizations were justified in adopting different policy with respect to the filling of the reserved vacancies.

14. Apart from above, one of the issue which needs to be answered is whether there is no absolute right in favour of the petitioners to claim appointment as of right? The said issue in our opinion is no more *res integra*. The Hon'ble Supreme Court in the matter of **Sankarsan Dash v. Union of India** cited supra has already held that if name of the candidate appears in the select list, he does not have absolute right in asking for the appointment. Mere inclusion of candidate's name in the select list does not confer any right to be appointed even if some of the vacancies remain unfilled. The concern candidate cannot claim that there is a hostile discrimination. The Hon'ble Supreme Court has observed that the select list cannot be treated as a reserve list for the purpose of issuing appointment, so that the vacancies can be filled up by taking the names from the list as and when if so required.

15. Though the learned counsel for the petitioners has invited attention of this Court to the judgment delivered in *Writ Petition No.10904 of 201t Suresh Ingole v. State of Maharashtra and others*, decided on 11/10/2017, upon appreciation of the facts of the said case, it is clear that, same cannot be in any case be treated to have decided the issue similar to the one in the present case. In the said case, the

petitioner was not given appointment *mala fide* which is not the case as has been sought to be put forth by the petitioners in the present case.

16. That being so, there is no substance in the present petition, as such, lacks merits and the same is dismissed.

(NITIN W. SAMBRE, J.)

(SHANTANU KEMKAR, J.)