

In the High Court of Punjab and Haryana, at Chandigarh

Letters Patent Appeal No. 1436 of 2015

Date of Decision: 30.09.2015

State of Punjab and Another

... Appellants

Versus

Naresh Kumari

... Respondent

**CORAM: Hon'ble Mr. Justice Satish Kumar Mittal.
Hon'ble Mr. Justice Mahavir S. Chauhan.**

1. Whether reporters of local newspapers may be allowed to see judgment? Yes/No
2. To be referred to reporters or not? Yes/No
3. Whether the judgment should be reported in the Digest? Yes/No

Present: Mr. Manoj Bajaj, Additional Advocate General, Punjab for the appellants.

Mahavir S. Chauhan, J.

Vide advertisement dated 23.9.2009, appellant No.2 i.e. Director Public Instructions (Secondary Education), Punjab advertised 7654 posts in the teaching/non-teaching cadre in Education Department, which included 78 posts of Vocational Masters/Mistresses in Computer Science. Out of those 78 posts, eight were reserved for Scheduled Castes (R&O) category. The respondent, being a member of Scheduled Castes (R&O), also applied for one such post. In the first list of successful candidates, released by the appellants, respondent's name figured at serial No. 40 and she was shown to have secured 50.1429

marks. Vide public notice dated 9.7.2010, the candidates were again called for counselling/scrutiny and a revised merit list was issued in February, 2011. However, the respondent's name did not figure in that revised list. Therefore, vide public notice dated 29.6.2011, appellant No.2 again called the candidates for filling up vacant posts. In view thereof, the respondent along with other candidates again attended the counselling on 10.7.2011 but no post was offered to her. Having come to know that some posts were still lying vacant as candidates higher in merit than the respondent were either absent during counselling or did not join despite having been selected. Respondent, accordingly, sought information from the Director, SCERT, Punjab with regard to availability of vacancies. Vide letter dated 24.8.2012 (Annexure P9), respondent was informed that out of eight posts, five had been filled and three were still vacant. The petitioner, accordingly, made a representation dated 25.8.2012 (Annexure P10) requesting the appellants to consider her case against one of the available vacancies. On representation having remained unresponded to, the respondent preferred Civil Writ Petition No. 17696 of 2012, which was disposed of by this Court vide order dated 10.9.2012 (Annexure P11) directing the respondents therein (appellants herein) to take a final decision on the representation dated 25.8.2012 (Annexure P10) by passing a speaking order. The second appellant, vide letter dated 9.9.2013 (Annexure P12), however, rejected the representation of the respondent by observing as under:-

*"AND whereas, the petitioner has mentioned in
her representation dated 25.08.2012 (Annexure P10) that 3*

posts are lying vacant in the category of petitioner. No doubt, vacant post can be available in the category of the petitioner on account of non-joining of certain candidates. However, no candidate having less merit than the petitioner has been appointed. Therefore, the claim of the petitioner is not sustainable.

AND whereas, I, Dr. Kamal Kumar (PCS), Director of Public Instructions (S.E.), Punjab, after having considered the claim of the petitioner on the basis of available record, am of the opinion that there is no merit in the claim of the petitioner and for the reasons afore-stated, it is rejected."

To challenge order dated 9.9.2013, the respondent preferred Civil Writ Petition No. 21090 of 2013 which, after contest, has been allowed by the learned Single Judge vide judgment dated 10.11.2014.

To lay challenge to the judgment dated 10.11.2014, State of Punjab and Director, Public Instructions (Secondary Education), Punjab have brought this intra court appeal under Clause X of the Letters Patent.

The appeal is barred by limitation and there is an application for condonation of delay of 283 days in filing the appeal.

After going through the contents of the application for condonation of delay and hearing the learned counsel for the appellants, though we find no sufficient ground to condone the delay,

yet we have heard learned counsel for the appellants on merits.

The only contention put forth on behalf of the appellants is that no candidate lower in merit than the respondent having been considered for appointment, the respondent has no case, whatsoever, but the learned Single Judge has overlooked this aspect of the matter.

The contention, in our considered opinion, is fallacious and misconceived. A similar contention raised before the learned Single Judge, has been brushed aside by the learned Single Judge by observing as under:-

"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.”

Learned Single Judge, to allow the claim of the respondent, has relied upon ***State of Haryana v. Gajraj Singh, 2011(4) SCT***

207 and Vinay Singh v. State of Haryana, 1993(2) RSJ 616. A

Division Bench of this Court in the case of **State of Haryana v. Gajraj Singh** (*supra*) has observed as under:-

"It is well settled that once a post has not been consumed and a meritorious candidate in the merit list is available then the vacancy could be filled in by inviting next person in merit. The direction issued by the learned Single Judge are consistent with the principles of equality laid down in Articles 14 and 16(1) of the Constitution. The post of Lecturer in Hindi has to be offered to the most meritorious candidate who may be next in the merit after Vinod Kumar under the ex serviceman category. Therefore, no exception is provided to interfere in the view taken by the learned Single Judge. The appeal is wholly without merit and does not warrant admission. Accordingly, the appeal fails and the same is dismissed."

Nothing to the contrary has been shown during the course of hearing.

It has been conceded before us on behalf of the appellants that the waiting list prepared by the appellants in respect of the selection, in question, was valid for one year and three vacancies became available before expiry of the period of currency of the waiting list as the candidates with higher merit than the respondent either did not join or absented from the process of counselling/scrutiny. In such circumstances, the only course available to the appellants was to offer

the first vacancy so remaining unfilled, to the respondent being the first candidate with highest merit available in the waiting list.

In view of the above, coupled with the fact that the appeal is frivolous and misconceived, we dismiss the appeal with costs of ₹ 10,000/- to be deposited with Punjab State Legal Services Authority.

(Satish Kumar Mittal)
Judge

(Mahavir S. Chauhan)
Judge

September 30, 2015

"DK"