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STATE OF J & K AND ORS.

v.

SAT PAL

(Civil Appeal Nos.938-939 of 2013)

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FEBRUARY 5, 2013

[P. SATHASIVAM AND JAGDISH SINGH KHEHAR, JJ.]

Service Law:

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Appointment – Recruitment – Candidate in wait-list – Claiming appointment, in view that candidate above him in the merit list did not join – His writ petition disposed of directing the appellant-State to examine the claim – State rejected the claim – Contempt petition – Disposed of holding that the candidate deserved to be appointed and directing the State to consider the case and pass orders in accordance with the order of the Court – LPA by State – Dismissed as not maintainable – On appeal, held: In the facts of the case, the candidate deserved to be appointed to the post – The offer of appointment would relate back to the permissible date contemplated under rules laying down conditions of service of the cadre – The candidate entitled to seniority immediately below those who were appointed from the same process of selection – He would be entitled to wages from the date of the order.

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The respondent participated in the selection process for the post of Junior Engineer (Civil) Grade-II, and figured in the final merit/select list of Scheduled Caste candidates. On coming to know that some scheduled Caste candidates above him in the merit list had not joined inspite of having been offered appointment, he addressed a representation seeking appointment against an available vacancy. He specifically named a candidate 'T', in the merit list, who did not join despite being offered

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appointment. As the representation remained undecided, the respondent filed writ petition before High Court. The appellant-State did not appear before the Court. High Court disposed of the petition and directed the appointing authority to examine the claim of the respondent. The appellants dismissed the claim of the respondent taking the view that the vacancies cannot be filled at the belated stage; and that the appointment could not have been granted in accordance with the waiting list, as the same had outlived its validity. The respondent filed contempt petition against the order. High Court disposed of the petition holding that the respondent deserved to be appointed and directed the appellant-State to consider the issue and pass orders in accordance with the judgment of the Court. Appellants filed LPA taking the plea that the directions in the nature recorded by High Court was not permissible in exercise of contempt jurisdiction. Division Bench of High Court dismissed the appeal as not maintainable. Hence the present appeal.

Disposing of the appeals, the Court

HELD: 1. In the facts and circumstances of the case, it would be just and appropriate to direct the appellants to appoint the respondent against the post of Junior Engineer (Civil) Grade-II. Even though candidates who were higher in merit, were offered appointment to the post of Junior Engineer (Civil) Grade-II, for which recruitment was held, some of such posts remained vacant on account of the fact that persons higher in merit to the respondent had declined to join, despite having been offered appointment. Atleast one such vacancy never came to be filled up. In such a situation, the claim of the respondent whose name figured in the merit/select list, ought to have been offered appointment against the said post. The claim of the respondent could not have been repudiated. The offer of appointment would relate back

A to the permissible date contemplated under the rules
laying down conditions of service of the cadre to which
the respondent would be appointed. The respondent
would be entitled to seniority immediately below those
B Since the respondent has not discharged his duties, he
would be entitled to wages only with effect from the date
of the instant order. [Paras 10 and 18] [656-G-H; 657-A-
C; 663-F-G]

C 1.2. The reason for declining the claim of the
respondent for appointment out of the waiting list is
unjustified. A waiting list would start to operate only after
the posts for which the recruitment is conducted, have
been completed. A waiting list would commence to
D operate, when offers of appointment have been issued to
those emerging on the top of the merit list and after the
vacancies for which the recruitment process has been
conducted have been filled up. In the instant case, the
situation for operating the waiting list had not arisen,
E because one of the posts of Junior Engineer (Civil) Grade-
II for which the recruitment process was conducted was
actually never filled up. [Para 11] [657-E-G]

F 1.3. Even if it is assumed, for arguments sake, that all
the posts for which selection was held were duly filled
up, the validity of the waiting list, in the facts of the present
case, has to be determined with reference to 22.4.2008,
because the offer of appointment to 'T' (the candidate,
who did not join) was made on 22.4.2008. It is the said
vacancy, for which the respondent had approached the
G High Court. As against the aforesaid, it is the
acknowledged position recorded by the appellants in the
impugned order that the waiting list was valid till May, 2008.
If 'T' was found eligible for appointment against the
vacancy in question, out of the waiting list, the respondent
H herein would be equally eligible for appointment against

the said vacancy. [Para 11] [658-A-D]

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Virender S. Hooda v. State of Haryana (1999) 3 SCC 696; *Mukul Saikia v. State of Assam* (2009) 1 SCC 386: 2008 (16) SCR 236 – relied on.

2.1. The observations made by the High Court in the contempt cases were advisory in nature. Rather than initiating action against the appellants for having missed the point, while considering the claim of the respondent in contempt jurisdiction, the High Court in its wisdom, required the appellants to correct the mistake committed by the appellants. The High Court did not, in the first instance, initiate any coercive action against the appellants. In the aforesaid view of the matter, it is apparent that the appellants unnecessarily preferred a letters patent appeal to assail the order of the High Court on a technical plea that the High Court in exercise of its contempt jurisdiction could not have dealt with the merits of the claim of the respondent. [Para 14] [661-D-G]

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Prithawi Nath Ram v. State of Jharkhand and Ors. (2004) 7 SCC 261: 2004 (3) Suppl. SCR 740; *V.M. Manohar Prasad v. N. Ratnam Raju and Anr.* (2004) 13 SCC 610; *Midnapore Peoples' Coop. Bank Ltd. and Ors. v. Chunilal Nanda and Ors.* (2006) 5 SCC 399: 2006 (2) Suppl. SCR 986 – referred to.

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2.2. Though the technical pleas raised by the appellants are fully legitimate but in the facts and circumstances of the present case, the Court would not invoke the jurisdiction under Article 136 of the Constitution of India, for debating and deciding the technical pleas advanced by the appellants. The court would rather invoke its jurisdiction under Article 142 of the Constitution of India for doing complete justice in the instant case. Entertaining the instant appeals would defeat the ends of justice for which the respondent had approached the High Court. Entertaining the objections

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A filed by the appellants would result in deviating from the merits of the claim raised by the respondent before the High Court. [Para 16] [662-E-G]

B 2.3. The State is not an adversary, and ought not have behaved in the manner, it has chosen, in the facts and circumstances of the instant case. In the first instance, it failed to even file a response before the High Court, to the writ petition preferred by the respondent. In order to ensure that justice to the respondent was not delayed, the High Court, instead of adjudicating the matter on merits, considered it just and appropriate to direct the appointing authority to consider the claim of the respondent, consequent upon 'T' having declined to join the post of Junior Engineer (Civil) Grade-II. Mainly because, the respondent had approached the High Court for relief, the appellants rejected his claim for wholly unreasonable grounds. Rather than focusing on the merits of the claim raised by the respondent, the appellants chose to initiate proceedings which would deviate the legal process from the merits of the claim of the respondent. [Para 17] [662-G-H; 663-A-C]

Case Law Reference:

	(1999) 3 SCC 696	relied on	Para 13
F	2008 (16) SCR 236	relied on	Para 13
	2004 (3) Suppl. SCR 740	referred to	Para 15
	(2004) 13 SCC 610	referred to	Para 15
	2006 (2) Suppl. SCR 986	referred to	Para 15

G CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 938-939 of 2013.

H From the Judgment & Order dated 03.04.2012 of the High Court of Jammu and Kashmir at Jammu in LPAC No. 2 of 2012 & CMP No. 3 of 2012.

Gaurav Pachnanda, Sunil Fernandes, Vernika Tomar, Astha Sharma, Rahul Sharma, Insha Mir for the Appellants. A

Sakal Bhushan, P.D. Sharma for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted. B

2. The Public Works Department of the State of Jammu & Kashmir conducted a process of selection, for recruitment against the posts of Junior Engineer (Civil) Grade-II. Sat Pal, the respondent herein participated in the aforesaid process of selection. He was successful, inasmuch as, he figured in the final merit/select list of scheduled caste candidates, prepared at the culmination of the selection process. Having learnt that some scheduled cast candidates above him in the merit/select list had not joined inspite of having been offered appointment, Sat Pal addressed a representation to the appellants seeking appointment against an available vacancy. In his representation, he mentioned the name of Trilok Nath as one of the selected candidates, who had been offered appointment, but had not joined. In his representation, he also pointed out, that in the merit/select list pertaining for scheduled caste candidates, his name figured immediately after the name of the said Trilok Nath. C
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3. Since the representation filed by the respondent remained undecided, he approached the High Court of Jammu & Kashmir at Jammu (hereinafter referred to as, the High Court) by filing SWP no. 1156 of 2009. Before the High Court, the respondent Sat Pal reiterated the factual position asserted by him in his representation. To substantiate his assertion pertaining to Trilok Nath, that although the aforesaid Trilok Nath had been offered appointment against the post of Junior Engineer (Civil) Grade-II on 22.4.2008, Trilok Nath had not joined against the same, he placed before the High Court a communication dated 5.5.2008 issued by the Chief Engineer F
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A (R&B) Department, Jammu, narrating that Trilok Nath was not interested to join against the post of Junior Engineer (Civil) Grade-II.

B 4. Before the High Court, the respondent relied upon the prevalent rule, whereunder, a waiting list was valid for one year. The fact that the prevalent rules envisaged, that the merit list of candidates in continuation of those offered appointment, would constitute the waiting list, and would be valid for a period of one year, was not disputed even before us.

C 5. Despite the High Court having issued notice to the State Government in SWP no.1156 of 2009, and had required it to file pleadings, the State Government i.e., the appellants before this Court, did not file any objections. The right of the appellants to file objections was closed by an order dated 5.4.2010. In the aforesaid view of the matter, it was natural for the High Court to infer, that the assertions made by the respondent before it, were truthful and acceptable for a final determination of the controversy. Despite the aforesaid, the High Court disposed of the aforesaid writ petition at the admission stage, by directing the appointing authority to examine the claim of the respondent, for appointment against the post of Junior Engineer (Civil) Grade-II, by keeping in mind the communication dated 5.5.2008 issued by the Chief Engineer (R&B) Department, Jammu, affirming that Trilok Nath, who was offered appointment against the post under reference, had declined to join. The High Court required the appellants herein to take a final decision in respect of the appointment of the respondent, within a period of two months, from the date a copy of the order of the High Court was made available.

G 6. In compliance of the directions issued by the High Court vide order dated 9.8.2010 in SWP no. 1156 of 2009, the appellants passed an order on 23.8.2011. By the said order dated 23.8.2011, the claim of the respondent for appointment against the post of Junior Engineer (Civil) Grade-II was rejected for the following reasons:-

- "(i) In view of the fact that the waiting list issued in respect of the recruitment has outlived its validity way back in May, 2008 itself, he cannot be granted appointment in accordance with the same. A
- (ii) And that for the abovesaid reason, vacancies cannot be filled at a belated stage." B

7. Aggrieved by the rejection order dated 23.8.2011, rather than assailing the same by way of a fresh writ petition, the respondent filed Contempt (SWP) no. 157 of 2011. The aforesaid contempt petition was disposed of by the High Court vide order dated 29.10.2011, with the following observations:- C

"The claim of the petitioner for his appointment as Junior Engineer (Civil) Grade-II arose during the validity of select list/wait list. The duty was cast on the competent authority, who was seized of the select list/wait list to fill up the vacancies from the wait list, but it failed to perform its duty. It is not the fault of the petitioner that his claim for appointment was not considered during the validity of select list/wait list. The fault is committed by the authority and the petitioner cannot be penalized for the same. The claim of the petitioner on merits deserved to be allowed for being appointed on the post of Junior Engineer (Civil) Grade-II when select list/wait list was in operation. Same having not been done despite request having been made, his right of consideration for being appointed would thus survive though such claim was considered by the Government after the expiry of the validity period of select list/wait list. D
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Consideration order issued by the Government does not comply with the court directions. Before initiating action for framing rule in this contempt petition, it will be appropriate to afford an opportunity to the respondents to consider the whole issue and pass orders in accordance with judgment of the Court. Four week's time is granted to H

A the respondents to reconsider the whole issue in the light of the observations made hereinabove and file compliance report by or before next date."

B 8. The appellants herein were aggrieved by the order passed by the High Court in Contempt (SWP) no. 157 of 2011 filed by the respondent, since the appellants felt, that the directions in the nature recorded by the High Court (in the order extracted hereinabove), were not permissible in exercise of contempt jurisdiction. It is, therefore, that the appellants preferred a letters patent appeal (LPAC no.2 of 2012) to assail the order dated 29.10.2011 passed by the High Court in Contempt (SWP) no. 157 of 2011. The letters patent bench, by its order dated 3.4.2012, held the said letters patent appeal as not maintainable. The orders passed by the High Court dated 29.10.2011 and 3.4.2012 have been assailed by the appellants before this Court, by way of present appeals.

E 9. The controversy in hand is yet another illustration of the denial of a legitimate claim, of an innocent citizen. Rather than appreciating the claim raised by the respondent before the High Court through SWP no.1156 of 2009, to which the appellants failed to even file their response, the same was ordered to be closed by an order dated 5.4.2010. Thereupon appellants have chosen to pursue a course, which would sideline the main controversy. The course adopted would neither serve their own purpose, nor the purpose of the respondent Sat Pal.

G 10. It is not a matter of dispute, that the respondent Sat Pal participated in a process of selection for recruitment against the post of Junior Engineer (Civil) Grade-II. It is also not in dispute, that his name figured in the merit/select list of scheduled caste candidates. Trilok Nath, who had been offered appointment against the post of Junior Engineer (Civil) Grade-II on 22.4.2008, did not join, despite the said offer of appointment. The instant fact is fully substantiated from the order dated 5.5.2008 issued by the Chief Engineer (R&B)

Department, Jammu. Even though candidates who were higher in merit, were offered appointment to the post of Junior Engineer (Civil) Grade-II, for which recruitment was held, some of such posts remained vacant on account of the fact that persons higher in merit to the respondent Sat Pal had declined to join, despite having been offered appointment. Atleast one such vacancy offered to Trilok Nath never came to be filled up. In such a situation, the claim of the respondent Sat Pal whose name figured in the merit/select list, ought to have been offered appointment against the said post. The claim of respondent Sat Pal could not have been repudiated, specially on account of his assertion, that his name in the merit/select list amongst Scheduled Caste candidates immediately below the name of Trilok Nath, was not disputed even in the pleadings before this Court. It is not the case of the appellants before this Court, that any other candidate higher than Sat Pal in the merit/select list is available out of Scheduled Caste candidates, and can be offered the post against which Trilok Nath had not joined.

11. In view of the factual position noticed hereinabove, the reason indicated by the appellants in declining the claim of the respondent Sat Pal for appointment out of the waiting list is clearly unjustified. A waiting list would start to operate only after the posts for which the recruitment is conducted, have been completed. A waiting list would commence to operate, when offers of appointment have been issued to those emerging on the top of the merit list. The existence of a waiting list, allows room to the appointing authority to fill up vacancies which arise during the subsistence of the waiting list. A waiting list commences to operate, after the vacancies for which the recruitment process has been conducted have been filled up. In the instant controversy the aforesaid situation for operating the waiting list had not arisen, because one of the posts of Junior Engineer (Civil) Grade-II for which the recruitment process was conducted was actually never filled up. For the reason that Trilok Nath had not assumed charge, one of the posts for which the process of recruitment was conducted, had

A remained vacant. That apart, even if it is assumed for arguments
sake, that all the posts for which the process of selection was
conducted were duly filled up, it cannot be disputed that Trilok
Nath who had participated in the same selection process as
the respondent herein, was offered appointment against the
B post of Junior Engineer (Civil) Grade-II on 22.4.2008. The
aforesaid offer was made, consequent upon his selection in the
said process of recruitment. The validity of the waiting list, in
the facts of this case, has to be determined with reference to
22.4.2008, because the vacancy was offered to Trilok Nath on
C 22.4.2008. It is the said vacancy, for which the respondent had
approached the High Court. As against the aforesaid, it is the
acknowledged position recorded by the appellants in the
impugned order dated 23.8.2011 (extracted above), that the
waiting list was valid till May, 2008. If Trilok Nath was found
D eligible for appointment against the vacancy in question out of
the same waiting list, the respondent herein would be equally
eligible for appointment against the said vacancy. This would
be the unquestionable legal position, in so far as the present
controversy is concerned.

E 12. The date of filing of the representation by the parties
concerned and/or the date on which the competent authority
chooses to fill up the vacancy in question, is of no consequence
whatsoever. The only relevant date is the date of arising of the
vacancy. It would be a different legal proposition, if the
F appointing authority decides not to fill up an available vacancy,
despite the availability of candidates on the waiting list. The
offer made to Trilok Nath on 22.4.2008 by itself, leads to the
inference that the vacancy under reference arose within the
period of one year, i.e., during the period of validity of the
waiting list postulated by the rules. The offer of the vacancy to
G Trilok Nath, negates the proposition posed above, i.e., the
desire of the employer not to fill up the vacancy. Herein, the
appellants wished to fill up the vacancy under reference.
Moreover, this is not a case where the respondent was seeking
H appointment against a vacancy, over and above the posts for

which the process of selection/ recruitment was conducted. Based on the aforesaid inference, we have no hesitation in concluding that the appellants ought to have appointed the respondent Sat Pal, against the vacancy which was offered to Trilok Nath.

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13. The issue arising for consideration herein, has already been adjudicated upon by this Court. In the first instance reference may be made to the decision rendered by this Court in *Virender S. Hooda v. State of Haryana* (1999) 3 SCC 696. In the instant case administrative instructions envisaged, that vacancies which came into existence within six months of the date of recommendation by the Public Service Commission, could be filled up from the earlier process of selection. The observations made by this Court on the instant issue, in the aforesaid background, are being extracted below:

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".....The fact that there were further vacancies available and when 9 vacancies were advertised to be filled up within a period of six months after announcement of the previous selection cannot be disputed at all. In terms of the circulars issued by the Government on 22.3.1957 and 26.5.1972 when such vacancies arise within six months from the receipt of the recommendation of the Public Service Commission they have to be filled up out of the waiting list maintained by the Commission. In respect of the vacancies which arise after the expiry of six months it is necessary to send the requisition to the Commission. It is also made clear that if the Commission makes recommendations regarding a post to the Department and additional vacancies occur in the Department within a period of six months on the receipt of the recommendations, then the vacancies which occur later on can be filled in from amongst the additional candidates recommended by the Commission. It is urged on behalf of the appellants that letter dated 7.1.1992 indicated that the cadre strength in the Haryana Civil Service (Executive

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A Branch) was 440 and the officers filling these posts were
around 129 and there was a shortfall of 111 and 23 posts
had to be filled up by direct recruitment. Thus 12 posts for
direct recruitment were vacant when the advertisement for
recruitment was made which was held in 1991. Therefore,
B the appellants' case ought to have been considered when
some of the vacancies arose by reason of non-
appointment of some of the candidates. Therefore, the
Government ought to have considered the case of the
appellants as per the rank obtained by them and the
C appellants had to be appointed if they came within the
range of selection. Thus when these vacancies arise within
the period of six months from the date of previous selection
the circulars are attracted and hence the view of the High
Court that vacancies arose after selection process
D commenced has no relevance and is contrary to the
declared policy of the Government in the matter to fill up
such posts from the waiting list."

This Court has also considered the same issue wherein there
were no rules/administrative instructions for filling up vacancies
E from the waiting list. While examining the aforesaid issue this
Court in *Mukul Saikia v. State of Assam*, (2009) 1 SCC 386,
held as under:

F "At the outset it should be noticed that the select list
prepared by APSC could be used to fill the notified
vacancies and not future vacancies. If the requisition and
advertisement was only for 27 posts, the State cannot
appoint more than the number of posts advertised, even
though APSC had prepared a select list of 64 candidates.
G The select list got exhausted when all the 27 posts were
filled. Thereafter, the candidates below the 27 appointed
candidates have no right to claim appointment to any
vacancy in regard to which selection was not held. The fact
that evidently and admittedly the names of the appellants
H appeared in the select list dated 17.7.2000 below the

matter could have been adjudicated on merits, had the High Court chosen to do so. In order to ensure that justice to the respondent was not delayed, the High Court considered it just and appropriate to direct the appointing authority to consider the claim of the respondent, consequent upon Trilok Nath having declined to join the post of Junior Engineer (Civil) Grade-II. Mainly because, the respondent Sat Pal had approached the High Court for relief, the appellants rejected his claim for wholly unreasonable grounds. Rather than focusing on the merits of the claim raised by respondent Sat Pal, the appellants chose to initiate proceedings which would deviate the legal process from the merits of the claim of respondent. Had we issued notice to respondent Sat Pal based on the technical pleas raised by the appellants, the respondent Sat Pal may not even have been in a position to defend himself before this Court. Litigation before this Court, is an expensive proposition. A poor scheduled caste candidate cannot be subjected to unnecessary harassment at the hands of the mighty State. It is for the aforesaid reasons, that the instant order is being passed, for doing complete justice in the instant cause.

18. In view of the factual and legal position discussed by us hereinabove, we are of the view, that in the facts and circumstances of this case, it would be just and appropriate to direct the appellants to appoint the respondent Sat Pal against the post of Junior Engineer (Civil) Grade-II. The aforesaid offer of appointment will relate back to the permissible date contemplated under the rules laying down conditions of service of the cadre to which the respondent Sat Pal will be appointed. Naturally, the respondent will be entitled to seniority immediately below those who were appointed from the same process of selection. Since Sat Pal has not discharged his duties, he would be entitled to wages only with effect from the date of the instant order.

19. Disposed of in the aforesaid terms.

K.K.T.

Appeals disposed of.