

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

107

CWP-23314-2016

Date of Decision : 10.04.2024

ASHISH KUMAR

... PETITIONER

Versus

JOINT SECRETARY (T), GOVERNMENT OF INDIA, MINISTRY OF
HUMAN RESOURCE DEVELOPMENT AND ORS

... RESPONDENTS

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present: Mr.Aditya Yadav, Advocate
for the petitioner.

Mr. Aman Dhir, DAG, Punjab.

Mr. Vivek Singla, Advocate
for respondents No.3 and 4.

JAGMOHAN BANSAL, J. (Oral)

1. The petitioner through instant petition under Articles 226/227 of the Constitution of India is seeking directions to the respondents to appoint him on the post of Assistant Professor.

2. The petitioner pursuant to advertisement dated 10.10.2014 applied for the post of Assistant Professor in the Chemical Engineering Department of respondent-Institute. He was found at Sr. No.7 in the selection list dated 29.01.2016 and at Sr. No.3 in his category i.e. OBC. The respondent after conducting process selected one candidate who was at Sr. No.1 and belonged to OBC Category. The petitioner was at Sr. No.3 in OBC Category. As per respondent, there was no other vacancy, thus, petitioner could not be selected.

3. Mr. Aditya Yadav, Advocate submits that at the time of advertisement, vacancy was available and petitioner was found eligible. At the time of advertisement, he was working with respondent on contract basis. The respondent could not reduce number of vacancies. The action of respondent was arbitrary and unreasonable, thus, violative of Articles 14 and 19 of Constitution of India. The respondent in 2019 again advertised the post which indicates that vacancy was available.

4. Per contra, Mr. Vivek Singla, Advocate submits that the petitioner was at Sr. No.3 in OBC Category. Only one vacancy was available which was filled up from OBC Category candidates. The candidate at Sr.No.1 was selected. In the absence of vacancy, the petitioner could not be selected.

5. I have heard the arguments of learned counsel for the parties and perused the record.

6. A three Judge Bench of Supreme Court in **Official Liquidator vs. Dayanand and others, 2008 (10) SCC** has held that Courts cannot ask State to create or abolish any post or cadre. The relevant extracts of the judgment read as :

“59. The creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source and mode of recruitment and qualifications and criteria of selection, etc. are matters which fall within the exclusive domain of the employer. Although the decision of the employer to create or abolish posts or cadres or to prescribe the source or mode of recruitment and laying down the qualification, etc. is not immune from judicial review, the Court will always be extremely cautious and circumspect in tinkering with the exercise of discretion by the employer. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post or number of posts be created or filled by a particular mode of recruitment. The power

of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is patently arbitrary or vitiated by mala fides.

60. *In State of Haryana v. Navneet Verma [(2008) 2 SCC 65 : (2008) 1 SCC (L&S) 373] , a Division Bench of two Judges referred to M. Ramanatha Pillai v. State of Kerala [(1973) 2 SCC 650 : 1973 SCC (L&S) 560] , Kedar Nath Bahl v. State of Punjab [(1974) 3 SCC 21] , State of Haryana v. Des Raj Sangar [(1976) 2 SCC 844 : 1976 SCC (L&S) 336] , N.C. Singhal (Dr.) v. Union of India [(1980) 3 SCC 29 : 1980 SCC (L&S) 269] and Avas Vikas Sanghathan v. Engineers Assn. [(2006) 4 SCC 132 : 2006 SCC (L&S) 613] and culled out the following principles: (Navneet Verma case [(2008) 2 SCC 65 : (2008) 1 SCC (L&S) 373] , SCC p. 70, para 14)*

“(a) the power to create or abolish a post rests with the Government;

(b) whether a particular post is necessary is a matter depending upon the exigencies of the situation and administrative necessity;

(c) creation and abolition of posts is a matter of government policy and every sovereign Government has this power in the interest and necessity of internal administration;

(d) creation, continuance and abolition of posts are all decided by the Government in the interest of administration and general public;

(e) the court would be the least competent in the face of scanty material to decide whether the Government acted honestly in creating a post or refusing to create a post or its decision suffers from mala fides, legal or factual;

(f) as long as the decision to abolish the post is taken in good faith in the absence of material, interference by the court is not warranted.”

61. *In State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] the Constitution Bench adverted its attention to financial implications of creation of extra posts and*

held that the courts should not pass orders which impose unwarranted burden on the State and its instrumentalities by directing creation of particular number of posts for absorption of employees appointed on ad hoc or temporary basis or as daily wagers.

62. *In Aravali Golf Club v. Chander Hass [(2008) 1 SCC 683 : (2008) 1 SCC (L&S) 289] also, a two-Judge Bench considered the issue relating to creation of posts and held: (SCC p. 688, para 15)*

“15. The court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organisation. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and the first appellate court to create the posts of tractor driver and regularise the services of the respondents against the said posts cannot be sustained and are hereby set aside.”

7. In the case in hand, the petitioner participated in the selection process. He was found at Sr. No.3 in the OBC Category. There were total 05 posts of Assistant Professor in Chemical Engineer and only one vacancy was available at the time of recruitment. The respondent recruited candidate who was at Sr. No.1 in OBC Category. This Court cannot ask the respondent to fill up vacancy which was not available with respondent. Mere participation or finding eligible by recruitment board does not create absolute or vested right in any candidate.

8. The petitioner is claiming that recruitment process also took place in 2019 which indicates that vacancy was available. The petitioner was not precluded to participate in the said selection process. It is prerogative of the

State-employer to fill up posts as and when vacancy arises. The Court cannot determine time, mode and manner of vacancy. This Court does not find that by not selecting petitioner, the respondent has violated any vested or fundamental right of the petitioner warranting interference of this Court.

9. Dismissed.

(JAGMOHAN BANSAL)
JUDGE

10.04.2024
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<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>