

(2020) 09 SHI CK 0077

High Court Of Himachal Pradesh

Case No: Civil Writ Petition No. 2053, 2064 Of 2017

Karun Nagar And Others

APPELLANT

Vs

State Of Himachal Pradesh And
Another

RESPONDENT

Date of Decision: Sept. 7, 2020

Acts Referred:

- Himachal Pradesh Financial Rules 2009, - Rule 10, 170(5)

Hon'ble Judges: Tarlok Singh Chauhan, J ; Jyotsna Rewal Dua, J

Bench: Division Bench

Advocate: Guna Nand Verma, Ashok Sharma, Ranjan Sharma, Vinod Thakur, Desh Raj Thakur, Seema Sharma, Vikrant Thakur

Final Decision: Disposed Of

Judgement

Jyotsna Rewal Dua, J

1. Action of respondent No.2/Himachal Pradesh Public Service Commission in withdrawing an advertisement issued for selection against 12 posts of

clerks at the stage of declaration of result, has been assailed by the petitioners in the instant petitions. Petitioners had participated in the selection

process initiated under the advertisement in question.

2. Facts are undisputed and we may hereinafter take note of the same:-

2(i) Respondent No.2/Himachal Pradesh Public Service Commission, issued an advertisement on 3.1.2019 for filling up 12 posts of clerks (Class-III)

(Non-Gazetted) (on contract basis). The last date for submission of application forms was 23.01.2019. Petitioners applied under this advertisement.

2(ii) The application forms were scrutinized by respondent No.2. The list of candidates, who qualified for the screening test was thereafter uploaded on its website.

2(iii) Screening test was held on 28.4.2019. Petitioners appeared therein. Result of the screening test was declared on 23.7.2019. Petitioners were also declared as successful candidates.

2(iv) Respondent No.2 thereafter held a type-writing test of those candidates, who had cleared the screening test. The type-writing test was conducted on 23.8.2019. The result of same was announced on 6.11.2019. Petitioners emerged successful therein.

2(v) On 19.11.2019, respondent No.2 issued a press note informing that candidates declared qualified in type-writing test are being called for evaluation of their documents through separate call letters. Evaluation of documents was carried out on 23.11.2019. Petitioners accordingly appeared for evaluation of his documents in the office of respondent No.2 on 23.11.2019. Their documents were evaluated.

After completing different steps of the selection process, respondent No.2 instead of declaring the final result, issued a press note on 15.6.2020

withdrawing the advertisement dated 3.1.2019 "due to administrative reasons". Aggrieved against withdrawal of the advertisement by

respondent No.2 at the stage of declaration of the result, instant writ petitions have been preferred, seeking direction to respondent No.2, to declare the final result on the basis of selection process undertaken by it.

3. As observed earlier, the respondents have not disputed the above factual position, however, withdrawal of advertisement has been justified because of following situation:-

3(i) As on 3.1.2019, respondent No.2 had only two clear vacancies of clerks in its establishment. Additionally 10 vacancies in the higher posts were

lying vacant. The feeder cadre personnel against the vacancies of the higher posts were not available. Keeping in view that the functional posts in the

higher cadre cannot be kept vacant for a long period and considering that work of respondent No.2/Commission in holding examinations/declaring

results/ holding interviews may not suffer because of inadequate Ministerial Staff, therefore, respondent No.2 in exercise of its power under Rule

170(5) of the Himachal Pradesh Financial Rules 2009, thought it fit to fill up 12 posts of clerks i.e. 2 clear vacancies of clerks and 10 against vacancies of the higher posts. Decision was accordingly taken by respondent No.2 and it apprised respondent No.1/State Personnel Department, of this decision vide communication dated 13.12.2018. However, without waiting for response of the State Government, respondent No.2 issued the advertisement on 3.01.2019.

3(ii) While selection process was in progress, respondent No.1/Personnel Department of the State of Himachal Pradesh vide its communication dated 13.6.2019 informed respondent No.2 that though the Himachal Pradesh Public Service Commission, through its Chairman is empowered to fill up the resultant vacancies, however, resultant vacancies cannot be filled up against the higher posts by applying Rule 170(5) of Himachal Pradesh Financial Rules 2009. For filling up posts of clerks against vacancies of higher posts, concurrence of Finance Department is required to be obtained alongwith approval of CMM. Respondent No.2, was therefore, requested to take further necessary action in the matter.

3(iii) To the above communication of respondent No.1 dated 13.6.2019, respondent No.2 after about five months responded through its letter dated 22.11.2019. In this response, respondent No.2 informed respondent No.1 about its already taken decision of filling up 12 posts of clerks including 10 against vacancies of higher posts by exercising purported powers under Rule 170(5) under Chapter 10 of Himachal Pradesh Financial Rules 2009.

Respondent No.1 was therefore requested to close the matter.

3(iv) In answer to the communication dated 22.11.2019, respondent No.1 vide letter dated 20.2.2020 reiterated its stand as was taken in the earlier communication dated 13.6.2019. Relevant para from the communication dated 20.02.2020 is extracted hereinafter:-

“I am directed to Page 256/C refer to your office letter No.4-75/84-PSC-loose-1192 dated 22.11.2019 on the subject cited above and to say that it has already been clarified vide this Department’s letter of even number 13.6.2019 (copy enclosed for read reference) that

Rule 170(5) of HPFR-2009 does not apply in this case and as per delegation of financial powers dated 08.12.1994, the Chairman, HPPSC

is empowered to fill up resultant vacancies but it does not mean that resultant vacancies be filled up against higher post by invoking Rule-

170(5). Finance Department's Notification dated 8.12.1994 is still in operation but for filling up the post of clerks against higher posts,

concurrence of the Finance Department and approval of Cabinet has to be obtained.

You are, therefore, requested to ensure observance of rule/Govt instructions as above and not to proceed further with recruitment process if it has

been initiated.

3(v) On receipt of above communication, respondent No.2 on 26.2.2020 decided that:-

The commission after detailed deliberations decided to stop the ensuing recruitment process. The Commission also decided

that the office shall re-initiate the proposal for obtaining the approval of the CMM in the matter before these vacancies are re-

advertised.

The above decision taken on 26.02.2020 for stopping the ongoing recruitment process was eventually brought to the notice of general public by issuing

a Press Note on 15.6.2020, which is impugned herein.

4. Observations

4(i) The issuance of advertisement, initiating the selection process, scrutinizing the application forms of the candidates, holding the screening tests,

conducting type-writing tests of the eligible candidates and evaluating their documents is not only a time consuming process but also entails huge

expenditure from Government exchequer. It is not the case of respondent No.2 that prior concurrence of Finance Department or approval of Cabinet

was not required for filling up post of clerks against 10 vacancies of higher posts. It would have been prudent on part of respondent No.2 to have

properly comprehended the existing rule position as well as directions/notifications issued in respect of its power and authority and to have ensured

adherence to same before advertising 10 posts of clerks against vacancies of the higher posts. It is quite surprising that even after respondent No.1

had informed respondent No.2 on 13.6.2019, about necessity of obtaining prior concurrence of Finance Department as well as approval of Cabinet for

filling up posts of clerks against 10 vacancies of higher posts, respondent No.2 did not stop the recruitment process against vacancies of higher posts.

Respondent No.2 proceeded ahead with the advertisement and reached at a stage, when only the result was left to be declared. Honâ€™ble Apex

Court in 1992 (2) SCC 148, titled as Dr. P.K. Jaiswal Vs Ms Debi Mukherje eand others observed that such an exercise would be an exercise in

futility, waste of public time and money and will also cause hardship to the candidates seeking appointments. Relevant para in this regard from the

judgment is extracted hereinafter as under:-

â€œ5â€|â€|â€|â€|â€|.. But in the instant case the question is whether the Government can withdraw the requisition sent to the Commission

for initiating the process of selection because at the point of time no right had crystallised in anyone for being considered for selection. If

the Government is at a given point of time considering the question of amending the recruitment rules with a view to providing for promotion

to the post in question, the Government can before an advertisement is issued by the Commission and the process of selection is under way

request the Commission to withdraw the same till it decides on the question of amending the rules. The decision of the Government to

withdraw the requisition sent to the Commission in NOVEMBER 1989 before the issuance of the advertisement does not interfere with any

vested right of selection because that stage had yet not reached. In the instant case, that is exactly what happened. Therefore, before the

appellant acquired a right to be considered for selection the Government had already intimated that it was examining the question of

amending the recruitment rules with a view to providing for appointment by promotion to the post in question. Once this decision was

communicated to the Commission before it had set the process of selection in motion by issuing an advertisement, it was not open to the

Commission to insist that it will go ahead with the selection process as the extant rule provided for promotion by direct recruitment and the

Government could amend the recruitment rules retrospectively, if it so desired, with a view to providing for appointment by promotion. Such

an exercise by the Commission would be an exercise in futility, waste of public time and money and hardship to candidates who seek

appointment. Whether to provide for promotion as a mode of appointment to the post in question is a matter of policy left to the Government

to decide and if it desired that the selection process should be held in abeyance till the question was examined and a final decision was

taken thereon, it was not open to the Commission to ignore the communication of the Government in that behalf and proceed to set the

selection process in motion. We think the action of the Commission was somewhat hasty and unjustified. The appellant, therefore, cannot

claim any vested right as urged by his learned counsel. Nor can the Tribunal's omission to notice that two new layers were created have a

bearing on the Government's decision to place the process of selection in hibernation till a final decision is taken on the proposal to provide

for promotion to the postâ€.

We refrain ourselves from commenting any further on such wasteful and avoidable selection process initiated and continued by respondent No.2 w.r.t.

filling up posts of clerks against vacancies of higher posts.

4(ii) Learned counsel for petitioners contended that present was not the case where allegations of bungling, malpractices, corruption, favouritism or

nepotism were levelled against the selection process, therefore decision of respondent No.2 to withdraw the advertisement was arbitrary,

unreasonable and illegal.

It is evident from the factual matrix noticed above that respondent No.2 has also not disputed the legal position projected by respondent No.1

whereunder it could not have advertised posts of clerks against 10 vacancies of higher posts without obtaining prior concurrence of Finance

Department and without prior approval of Cabinet. This is also the stand of respondent No.1. Under the circumstances, decision and consequent

action of respondent No.2 in scrapping the selection process for 10 vacancies of higher posts cannot be said to be unreasonable or illegal. Mere

existence of vacancies, the issuance of advertisement and initiation of selection process for filling up the vacancies, will not give a legal right to the

candidate to be selected for appointment. Examination is for purpose of showing that a particular candidate is eligible for consideration. Even the fact

that name of candidate appears in the merit list, will not entitle him for appointment. This was held by Hon^{ble} Apex Court in (1974) 3 SCC 220,

titled The State of Haryana Vs. Subash Chander Marwaha and others:-

¶10. 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.

11. 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.â€

In 1991 (3) SCC 47, titled Shankarsan Dash Vs. Union of India, a 5 member Constitution Bench of Honâ€™ble Apex Court held that a candidate seeking

appointment to a civil post cannot be regarded to have indefeasible right to appointment in such post merely because of appearance of his name in the

merit list. It was also held that existence of vacancies does not give legal right to a selected candidate. It is for the Government to decide how many

appointments would be made. Relevant paras from the judgment are extracted hereinafter:-

â€œ7. 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.

8. In State of Haryana v. Subhash Chander Marwaha and Others, (supra) 15 vacancies of Subordinate Judges were advertised, and out of

the selection list only 7, who had secured more than 55% marks, were appointed, although under the relevant rules the eligibility condition

required only 45% marks. Since the High Court had recommended earlier, to the Punjab Government that only the candidates securing 55% marks or more should be appointed as Subordinate Judges, the other candidates included in the select list were not appointed. They filed a writ petition before the High Court claiming a right of being appointed on the ground that vacancies existed and they were qualified and were found suitable. The writ application was allowed. While reversing the decision of the High Court, it was observed by this Court that it was open to the Government to decide how many appointments should be made and although the High Court had appreciated the position correctly, it had "somehow persuaded itself to spell out a right in the candidates because in fact there were 15 vacancies". It was expressly ruled that the existence of vacancies does not give a legal right to a selected candidate. Similarly, the claim of some of the candidates selected for appointment, who were petitioners in *Jitendra Kumar and Others v. State of Punjab and Others*, was turned down holding that it was open to the Government to decide how many appointments would be made. The plea of arbitrariness was rejected in view of the facts of the case and it was held that the candidates did not acquire any right merely by applying for selection or even after selection.

It is true that the claim of the petitioner in the case of *Miss Neelima Shangla v. State of Haryana* was allowed by this Court but, not on the ground that she had acquired any right by her selection and existence of vacancies. The fact was that the matter had been referred to the Public Service Commission which sent to the Government only the names of 17 candidates belonging to the general category on the assumption that only 17 posts were to be filled up. The Government accordingly made only 17 appointments and stated before the Court that they were unable to select and appoint more candidates as the Commission had not recommended any other candidate. In this background it was observed that it is, of course, open to the Government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates; and there

must be a conscious application of mind by the Government and the High Court before the number of persons selected for appointment is

restricted. The fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment.

None of these decisions, therefore, supports the appellant.

Hon^{ble} Supreme Court in 2020 (2) SCC 582 titled Mohd. Rashid Vs Director, Local Bodies, New Secretariat and other sw,as considering a case

where recruitment process was set in motion for filling up posts advertised by way of direct recruitment. Placing reliance upon judgment in

Shankarsan^s case supra, it was held that:-

“12. The appellants who are aspirants for direct recruitment have no right for appointment merely because at one point of time the

vacancies were advertised. The candidates such as the appellants cannot claim any right of appointment merely for the reason that they

responded to an advertisement published on 12th September, 2013. Even after completion of the selection process, the candidates even on

the merit list do not have any vested right to seek appointment only for the reason that their names appear on the merit list. In Shankarsan

Dash V. Union of India, a Constitution Bench of this Court held that a candidate seeking appointment to a civil post cannot be regarded to

have acquired an indefeasible right to appointment in such post merely because of the appearance of his name in the merit list.”

13. Since the selection process has not been completed and keeping in view the mandate of the Statutory Rules, we find that the appellants

have no right to dispute the action of the Municipal Bodies to fill up the posts either by way of promotion or by deputation as such posts are

being filled up in terms of mandate of the Rules. It is always open to the Municipal Bodies to fill up the vacant posts by way of direct

recruitment after the posts by way of promotion and/or deputation quota are not filled up either on the basis of recruitment process already

initiated or to be initiated afresh.”

5. Conclusion

Respondent No.2 had neither obtained prior concurrence of the Finance Department nor it had obtained prior approval of the Cabinet for filling up 10

posts of clerks against the vacancies of higher posts, therefore, the decision taken by it on 15.6.2020 in withdrawing the advertisement issued on

3.01.2019 cannot be faulted vis-a-vis 10 vacancies belonging to higher posts. However, it is admitted case of the parties that two out of twelve

vacancies, which were advertised on 3.1.2019 were clear-cut vacancies in the clerical cadre of respondent No.2. There was no embargo for filling

these two posts. Under the circumstances when respondent No.2 had completed the entire selection process and only result was left to be declared

then it should have declared the result for the two clear vacancies, which existed in the clerical cadre qua which there was no objection, even on part

of respondent No.1/State. During the arguments, learned Deputy Advocate General also submitted that State has no objection to respondent

No.2's in filling up two clear-cut vacancies of its clerical cadre from the selection process undertaken pursuant to advertisement dated 3.1.2019.

In the facts and circumstances of the case and in view of foregoing observations, we partly allow these writ petitions. Respondent No.2 is directed to

treat the advertisement dated 03.01.2019 (Annexure P-4) as having been issued only for two posts of clerks against available vacancies in the clerical

cadre and to take it to its logical conclusion after announcing the result in accordance with the selection process already undertaken by it. The

exercise be complete within a period of four weeks from today.

With these observations, these writ petitions are disposed of with aforesaid direction. Pending application(s), if any, shall also stand disposed of.