

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

CWP-4565 of 2013

Date of decision: 07.11.2019

Sanjeev Kumar and others

.... Petitioners

versus

State of Haryana and others

.... Respondents

CWP-7866 of 2013

Rohtas and others

.... Petitioners

versus

State of Haryana and others

.... Respondents

CWP-17272 of 2012

Mahinder Singh and others

.... Petitioners

versus

State of Haryana and others

.... Respondents

CWP-143 of 2014

Anil Kumar and others

.... Petitioners

versus

State of Haryana and others

.... Respondents

CWP-27157 of 2013

Amit Kumar and others

.... Petitioners

versus

State of Haryana and others

.... Respondents

CORAM:HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. Anurag Goyal, Advocate
for the petitioners.

Mr. Amit Rao, Advocate for
Mr. Lalit Rishi, Advocate for the petitioners
in CWP-27157 of 2013.

Mr. Mohit Trikha, Advocate for
Mr. Jatinder Dhanda, Advocate
for the petitioners in CWP-17272 of 2012.

Mr. C.S. Bakhshi, Addl. A.G. Haryana.

Mr. D.S. Nalwa, Advocate for respondents No.2 and 3.

HARSIMRAN SINGH SETHI, J. .

By this common order, the above mentioned five writ petitions are being disposed of as all the writ petitions involve same question of law and similar facts.

For the purpose of this order, the facts are being taken from CWP No.4565 of 2013 titled as **Sanjeev Kumar and others vs. State of Haryana and others.**

Respondent No.2-Haryana School Shiksha Pariyojna Parishad issued an advertisement advertising 3118 posts of Information-cum-office-cum-Library Manager, for the schools within the State of Haryana. The said advertisement was issued on 08.02.2012. As per the advertisement, appointment was to be made on the basis of merit, which was to be prepared on the basis of written test and there was no negative marking in the written examination. Petitioners claiming themselves to be fully eligible and qualified for the advertised posts, applied for the same and were issued roll numbers for competing for the post of Information-cum-office-cum-Library Manager. Before the written test was conducted, a corrigendum was issued that the

written test would be of 300 marks with negative marking as well. Without raising any grievance to the said change of criteria, petitioners participated in the selection process and appeared in the written test. Ultimately, the result of the test was declared on 07.08.2012, wherein, only candidates, who had secured 23% marks, were brought into merit list so as to consider them for appointment irrespective of the number of posts advertised. The petitioners failed to make it to the merit list as they did not secure 23% marks in the written test. The challenge in the present writ petition is to the effect that once there was no condition in the advertisement that candidate will be considered for appointment in case, he/she secures at least 23% marks in the written test and the said condition was brought into operation after issuance of advertisement. The said condition of securing minimum 23% marks in written test is contrary and illegal and cannot be given effect to and appointment should be made keeping in view the first advertisement ignoring the requirement of minimum 23% marks in the written test and consequently the claim of the petitioners should be considered, especially, that posts are lying vacant.

Upon notice of motion, respondents have filed reply. In the reply, respondents have stated that in the advertisement there was no condition that a candidate, in order to become eligible to be brought in the merit list for being considered for appointment must obtain minimum 23% marks in the written test but before the result was declared, it was decided by the competent authority that keeping in view the requirement of the post and large numbers of candidates applying, only the candidates who secure minimum 23% marks in the written examination be brought in the merit list for consideration for appointment to the advertised post. The respondents have further stated that

said cut off marks in the eligibility was fixed keeping in view the duties and responsibilities attached with the post and though the decision was taken after issuance of advertisement but the same was permissible keeping in view the settled principles of law.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

The only question raised for the consideration of this Court is whether after an advertisement is issued, competent authority of recruiting agency is within its right to prescribe the minimum marks required to be considered as eligible for appointment to the advertised post or not.

The first question which needs to be decided is as to whether the petitioners have any right to claim appointment merely on the basis that they have not been selected and appointed, though, some of the posts out of the total advertised posts are still lying vacant. It is settled principle of law that selection does not confer right to claim appointment. The Government is well within its jurisdiction to decline appointment on valid grounds. The mandamus which is being sought can only be issued in case there is a legal right with the petitioner for getting appointment with the corresponding duty upon the State to appoint the petitioners. In the present case, there is no legal right with the petitioners which has been infringed as there is no legal duty upon the State to fill all the advertised post. Hence, no mandamus can be issued merely on the asking of the petitioner.

Further question as to whether the action of the respondents in declining the petitioners for appointment on the ground that the petitioners failed to secure minimum 23% marks in the written test, is a valid restriction. The said restriction may have come into existence after the advertisement. This

question came up for consideration before Hon'ble Supreme Court of India in Civil Appeal No.534 of 1973 decided on 02.05.1973 titled as **State of Haryana vs. Subash Chander Marwaha**. In the said case also, though, 15 vacancies were advertised to be filled up under the Punjab Civil Service (Judicial Branch) Service Rules which had been adopted by the Government of Haryana but only seven vacancies were filled up on the ground that the candidates, who failed to secure 55% marks in the examination were not considered for appointment. The grievance raised before the Hon'ble Supreme Court of India was that once the vacancies are available and candidates fulfilled the minimum qualification for competing in the examination, declining of the appointment to the candidates that they failed to secure 55% marks during the selection, is contrary to the rules and the minimum qualification required. Hon'ble Supreme Court of India considered this aspect and held that the Government, which is the employer, is well within its jurisdiction for fixing a higher score or marks for the purpose of selection and appointment than the minimum required eligibility for competing for selection. Relevant paragraphs of the judgement are as under: _

“One fails to see how the existence of vacancies gives a legal right to a candidate to be selected for appointment. The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the Government to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of rule 10 in Part C is that if and when the State Government propose to make appointments of Subordinate Judges the State Government (i) shall not make such appointments by travelling outside the list and (ii) shall make the selection for appointments strictly in the order the

candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints on the power to make the appointments, rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence.

It must be remembered that the petition is for a mandamus. This Court has pointed out in [Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College](#)(") that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived.

It was, however, contended by Dr. Singhvi on behalf of the respondents that since rule 8 of Part C makes candidates who obtained 45 per cent or more in the competitive examination eligible for appointment, the State Government had no right to introduce a new rule by which they can restrict the appointments to only those who have scored not less than 55%. It is contended that the State Government have acted arbitrarily in fixing 55 per cent as the minimum for selection and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who, is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why rule 10(ii), Part C speaks of "selection for appointment". Even as there is no constraint on the State Government in respect of the number of appointments to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high-standards of competence to fix a score which is much higher than the one required for

mere eligibility. As shown in the letter of the Chief Secretary already referred to, they fixed a minimum of 55% for selection as they had done on a previous occasion. There is nothing arbitrary in fixing the score of 55% for the purpose of selection, because that was the view of the High Court also previously intimated to the Punjab Government on which the Haryana Government thought fit to act. that the Punjab Government later on fixed a lower score is no reason for the Haryana, Government to change their mind. This is essentially a matter of administrative policy and if the Haryana State Government think that in the interest of judicial competence persons securing less than 55% of marks in the competitive examination should not be selected for appointment, those who get less than 55% have no right to claim that the selections be made of also those candidates who obtained less than the minimum fixed by the State Government. In our view the High Court was in error in thinking. that the State Government had somehow contravened rule 8 of Part C.”

Thereafter, again the same question came up for consideration before the Full Bench of this Court in CWP No.4277 of 2000 titled as **Jarnail Singh etc. vs. State of Punjab etc.**, which related to the appointment to the PCS (Judicial Branch). In this case also, though minimum eligibility was prescribed in the advertisement for considering the candidate eligible for appearing in the selection process for appointment, but minimum required marks were fixed by this Court for selection and appointment and that too after issuance of advertisement to the effect that a candidate, who does not obtain minimum 50% marks in aggregate of the written examination plus viva voce will not be treated as eligible candidate to be considered for selection and appointment. The said action of fixing the minimum eligibility of 50% marks in aggregate for selection and appointment, was challenged before this Court on the ground that after the process of selection has been initiated i.e. after the issuance of the advertisement, rules of selection cannot be changed and further once the posts, which have been advertised are lying vacant, the candidate cannot be denied appointment on the ground that they have not obtained the minimum 50%

marks in the written examination plus viva voce so as to considered them eligible for selection and appointment. The Full Bench of this Court after considering all the facts upheld the action of prescribing minimum 50% marks in written examination plus viva voce, for selection and appointment though, the condition was introduced after issuance of advertisement. Relevant paragraph of the judgement is as under:-

“30. We do not find any merit in the said argument that the Scheduled Castes or the Backward Classes candidates cannot be treated at par with the General Category candidates inter-alia for the reason that the sub-committee has considered the condition of 50% marks even in respect of Backward Class candidates. As per Rule 7 of Part-C, the candidates belonging to the Scheduled Castes and Backward Classes are required to obtain 45% marks in aggregate in the written examinations to be called for viva-voce. The decision taken by the Sub-Committee and communicated to the State Government applies to the candidates of all the categories and is not restricted to the General Category candidates. The marks fixed for making a candidate eligible for vivo voce widens the zone of consideration. It does not mean that a candidate, who has obtained 45% marks, is required to be appointed. The stage of appointment is to come later after viva voce.”

This question was again raised before this Court in CWP No.15788 of 2012 titled as **Paramjit Sharma vs. Union of India and others** decided on 19.09.2017. In this case also, minimum bar was fixed after issuance of advertisement stating that a candidate who does not secure 50 marks in viva voce will not be treated eligible for appointment. Petitioner in the said case, Paramjit Sharma, who had secured 49.33 marks in interview, which were less than 50 marks, was denied the benefit of appointment being ineligible. The said action was challenged on the ground that the criteria was changed after completion of the interview process, which amounted to change of rules of the game, which is not permissible under law. The Co-ordinate Bench of this Court after relying upon **Jarnail Singh's case (supra)** which has been cited

before, held that though the required 50 marks to be obtained in interview for being considered for appointment was fixed after issuance of advertisement and during the selection process was already in progress but same is permissible and the same cannot be treated as change of criteria, though the writ petition was allowed on different aspects. Relevant paragraph of the judgement is as under:-

“Per contra, learned counsel for the respondents-Bank submitted that in the advertisement Post Code No. 11 relates to the Financial Analyst [JMG Scale-I], qualification, experience and job profile has been prescribed. Maximum marks for interview is 100 and the final selection shall be on the basis of performance in interview only and further it was informed to the candidates that

“Maximum marks for interview is 100 and the final selection shall be on the basis of marks secured by the candidate in Test and/or Interview, as decided by the Bank.”

“The Bank reserves the right to change the selection procedure, if necessary. The change, if any, shall be communicated to the candidates in advance.”

The respondents-Bank with reference to the aforesaid clauses, proceeded to fix the cut-off marks for qualifying in interviews have been fixed as 55 for unreserved category candidates and 50 for reserved category candidates vide decision dated 07.04.2011 which was approved by the Board of Directors. Since the petitioner has secured 49.33 marks in the interview, he could not meet the cut-off marks of 50 for reserved category candidate, therefore, rightly, the respondents-Bank have declined to appoint the petitioner. It was further submitted that respondents-Bank have every right to prescribe criteria for the recruitment to any of the post even after interviews were held. In support of this, learned counsel for the respondents-Bank relied on following decisions:-

1. **The State of Haryana vs. Subash Chander Marwaha and others, (1974) 3 SCC 220 (Para 12);**
2. **Tej Prakash Pathak and others vs. Rajasthan High Court and others, (2013) 4 SCC 540 (Para 13);**
3. **Jarnail Singh etc. vs. State of Punjab etc., CWP No. 4277 of 2000, decided on 23.01.2014 (Para 31 and 33);**
4. **Salam Samarjeet Singh vs. High Court of Manipur at Imphal and another, 2016(4) SCT 792 (Paras 8, 9 and**
5. **Yogesh Yadav vs. Union of India and others, 2013(4) SCT, 772.**

In view of the aforesaid decisions, petitioner's contention that respondents-Bank have changed the criteria after completion of interview which amounts to change of game and it is not permissible is not tenable since matter is referred to larger Bench by the Supreme Court in Tej Prakash Pathak's case (supra). In this background, Full Bench decision of this Court to the extent that Subash Chander Marwaha and Neelima Shangla's cases are binding judgments on this Court.

In the aforesaid decisions for selecting and appointing authorities were permitted to prescribe higher standard for the purpose of merit consideration. Therefore, contention of the petitioner that the respondents-Bank have changed the criteria after holding interviews which is impermissible is not tenable.

7. Learned counsel for the respondents-Bank further submitted that question of relaxation to reserved category candidates is not applicable in view of Office Memorandum dated 29.12.2005 which are applicable to posts and services under the Government of India, therefore, question of relaxation any application of the office memorandum dated 29.12.2005 is not tenable.

8. Learned counsel for the respondents-Bank further submitted that the petitioner has not pleaded that the respondents-Bank have yet to take a decision insofar as fixing a cut-off marks for qualifying in interviews as 50 marks for reserved category candidates, therefore, he is not permitted to contend the said contention. Whereas on 07.04.2011 Board of Directors have approved for fixing the cut-off marks for qualifying in interviews as 55 for unreserved category candidates and 50 for reserved category candidates. As is evident from the office note dated 07.04.2011 that when the proposal and views/recommendations was made to the extent of fixing the cut-off marks for qualifying in interviews were submitted for consideration and orders, Board of Directors have signed. Thus, Board of Directors have approved for fixing the cut-off marks (Bench marks) for interviews. Thus, the petitioner has not made out a case to interfere with the communication dated 12.04.2012 (Annexure P/7). Hence, instant writ petition is liable to be dismissed.

9. Heard learned counsel for the parties.

10. Learned counsel for the respondents-Bank resisted the contention of the petitioner to the extent that he cannot contend that proceedings dated 07.04.2011 is not in accordance with law to the extent of approving the proposed cut-off marks for qualifying in interviews to the extent of 55 for unreserved category and 50 for reserved category candidates as he has not pleaded in the present petition for which the petitioner contended that on the directions of this Court, proceedings dated 07.04.2011 were placed and it was not made available to the petitioner as required under the advertisement to the extent **“The change, if any, shall be communicated to the candidates in advance”**. Since the candidates have not been informed and the fact that it was not made available to the candidates, during the course of the writ proceedings, such plea can be raised. In support of this, learned counsel for the petitioner has relied on the following two decisions:-

1) **Ram Niwas and another vs. Rakesh Kumr and others, AIR 1981, Punjab and Haryana, 397.** Para no. 5 reads as under:

“5. The main question which arises for decision is that if in a suit for ejectment on the ground of tenancy, the plaintiff pleads tile and the parties lead evidence in that regard, can a decree for possession on the basis of the title be passed. According to the leaned counsel for the appellants, it cannot be done. It is well settled that if the parties knew that a point arises in a case and they produce evidence on it, though it

does not find place in the pleadings and no specific issue has been framed on it, the court can still adjudicate thereon. None of the parties can be allowed to say that the court cannot decide the matter because it was not raised in the pleadings. The matter is not *res integra*. A similar question arises arose before the Privy Council in *Rani Chandra Kunwar v. Narpoat Singh*, (1906) 34 Ind App 27. In that case, the defendants at the time of trial raised a contention that the plaintiff had been given away in adoption and was, therefore, not entitled to inherit. This plea was neither taken in the written statement nor an issue had been framed thereon. The contention was raised before the privy council by the plaintiff that in view of the pleadings, the question of adoption could not be gone into. It was held by lord Atkinson that as both the parties had gone to trial on the question of adoption and as the plaintiff had not been taken by surprise, the plea as to adoption was open to the defendants. The objection was consequently overruled. The view of the Privy Council was followed by the Supreme Court in *Nagubai Ammal v. B. Shama Rao*, AIR 1956 SC 593. In that case, no specific plea that the sale in favour of the defendants was affected by the doctrine of *lis pendens* was taken in the plaint and no specific issue had been framed on the question. However, the defendants went to trial with full knowledge that the question of *lis pendens* was in issue, had ample opportunity to adduce their evidence thereon and fully availed themselves of the same. Venkatarama Ayyar, J. speaking for the Court, observed that the principle that the evidence led on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties, has no application to a case where parties go to trial with the knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence relating there to. The absence of a specific pleading on the question is a mere irregularity which causes no prejudice to the defendant.”

2) **Smt. Rajbir Kaur and another vs. M/s S. Chokosiri and Co., AIR 1988 Supreme Court, 1845.** Para No.22 reads as under:-

“22. Dr. Chitale than urged that there was not even a pleading by the appellant on the point of money-consideration for the parting of possession and that no amount of evidence adduced on a point not pleaded could at all be looked into. As a general proposition the submission is unexceptionable; but in the present-case, the point, in our opinion, is not well taken. Appellants specifically pleaded "sub-letting". Respondent understood that pleading as to imply all the incidents of subletting including the element of 'Rent' and specifically traversed that plea by denying the existence of considerations. Parties went to trial with full knowledge of the ambit of the case of each other. In the circumstances the pleadings would required to be construed liberally.

In *Ram Sarup Gupta v. Bishun Narain Inter College*, AIR 1987 SC 1242 this Court said this of the need to construe pleadings liberally:

“.... Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with

strict interpretation of law, in such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and find the proceeded or trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal." (Emphasis Supplied)

After all, the "parties do not have the foresight of prophets and their lawyers the draftmanship of a Chalmers." There is no substance in this contention of Dr. Chitaleey either."

In view of above facts, the respondents-Bank contention that petitioner cannot raise a plea against the defective proceedings dated 07.04.2011 is hereby rejected and petitioner's contention is accepted.

11. Petitioner contended that interviews for the post of FA [JMGI] was held between 21.03.2011 to 25.03.2011. Thus, the selection process was over. Consequently, fixation of cut-off marks for qualifying in interviews to the extent of 55 for unreserved category and 50 for reserved category candidates amongst to change of criteria. The respondents-Bank submitted that in the advertisement, bank reserves its right to change the selection procedure. Moreover, for the purpose of appointment, cut-off marks for qualifying in interviews has been fixed, therefore, it does not amount to change of criteria. Further, it was submitted that in view of various decisions cited by him (supra), the latest position in respect of change of criteria during the process of selection is permissible with reference to Subash Chander Marwaha's case. Since the said decision was not considered by the Supreme Court in the case of K. Manjushree vs. State of Andhra Pradesh, (2008) 3 SCC 512 and Tej Prakash Pathak's case (supra), therefore, Supreme Court referred the matter to larger Bench. Further, Full Bench of this Court in the case of Jarnail Singh (supra), this Court was pleased to held that even today Subash Chander Marwaha and Neelima Shangla's cases are binding. Hence, respondents were permitted to change the criteria of selection and appointment even during the course of selection and appointment. Therefore, the petitioner's contention is not tenable. No doubt, issue relating to change of criteria during the process of selection is a subject matter which is pending consideration before the larger Bench of the Supreme Court in view of decision in **Rej Prakash Pathank's** case (supra). Thus, petitioner has not made out a case insofar as change of criteria.

From the bare perusal of the above law settled by the Full Bench in

Jarnail Singh's case supra as well as by the Co-ordinate Bench in **Paramjit**

Sharma's case (supra) it is clear that condition of minimum required marks to

be obtained for being selected and appointed to a post, though, fixed after the issuance of advertisement, has been held to be valid.

In the present case, a similar grievance has been raised by learned counsel for the petitioner on the ground that the condition of obtaining minimum 23% marks in the written examination to be considered eligible for selection against the advertised post, fixed after issuance of advertisement, amounts to change in criteria, is liable to be rejected. Learned counsel for the petitioner has not been able to differentiate the case of the petitioner with that of the law laid down in **Subhash Chander Marwaha's case (supra)**; **Jarnail Singh's case (supra)** and **Paramjit Sharma's case (supra)**. Once the respondents have only fixed minimum requirement for selection and appointment and petitioners competed but failed to get minimum required marks for selection and appointment, no grievance can be raised by them as it is only the respondents being employer can decide minimum marks required for candidate to be selected, so as to be able to discharge the duties of the said posts efficiently. No right exists with the petitioners to claim selection/appointment merely by competing for the post advertised. Even selected candidates have no right to claim appointment.

Learned counsel for the respondents further contends that the selection which has been made, was made in the year 2013 and said appointment was made for the period of one year and thereafter the posts, which were advertised against which the petitioners are seeking appointment have already been abolished and are not in existence anymore. Though, subsequently, other posts with different nomenclature i.e. Assistant Manager (MIS) have been created. Candidates, who were selected were appointed being higher in merit than the petitioners, were adjusted as

Assistant Manager (MIS). Therefore, the posts against which the petitioners were claiming appointment on the ground that those were lying vacant, are not in existence anymore, hence, no relief can be granted.

Learned counsel for the petitioners does not dispute this fact but states that in case nomenclature of the posts has been changed, the petitioners, can be appointed against the posts which are now in existence. I am afraid, there is no prayer in the present writ petition for the appointment to the posts of Assistant Manager (MIS). There is no record that any posts of Assistant Manager (MIS) is also available at this given point of time and posts on which the petitioners were seeking appointment i.e. Information-cum-office-cum-Library Manager have already been abolished. Therefore in view the facts and circumstances of this case, even otherwise, the claim of the petitioners cannot be allowed in view of the subsequent events.

No interference is called for.

Dismissed.

(HARSIMRAN SINGH SETHI)
JUDGE

07.11.2019
aarti

- | | | |
|----|--------------------------------|--------|
| 1. | Whether speaking/non-speaking? | Yes/No |
| 2. | Whether reportable? | Yes/No |