

CWP No. 24762 of 2017 and other connected case

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

(220)

CWP No. 24762 of 2017

Date of Decision : 27.10.2022

Divya Bhatia

...Petitioner

Versus

State of Haryana and others

...Respondents

(271)

CWP No. 14588 of 2021

Vikas Khatkar

...Petitioner

Versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. R.K. Malik, Senior Advocate with
Mr. Sachmeet Singh Randhawa, Advocate for the petitioner
in both cases.

Mr. R.S. Budhwar, Additional Advocate General, Haryana.

Mr. Kanwal Goyal, Advocate for the respondent-HPSC.

Harsimran Singh Sethi J. (Oral)

By this common order, the writ petitions, details of which have
been given above, are being disposed of as both the writ petitions involve the
same question of law on similar facts.

For the purpose of this order, the facts are being taken from

CWP No. 24762 of 2017.

In the present petition, the grievance of the petitioner is that she be given appointment as Assistant Professor in Biotechnology against one of the post, which remains vacant due to non-joining of the selected candidates.

As per the averments made in the petition, the petitioner, who has obtained qualification of Master in Technology and has also qualified NET, applied in pursuance to the Advertisement No. 10, dated 16.02.2016 (Annexure P-1) by which, six posts of Assistant Professors in Biotechnology were advertised. The selection was to be made by the Haryana Public Service Commission and the same was to be made on the basis of written test, interview and personal achievement. The petitioner competed along with the others but could not get enough marks to get selected against the six posts advertised as, six meritorious candidates, who had higher marks than the petitioners were selected by the respondent-Commission in the order of merit. No waiting list was prepared by the respondents. One of the selected candidate, namely, Sunil Kumar, who was No. 1 in the merit list, did not join as he was selected in I.F.S. After the said development, the petitioner raised a grievance that as one of the candidate, who was in merit keeping in view the posts advertised, did not join the post, hence, the same should be offered to the petitioner even though no waiting list was ever circulated by the respondents. As, the prayer of the petitioner was not being accepted, the petitioner has approached this Court with a prayer that the post not accepted by Sunil Kumar, be offered to her after selecting her.

After notice of motion was issued, the respondents have filed

the reply, wherein, the respondent-Commission has stated that for conduct of the examination, an act has been framed titled as '*The Haryana Civil Services (Executive Branch) and Allied Services and Other Services Common/Combined Examination Act, 2002*' (hereinafter referred to as '2002 Act'), which was notified on 27.03.2002, according to which, there can be no waiting list while selecting the candidates against Class-A and Class-B post hence, as the post in question fall in the said category, no waiting list was prepared and the petitioner, who is not in the select list in respect of the post advertised, cannot claim the post not accepted by Sunil Kumar by operation of a waiting list, which list is not in existence.

Learned senior counsel appearing on behalf of the petitioner submits that 2002 Act, which is being relied upon by the respondents, is not applicable in the present case hence, petitioner is entitled for the grant of benefit of offering the post not accepted by Sunil Kumar.

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

The question, which arise in the present petition is whether, once there is no waiting list prepared by the respondent-Commission, can the petitioner claim a direction from this Court directing the respondent-Commission to frame a waiting list and then operating the same so as to accept her claim.

It is a settled principle of law that once there is no waiting list, a candidate has no right so as to claim the framing of waiting list itself, let alone thereafter seeking the operation of the same so as to claim the selection and consequent appointment. The law in this regard is very clear

keeping in view the judgment of the Hon'ble Supreme Court of India in Civil Appeal No. 2473 of 2022 titled as ***Vallampati Sathish Babu Vs. The State of Andhra Pradesh and others***, decided on 19.02.2022, wherein Hon'ble Supreme Court has categorically held that where there is no waiting list published, the Government or the Selecting Agency cannot be forced to form a waiting list so as to accommodate the candidates against the posts, which could not be filled up for any reason. The relevant paragraph of the said judgment is as under :-

“ 8.1 An identical question came to be considered by this Court in the case of Suresh Prasad and Ors. (supra). In the said decision, it is specifically observed and held that even in case candidates selected for appointment have not joined, in the absence of any statutory rules to the contrary, the employer is not bound to offer the unfilled vacancy to the candidates next below the said candidates in the merit list. It is also further held that in the absence of any provision, the employer is not bound to prepare a waiting list in addition to the panel of selected candidates and to appoint the candidates from the waiting list in case the candidates from the panel do not join. The aforesaid decision of this Court has been subsequently followed by the Andhra Pradesh High Court in the case of Samiula Shareef and Ors. (supra).

9. Applying the law laid down by this Court in the case of Suresh Prasad and Ors. (supra) to the facts of the case on hand and considering the statutory provisions contained in Rule 16 of the Rules, 2012 read with the Guidelines, we are of the view that the appellant cannot claim appointment on the unfilled vacancy being next below the candidate in the merit list. If the submission on behalf of the appellant is accepted, in that case, it will lead to providing for preparation of a waiting

list, which otherwise is not permissible as per sub-rule (5) of Rule 16. If the same is permitted, in that case, it will be directing the respondents to act contrary to the statutory provisions. Therefore, the High Court has not committed any error in refusing to appoint the appellant to the post which remained unfilled due to one of the selected candidates in the final selection list not appearing for counselling. The impugned judgment and order passed by the High Court is absolutely in consonance with the relevant statutory provisions with which we agree.”

Faced with this situation, learned senior counsel appearing on behalf of the petitioner submits that in the present case, the judgment in ***Vallampati Sathish Babu's case (supra)*** cannot be made applicable for the reason that there has to be a statutory provision of not publishing the waiting list or considering the candidate from waiting list for appointment, which fact is missing in the present case hence, the said judgment is not applicable.

Whether, there exist a statutory provision qua the present selection, which bars the framing a waiting list or accepting a candidate from the waiting list, is to be adjudicated in the present petition.

The respondents have relied upon 2002 Act to say that there is a statutory provision under the said Act to the effect that under Rule 4(3) of 2002 Act, the State Government is not competent to offer appointment to a candidate, who is placed in the waiting list or who claims himself to be in the waiting list on the basis of Common/Combined Examination for a post for which his name was not recommended by the Commission. The relevant rule 4(3) of 2002 Act is as under :-

“4(3) The State Government shall not be competent to offer appointment to a candidate, who is placed in the waiting list or who claims himself to be in the waiting list on the basis of Common/Combined Examination for a post for which his name was not recommended by the Commission.

Provided that if a candidate has been appointed or offered appointment over and above advertised posts for any reason, the services of such candidate shall be dispensed with. However, he shall be entitled to be appointed to the service/post, if any, for which his name was originally recommended by the Commission :

Provided further that no recovery of higher salary, emoluments or any other financial benefits drawn by such candidate as a result of the appointment in excess of the advertised posts, shall be made from him but his pay shall be fixed in the scale of the post to which he is found entitled for appointment under this Act.”

The said rule makes it clear that the Government is prohibited from offering the appointment to a candidate, who is in the waiting list also. Therefore, even if there is a waiting list, no appointment can be given to a candidate even from the said waiting list, in case selection is covered by the 2002 Act. In the present case, the petitioner is at a much lower pedestal. If a candidate on a waiting list cannot claim appointment even if an advertised post is not filled up then how can a direction be given by this Court, first to frame a waiting list and then to consider the claim from the said waiting list hence, no direction as being sought in this petition can be given by this Court keeping in view the settled principle of law and 2002 Act noticed hereinbefore.

Learned senior counsel appearing on behalf of the petitioner

has not been able to rebut the said contention but submits that 2002 Act is not applicable in the present case and direction can be given by this Court under the said act only with respect to the Allied Services and other services, which are similar to the said services, as the provisions of 2002 Act does not cover the selection to the post of Lecturer. The said argument needs to be tested on the basis of the provisions of 2002 Act. The relevant rules 1, 2 and 4 of 2002 Act are as under :-

“1. (1) This Act may be called the Haryana Civil Services (Executive Branch) and Allied Services and other Services Common/Combined Examination Act, 2002.

(2) It shall be deemed to have come into force with effect from the 29th August, 1989 and shall cover recommendations made by the Commission after that date except section 5 of this Act which shall come into force at once.

(3) It shall apply to those persons who have been or are appointed or offered appointment to the services/posts recruitment to which is made by holding Common/Combined Examination.

2. In this Act, unless the context otherwise requires,-

(i) “Allied Services” means the Services shown in Appendix-A;

(ii) “Appendix” means an Appendix appended to this Act;

(iii) “Commission” means the Haryana Public Service Commission or Haryana Staff Selection Commission or both and shall include Subordinate Services Selection Board, Haryana;

(iv) “Common/Combined Examination” means the competitive examination conducted by the Commission which may be comprising of written examination and/or interview/viva voce/personality test or any other method

adopted by the Commission for recruitment to services/ posts of more than one category;

(v) “Other Services” means the services/posts recruitment to which is made by holding Common/ Combined Examination, but does not include the services/posts shown in Appendix A ;

(vi) “Haryana Civil Services (Executive Branch)” means the State Civil Services (Executive Branch) or Extra Assistant Commissioner (Under Training), as the case may be;

(vii) “Direct Recruitment” means in the case of Haryana Civil Services (Executive Branch) out of register B of Punjab Civil Services (Executive Branch) Rules, 1930, as applicable to the State of Haryana and in the case of Allied Services and Other Services, recruitment by open competition but does not include-

(a) appointment by promotion; or

(b) appointment by transfer of an officer already in the service of any State Government or the Government of India ;

(viii) “State Government” means the Government of the State of Haryana ;

(ix) “waiting list” means recommendation(s) of additional name(s) by the Commission for appointment to a service/post over and above the advertised posts.

3. xxx xxx xxx xxx

4. (1) *No appointment shall be made to any post or service to which this Act applies beyond the number of posts advertised.*

(2) Notwithstanding anything to the contrary contained in any judgment, order, decree or decision of a court of law, Act, rule, regulation or executive instructions, no candidate, from the date of

commencement of this Act, shall, on the basis of his merit or placement in a Common/Combined Examination, have right to seek appointment to Haryana Civil Services (Executive Branch) and Allied Services or Other Services beyond the number of advertised posts.

(3) The State Government shall not be competent to offer appointment to a candidate, who is placed in the waiting list or who claims himself to be in the waiting list on the basis of Common/Combined Examination for a post for which his name was not recommended by the Commission.

Provided that if a candidate has been appointed or offered appointment over and above advertised posts for any reason, the services of such candidate shall be dispensed with. However, he shall be entitled to be appointed to the service/post, if any, for which his name was originally recommended by the Commission :

Provided further that no recovery of higher salary, emoluments or any other financial benefits drawn by such candidate as a result of the appointment in excess of the advertised posts, shall be made from him but his pay shall be fixed in the scale of the post to which he is found entitled for appointment under this Act.”

(4) The State Government may offer appointment to the candidates to Haryana Civil Services (Executive Branch) and Allied Services or Other Services, as the case may be, to the extent of number of advertised posts only. However, no candidate shall be offered appointment even to the extent of number of advertised posts, if his name is not commended by the Commission or if he does not fulfil the eligibility

condition laid down by the State Government for appointment to that service/post by way of service rule, regulations or executive instructions, as the case may be.”

A bare perusal of rule 1(1) would show that the said Act is to be called Haryana Civil Services (Executive Branch) and Allied Services and other Services Common/Combined Examination Act, 2002. The Allied Services have been defined in Appendix 'A' and the terms “Common and Combined Examination” to which 2002 Act applies, have also been defined in Rule 2(iv). The Other Services, which are also covered under 2002 Act have been defined in Rule 2(v). A bare perusal of Rule 2(iv) would show that the Common/Combined Examination means a competitive examination conducted by the Commission, which may be comprising of written examination and/or interview/viva voce/personality test or any other method adopted by the Commission for recruitment to services/posts of more than one category.

In the present case, the Advertisement was issued for recruitment to the post of Assistant Professors in the College Cadre in various subjects. The posts were to be filled in various reserved categories as well as the general category. Recruitment was being made with respect to 29 different subjects in the cadre of Assistant Professors in the College Cadre. Therefore, keeping in view the said factual aspect, the selection process in pursuance to which petitioners are seeking relief, will be covered under Rule 1 (3) as well as in Rule 2(iv) of 2002 Act. Even otherwise, the terms “services/posts of more than one category” mentioned in 2002 Act is to be interpreted that even the posts in a same cadre but being filled

different reserved categories. Therefore, the interpretation of learned senior counsel that 2002 Act will only be applicable if different posts envisaged in separate cadre, if being filled by a combined selection process will be covered under 2002 Act and is not applicable in the present case, cannot be accepted.

Even if, for the sake of argument the view is taken that the selection process initiated by the respondent-Commission in pursuance to Advertisement No. 10 (Annexure P-1) is not covered under Rule 2(iv), the same will be covered under Rule 2(v), which defines 'Other Services'. The 'Other Services' have been defined as services/posts recruitment to which is made by holding a Common/Combined Examination but does not include services/posts shown in Appendix 'A'.

In the present case, it is a conceded position that the post of Assistant Professor is not shown in Appendix 'A' and the recruitment to the said post has been made by holding a Common/Combined Examination. Learned senior counsel submits that the Common/Combined Examination is to mean that the common selection process has to be there in order to attract 2002 Rule whereas for different subjects, common selection has not been undertaken by the respondent-Commission, hence, Rule 2 (v) of 2002 Act will not be applicable.

The definition of Common/Combined Examination is very clear that it has to be a competitive examination conducted by the Commission comprising of written examination, interview or viva-voce and personality test or any other method adopted by the Commission for recruitment to the service/post of more than one category. In the present case, the recruitment

has been made to the post/service of more than one category as selection to the post of Assistant Professor in 29 different subjects were to be recruited by the respondents in pursuance to the Advertisement No. 10 (Annexure P-1). It is a combined selection process undertaken for recruiting Assistant Professors as admissible by the Administration in question. Hence, as selection process combined, 2002 Act will be applicable in the present case.

Learned senior counsel appearing on behalf of the petitioner submits that the similar controversy was raised before a Co-ordinate Bench of this Court in CWP No. 25682 of 2014 titled as ***Arun Singh and others Vs. State of Haryana and another***, decided on 13.11.2017, wherein, a direction was given that the merit list even if not prepared, has to be framed and the appointment needs to be given to a candidate next in the merit keeping in view the availability of vacancy on account of non-joining of the selected candidate.

Though, the said judgment also decide the same question of law but the 2002 Act was not brought to the notice of the Hon'ble Court at the time of passing of the said judgment. The framing of a waiting list and consequent appointment is governed by a statutory provision i.e. 2002 Act. Once, a statutory provision has not been noticed by the Co-ordinate Bench in ***Arun Singh and others' case (supra)***, no benefit of the said judgment can be extended to the petitioner, especially in view of the judgment of the Hon'ble Supreme Court of India in ***Vallampati Sathish Babu's case (supra)***, according to which, once there is a statutory provision of not framing a waiting list or not giving appointment from the waiting list, no

claim can be raised by the petitioner in the present petition.

Keeping in view the facts and circumstances noticed hereinbefore coupled with the settled principle of law settled by Hon'ble Supreme Court of India and the 2002 Act, no ground is made out for the interference by this Court in the present case.

Dismissed.

A photocopy of this order be placed on the file of connected case.

October 27, 2022
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(HARSIMRAN SINGH SETHI)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No