

HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

SWP No.1255/2017
MP Nos.1/2017 & 1/2018

Date of order: 31.05.2018.

Dr. Arti Khurana

v.

State of J&K and others.

Coram:

Hon'ble Mr. Justice Sanjeev Kumar, Judge

Appearing counsel:

For the Petitioner(s) : Mr Ankur Sharma, Advocate.
For the Respondent(s) : Mr Sanjeev Padha, GA
Mr F A Natnoo, Advocate

i/	Whether to be reported in Press/Media	:	Yes/No
ii/	Whether to be reported in Digest/Journal	:	Yes/No

1. The Jammu and Kashmir Public Service Commission vide its notice No.46-PSC(DR-P) of 2012 dated 01.08.2012 invited applications from eligible candidates for the post of Lecturer Radio Diagnosis in Government Medical College, Jammu in the Health and Medical Education Department. The petitioner applied under the open category. On conclusion of the selection process, a general merit list was issued in which the name of the petitioner figured at serial No.3. Since the advertised posts were two in the aforesaid discipline, as such, two candidates, namely, Nitin Vermani and Rohit Sharma came to be selected in open merit category. Consequently, the appointments in their favour were issued and both the candidates aforesaid joined. The petitioner being at serial No.3 of the merit panel was placed at serial No.1 of the wait-list.

2. The grouse of the petitioner, as projected in this petition, is that, though, the wait-list was still valid and the vacancy had arisen due to resignation of Dr. Nitin Vermani, yet the respondents did not appoint the petitioner. The petitioner

approached this Court by way of SWP No.2698/2013 which was disposed of by this Court on 12.06.2014 directing the respondents to consider the case of the petitioner. In compliance to the direction issued by this Court, claim of the petitioner was considered and rejected by respondent No.4 vide order dated 16.02.2015 declaring that the claim of the petitioner was not sustainable in view of Rule 57 of the Jammu & Kashmir Public Service Commissioner (Business and Procedure) Rules, 1980. It is also submitted that in similar set of circumstances respondent No.1 had operated the wait-list by supplying vacancy arisen due to resignation of a selected/appointed candidate.

3. Having heard the learned counsel for the parties and perused the record, I find that the only question which needs determination in this case is, ***“whether the vacancy arisen on account of resignation of a selected/appointed candidate can be supplied by operating the wait-list, particularly when the vacancy had arisen during the life of the wait-list”?***

4. Learned counsel for the petitioner has vehemently debated the issue but I think the issue cannot detain this Court any more in view of the settled legal position.

5. As is apparent from a bare reading of Rule 12 of the Rules of 2010, the procedure of selection to the gazetted posts shall be the same as prescribed by the Public Service Commission from time to time. The Jammu & Kashmir Public Service Commission, however, has promulgated the Jammu & Kashmir Public Service Commission (Business and Procedure) Rules, 1980 to regulate its business and procedure of selection. Rule 57 of the aforesaid Rules which is relevant in the context of controversy is reproduced hereunder:-

“57. The decisions of the Commission for making appointment by direct recruitment shall, subject to the provisions of Rule 9 and 10, be signed by all the members. The recommendations of the Commission shall be communicated to the Government by the Secretary.

The recommendations shall be valid for a period of one year from the date they are communicated to the Government. The validity period of one year can, however, be extended for a further period of six months on

specific request of the Government if the request for such extension is made before the expiry of the validity of the panel.

Provided that waiting list of candidates may be drawn up by the Commission and communicated to the Govt. alongwith the original recommendations, to the extent to be determined by the Commission in each case.

After the recommendations for direct recruitment as communicated to the Govt. the Secretary shall intimate individually to the candidates selected/ recommended against clear vacancies the fact of their names having been recommended to the Govt. for appointment. This shall be in Form No.6. # Secretary shall, thereafter, make public the select list and the waiting list by affixing a copy of the same on the Notice Board of the Commission and also by publishing in the Government Gazette. This shall be in form No.7.”

6. From a bare reading of the aforesaid Rule, it is clear that the validity of the waiting list to be prepared by the Public Service Commission along with the select list is one year extendable by another six months. The Rule, however, does not provide as to how and in what manner the wait list is required to be operated. It is trite that mere inclusion of a candidate's name in the merit list does not confer any right to be selected. In an appropriate case and of course in consonance with Articles 14 and 16 of the Constitution of India, the State may choose not to appoint all or some of the candidates selected against the notified vacancies. The decision not to fill up vacancies, however, has to be taken *bona fide* for appropriate reasons. The waiting list candidate who may get chance of selection and appointment in case the selected candidate does not join is still on a lesser footing.

7. Paragraph-7 of the judgment of the Supreme Court rendered in the case of ***Shankarsan Dash v. Union of India; AIR 1991 SC 1612*** which sums up the law on the subject reads thus:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the

relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha and Others*, [1974] 1 SCR 165; *Miss Neelima Shangla v. State of Haryana and Others*, [1986] 4 SCC 268 and *Jitendra Kumar and Others v. State of Punjab and Others*, [1985] 1 SCR 899: (AIR 1984 SC 1850).”

8. Regarding the wait list, ‘what is it’ and ‘how it is operated’, the Supreme Court in the case of ***Gujrat State, Dy. Executive Engineers’ Association v. State of Gujrat and others ; 1994 Supp (2) SCC 591*** elaborately discussed the issue in paragraph Nos.8 and 9 which for facility of reference are reproduced here under:-

“8. Coming to the next issue, the first question is what is a waiting list?; can it be treated as a source of recruitment from which candidates may be drawn as and when necessary?; and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent, authority prepares a waiting list then it is in respect of those ten seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason

within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. She has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons.

9. A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list, in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service.”

9. In a subsequent judgment of the Supreme Court in the case of *State of Punjab v. Raghubir Chand Sharma and another; AIR 2001 SC 2900*, the Supreme Court while reversing the judgment of the Punjab & Haryana High Court in paragraph No.4 observed thus:-

“4. We have carefully considered the submissions of the learned counsel on either side, in our view, the judgment rendered by the learned single Judge as well as the Division Bench of the Punjab and Haryana High Court cannot be sustained. As rightly contended for the appellant-State, the Notification issued inviting applications was in respect of one post and the first candidate in the select panel was not only offered but on his acceptance of offer came to be appointed and it was only subsequently that he came to resign. With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select panel prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising out of the subsequent resignation of the person appointed from the panel or any other vacancies

arising subsequently. The Circular orders dated 22-3-1957 in our view, relates to select panels prepared by the Public Service Commission and not a panel of the nature under consideration. That apart, even as per the Circular orders as also the decision relied upon for the first respondent, no claim can be asserted and countenanced for appointment after the expiry of six months. We find no rhyme or reason for such a claim to be enforced before Courts, leave alone there being any legally protected right in the first respondent to get appointed to any vacancy arising subsequently, when somebody else was appointed by the process of promotion taking into account his experience and needs as well as administrative exigencies.”

10. The position of law as enunciated in the aforementioned cases was reiterated by the Supreme Court in the cases of *Manoj Manu and another v. Union of India and others*; (2013) 12 SCC 171 and *Raj Rishi Mehra and others v. State of Punjab and another*; AIR 2013 SC 3580.

11. Relying upon the aforesaid judgments, particularly the judgment rendered by the Supreme Court in the case of *Raghubir Chand Sharma's* case (supra), a Division Bench of this Court in the case of *Renu Bala v. State of J&K and others*; 2011(2) JKJ 42 [HC] in paragraph No.23 of the judgment concluded as under:-

“23. The Hon’ble Supreme court in “Raghubir Chand Sharma’s case (supra) has in specific terms held that after the selected candidate is appointed and joins on the post, the selection process came to an end and on the resignation of appointed candidate no other person can be appointed from the selection list.”

In the aforesaid judgment, the Division Bench also considered the binding effect of the earlier Division Bench judgment of this Court rendered in the case of *Ghulam Ahmed Malik and others v. State of J&K and others*; 2006 KLJ 356. After considering the case law on the subject the Division Bench found that the earlier Division Bench in the case of *Gh. Ahmed Malik* (supra) had not considered the principle of law enunciated by Supreme Court in *Raghubir Chand Sharma's* case (supra). The Division Bench in the aforesaid case declared the judgment rendered by the earlier Division Bench in the case of

Gh. Ahmed Malik per incuriam. Paragraph No.29 of the judgment which is relevant in the context is also reproduced hereunder:-

“29. A specific issue was raised in Gh. Ahmed’s case (supra) on the basis of law laid by Hon’ble Supreme Court in Raghbir Chand Sharma’s case (supra) that “after the selected candidate joins the post on his appointment, the selection panel gets exhausted and outlives its life and no one else in the panel could legitimately contend that he should have been offered appointment in the vacancy arising on account of subsequent resignation of person appointed from the panel”. On the resignation of appointed candidate post become available for future selection and cannot be filled up by appointing candidate from earlier selection panel/wait list. This question of law was not related to the life of selection panel. The aforementioned principle of law enunciated by Hon’ble Supreme Court in Raghbir Chand Sharma’s case (supra) on the issue has not been considered by Division Bench in Gh.Ahmed’s case (supra). The bench adverted its attention to the life span of selection panel. The said judgment in law will not constitute a binding precedent, but is a judgment rendered per-incuriam. The reliance placed on Gh. Ahmed’s case (supra) by Id. Counsl for appellant is accordingly of no consequence. The writ petition as also appeal merits dismissal.”

12. The same principle of law with regard to the operation of the wait list was reiterated by a subsequent Division Bench of this Court in the case of **J&K Public Service Commission v. Safina Javeed and another (LPASW No.73/2011)** decided on 30.12.2011 and the decision of the earlier Division Bench rendered in the case of **Renu Bala** (supra) was followed.

13. On the conspectus of legal position, particularly in view of the judgment rendered by the Division Bench of this Court in the case of **Renu Bala** (supra), it is beyond the pale of any controversy that the decision rendered by the Division Bench in the case of **Gh. Ahmed Malik** (supra) is *per incuriam* having been rendered in ignorance of the law laid down by the Supreme Court in the case of **Raghbir Chand Sharma** (supra) and several other subsequent judgments.

14. The judgment relied upon by the learned counsel for the petitioner rendered by a co-ordinate Bench of this Court on 03.05.2018 in the case of **Danish Zia Bhat** (supra) is based on the judgment of a Division Bench of this

Court rendered in the case of **Gh. Ahmed Malik** (supra). As discussed above, the same was rendered *per incuriam* as held by a subsequent Division Bench of this Court. It appears that the subsequent judgment particularly the one rendered in the case of **Renu Bala** (supra) and the judgments of the Supreme Court referred to herein above were not brought to the notice of the coordinate Bench which has given the judgment in the case of **Danish Zia Bhat** (supra).

15. Since the judgment rendered by the Division Bench of this Court in the case of **Gh. Ahmed Malik** has already been held to be *per incuriam* and not laying correct law, the judgment of the coordinate Bench rendered in the case of **Danish Zia Bhat** (supra), which has been strongly relied upon by the learned counsel for the petitioner, also cannot be said to have laid down correct law.

16. In view of the clear position of law enunciated by the Supreme Court consistently in various judgments reference to some has been made herein above and the position of law clarified by the Division Bench of this Court in **Renu Bala's** case (supra), the wait list gets exhausted the moment all selected candidates join their position and simultaneously the wait list also ceases to operate even if the same is within the period of its validity. The posts which fall vacant on account of death or resignation of the selected candidate are required to be treated as fresh vacancies to be filled up by following the process of selection to be initiated by issuance of fresh notification. The candidates in the wait list cannot lay any claim on such posts. As is rightly said, wait list does not provide a perennial source of recruitment to be operated upon to fill the future vacancies including the vacancies that become available due to death or resignation of the selected/appointed candidates.

17. In view of the aforesaid settled legal position, the contention of the petitioner that the judgments of the Division Bench of this Court rendered in the cases of **Renu Bala** (supra) and **Safeena Javeed** (supra) are distinguishable is not well founded.

18. Viewed thus, I find no merit in this petition. The same is, accordingly, dismissed. There shall be no order as to costs.

(Sanjeev Kumar)
Judge

Jammu.
31.05.2018
Vinod.

