

241

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

CWP No.23425 of 2015
Date of Decision: 13.09.2019

Jyoti Bhukun

... Petitioner

Versus

State of Punjab and others

... Respondents

CORAM : Hon'ble Mr. Justice Jitendra Chauhan

Present : Mr. Kapil Kakkar, Advocate
for the petitioner.

Ms. Anju Sharma Kaushik, DAG Punjab.

JITENDRA CHAUHAN, J.(Oral)

Reply by respondent No.3 has not been filed, despite availing numerous opportunities. Therefore, defence of respondent No.3 is hereby struck off.

Through the instant civil writ petition filed under Articles 226/227 of the Constitution of India, the petitioner seeks direction to the respondents to appoint her on the post of Math Mastress against the seats reserved for Backward Class candidates.

It is contended by the learned counsel for the petitioner that an advertisement dated 23.09.2009 (Annexure P-1) was issued by the respondents inviting applications for filling up 7654 posts on contract basis in the teaching/non-teaching cadre in the department of education. Out of the said posts, 1275 posts were ear-marked for Math Mastress. The last date for submission of the application form was

09.10.2009. Thereafter, a corrigendum dated 27.09.2009 (Annexure P-2) was issued by the respondents in which a condition was laid down that the BC certificate should not be older than one year from the last date of submission of the applications. The petitioner applied for the post of Math Mastress under the BC category. Thereafter, the petitioner appeared in the counselling held on 31.12.2009 and a formal merit list (Annexure P-4) was prepared in which the name of the petitioner stood at Sr. No. 63. The petitioner again appeared in the counselling and in the merit list her name figured at Sr. No. 82 as she had scored 61.4652 marks. Thereafter, final merit list (Annexure P-7) was prepared in which the name of the petitioner was not mentioned and she was considered under the general category and her name figured at Sr. No. 585. Thereafter, the petitioner represented to the department that she be considered under the BC category. Thereafter, another counselling was held on 08.07.2011 and the petitioner appeared in the said counselling. Thereafter, a legal notice dated 10.07.2014 (Annexure P-11) was served upon the department but in vain.

It is further contended by the learned counsel for the petitioner that the case of the petitioner is similar to that of Naresh Kumari who has been allowed relief in CWP No. 21090 of 2013 vide judgment dated 10.11.2014 (Annexure P-16).

On the other hand on behalf of respondent Nos. 1 and 2, it is contended that as per the advertisement, the BC certificate should have been issued within one year from the last date of submission of application forms, however, the BC certificate issued in favour of the petitioner was dated 14.10.2009 whereas the last date of

submission of application form was 09.10.2009. Therefore, the claim of the petitioner was considered under the general category wherein the petitioner had obtained 61.4652 marks whereas in the general category the merit of last selected candidate was 62.4483 and as such the claim of the petitioner did not fall within the zone of selection being lower in merit than the last selected candidate in the general category.

Heard.

The relevant observations made in Naresh Kumari's case (supra) are reproduced as under:-

“The reliance placed on these judgments by Mr. Mann are inappropriate in deciding the issue raised in this case where the recruitment process has not come to an end inasmuch as three vacancies in the SC (R&O) category remain unfilled and for the wrong reason are being stonewalled. If they remain unfilled then the matter has to be examined in the light of the principles laid down by the Supreme Court in Asha Kaul (Mrs.) & Another vs. State of Jammu & Kashmir, (1993) 2 SCC 573 where it opined that Courts must look into the reasons why posts have remained unfilled as were duly advertised and select list drawn of the successful candidates. If the reasons for non-filling a vacant post in a direct recruitment process are found justified then the Court may refuse to interfere in the matter. It is not far to see cases where Courts may deny relief. For

instance, after the selection process a cadre review has taken place and some posts are abolished and are found not necessary to be manned for carrying out the administration of the Department which can easily go on in the numerical strength of those already appointed as per merit. There can be reasons of financial stringency or austerity measures adopted as are consistent with the efficiency of administration and which burden the State treasury may not support in footing salary bills etc. for the posts held back for future reference or revision. It also can be where a glaring mistake has been committed while counting existing and anticipated vacancies at the time of initiating the recruitment process which were miscalculated by an oversight or by an improper feedback on vacancies by the functionaries of the State who were charged with such duty. However, these reasons are evidently not exhaustive and are only supplied by way of illustration for a better understanding of the several dimensions of the case might have and if a direction were issued to the respondents as claimed by the petitioner then what may be the consequences and the fallout. None of these serious roadblocks are present in this case since the only defence against non-filling of vacant posts is that no person lower in

merit has been appointed. This ground is not found sufficient or plausible reason not to fill up the advertised posts undisputedly calculated after proper counting of existing vacancies or anticipated vacancies likely to arise during but before the selection process becomes a dead ball. This leaves the Court to examine the reason given in the impugned order and whether that is sufficient to sustain it. Indisputably, the three vacant posts were advertised in 2009. A selection process was initiated. The merit was prepared as per criteria in which the last selected candidate in R&O category secured 50.2632 while the petitioner was close at heel with 50.1429 merit points. It is not that her name never figured in the select list except in the last one which is the impugned part of the selection process. The impugned order admits candidly that the three posts remain vacant on account of non-joining of certain candidates. If that is so, then the reason ascribed to deny the claim is neither germane nor relevant to the issue of keeping back three posts and still lying unfilled only to re-advertise them in a subsequent recruitment process by applying the principle of carry forward of vacancies. But the carry forward principle is not applicable in the presence of suitable, available and qualified

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

good in this case where three candidates failed to join the posts offered to them which as a consequence remain vacant. It is equally clear that the State cannot deny appointment to a person duly selected without a justifiable cause. It is an equally well embedded proposition of law that if the reasons contained in an administrative order are found illegal, arbitrary, unreasonable and unconstitutional the order must fall in its entirety and cannot be sustained by supplying reasons just as a superior court of law can do while testing a judicial order of a court below in its appellate power. Still further, reservation of posts and vacancies in direct recruitment for scheduled castes in public appointments is not an ordinary trifling matter to be lightly brushed aside but suffers reasonable restrictions on State action and constitutional protections afforded and enabled by Article 16 (4) & 16 (4-A) of the Constitution and State policies of Punjab formulated thereunder. In the face of reservation policies issued through executive instructions under Article 162 of the Constitution full effect has to be given to them to make reservation meaningful till the prescribed percentage is achieved and all the reserved posts advertised are filled. It is also not the case of the

respondents that the prescribed percentage of reservation would be exceeded if this writ were allowed. Reservation law presupposes relaxations and concessions to a special category or class of persons for whom the constitutional benefits are admissible. Withholding posts duly advertised in the category of SC (R&O) may amount to a constitutional tort; the tortfeasor being the recalcitrant administrator not letting go the three vacant posts for an apparently perverse reason and keeping them in his desk drawer for future reference just because it is his wish and he has the power to do so or that relief is going out of his precious wallet. This is perverse thinking in the mind of the administrator to deny a just claim only because he holds the pen. Let us examine the matter from a hypothesis. Supposing the appointing authority had without any litigation appointed the petitioner to one of the three vacant posts on his own, would the Court have nullified the appointment as one which was illegal, if a challenge were laid? I think not. And by whom would the challenge be laid in a court of law? The answer can only be- the person aggrieved. Who would be the aggrieved person? The answer is- a member of SC (R&O) alone chasing a reserved post and not a candidate from any other category. Is

there any other candidate who is a member of the SC (R&O) complaining of right deprivation and in sight? The answer is-none whatsoever. Then the crucial question is put, is the petitioner a failed candidate? The competent authority does not say so in his impugned order neither does the State in the written statement filed before this Court. What were the prescribed cut off marks defining success and failure and at what merit point failure starts in order to understand the difference between merit points 50.2632 and 50.1429 in the matter of appointment? No one knows. The State defence is a clean slate on these questions, the answers to which could turn the fate of the case. For the foregoing reasons this petition is allowed. The impugned order dated September 09, 2013 is set aside by issuing a writ of certiorari. A mandamus is issued to the respondent-State to consider the claim of the petitioner for appointment as Vocational Mistress (Computer Science) in the category of Scheduled Caste (R&O) against one of the three vacancies lying unfilled without applying the impugned reason that only because persons lower in merit have not been appointed the petitioner has no right of consideration for appointment. The respondents are directed to consider the claim of the petitioner

within 30 days on receipt of a certified copy of this order keeping in view the observations made by this Court in this order. In passing, I wish to record that since the State has a right to appeal against this order I refrain from imposing exemplary costs, which I had almost made up my mind to, on the maker of the impugned order which is so entirely perverse in its reasoning and shortcomings which appear to be aimed only at willy nilly denying a just claim based on law of reservation and quotas, which is a sacrosanct constitutional obligation, but leave it to the appeal court to examine this aspect in case challenge is brought before it. However, I would record a post script and remind the State functionaries to foster mutual respect of the institutions that make for India and to say that it is not enough today for a Government servant to say- Here is the order you got the High Court to tell me to pass, now do what you can with it! Because these words are inaudible or out of earshot does not mean that the Court does not feel the pulse or lip-read the strong under-currents that lie behind such impugned orders. This is a form of subterranean contempt making a mockery of the law as laid down by Courts worse than ex facie contempt. This brooding culture must end in Government offices. I have no reason to

believe it will not. But if it continues, the Court is not ill-equipped to deal sternly with such aberrations including passing of strictures on a bureaucrat who deliberately and knowingly passes a perverse order which is not in accordance with law and is manifestly aimed at wrongfully depriving reserved category persons of their valuable and constitutionally protected rights.”

In view of ratio of law laid down in Naresh Kumar's case (supra), the present civil writ petition is allowed. The respondents are directed to consider the claim of the petitioner for appointment on the post of Math Mastress in the BC category.

The necessary exercise be completed within a period of two months from the date of receipt of certified copy of the judgment.

(JITENDRA CHAUHAN)
JUDGE

13.09.2019
Parveen Sharma

Whether reasoned/speaking	Yes/No
Whether reportable	Yes/No