
(2019) 07 PAT CK 0260

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 6948, 8149, 7748, 7531, 16113, 10410, 8413, 8388, 9202, 12397, 7973, 12945 Of 2017, 2434 Of 2019, Letters Patent Appeal No. 919 Of 2017, 407 Of 2019

Dr. Kishore Kumar Das And Ors

APPELLANT

Vs

State Of Bihar Through The Principal Secretary And Ors

RESPONDENT

Date of Decision : 02-07-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 166(1), 309
Bihar Medical Education Service Cadre And Cadre Post Appointment Rules, 1997 — Rule 3, 6, 6(f), 7(D), 14

Citation : (2019) 07 PAT CK 0260

Hon'ble Judges : Amreshwar Pratap Sahi, CJ;Anjana Mishra, J

Bench : Division Bench

Advocate : Vinod Kumar Kanth, Y.V. Giri, P.K. Shahi, D.K. Sinha, Mukesh Kumar, Vikas Kumar, Rajesh Kumar Choudhary, Rohit Mishra, Veena Kumari Jaiswal, Vikash Kumar, Upendra Prasad, Gunjita Gupta, Chandrakala Jaiswal, Krishnakant Singh, Anil Kumar Sinha, Rakesh Kumar, Lalit Kishore, Anjani Kumar, P.N. Sahi, S.D. Yadav, Ramadhar Singh, A.B. Sinha, Nagendra Kumar, Shailendra Kumar Singh, Amit Kumar Jha, Ajay Behari Sinha, Suryakant Kumar, Chitranjan Sinha, Ritni Kumari, Neeraj Kumar Sinha, Sanjay Pandey, Kumar Brijnandan, Tarees Hameed, Akashdeep, Shyameshwar Kumar Singh, Chaitanya Swaroop, Anil Kumar Singh, Surinder Kumar, Md. Shamimul Hoda

Final Decision : Partly Allowed

Judgement

1. The grievance raised is about the prescription of the age bar of 50 years in respect of appointment to the post of Assistant Professors as being irrational, arbitrary and having no nexus with the object sought to be achieved. The contention of all the petitioners in the writ petitions virtually raises a challenge to the prescription of the age bar in the rules challenging its validity as being violative of Article 14 of the Constitution of India with no purpose to be achieved. All these writ petitioners have crossed the age bar of 50 years and they contend that the prescription of age for appointment as Assistant Professors should be

relaxed keeping in view the maximum age of services as recommended by the Medical Council of India which comes up to 70 years. The claim is also based on the past prescriptions made by relaxing the age up to 67 years contending that this in no way would impede either the quality of appointments or the standards of medical education. This according to us may be a legal issue raised which has to be answered but the real challenge faced by the citizens and students of medical education is otherwise.

2. This entire bunch concerns one of the basic needs of the citizens of this State with regard to medical education which depicts a serious concern and also a perception as if one of the most important sectors concerning human life is facing neglect. At least this is for certain that be it any branch of governance, the subject matter did require a permanent thorough clinical treatment founded on sound diagnosis instead of a cosmetic ad hocism that is being continued in the matters of appointment of the teaching staff in the Medical Colleges throughout the State of Bihar.

3. About two decades ago, an attempt was made by the Government to re-structure the teaching cadre by declaring the establishment of a combined cadre consisting of junior and senior category of posts. This commenced with the promulgation of the Bihar Medical Education Care and Appointment on Cadre Post Rules (The Bihar Medical Education Service Cadre and Cadre Post Appointment Rules) 1997. A Hindi version of the Gazette dated 24th May, 1997) has been only made available which is Annexure-1 to C.W.J.C. No. 8149 of 2017. The Rules were applied to all vacancies that were existing in the past and were to occur in future. The definition clause defines Junior Teaching Post in Clause 4 (3) as Lecturers. In Clause 4 (4) Senior Teaching Posts have been defined as Assistant Professors, Associate Professors and Professors. While restructuring and creating a combined cadre, Clause 5 provided for an amalgamated cadre of all the Resident Doctors, Registrars, Assistant Professors, Associate Professors, Professors, Principals and the Deputy Director, Joint Director-cum-Examination Controller and Director or Additional Director of the Directorate of the then Medical Education Cadre. The Rules also provide that all the existing posts of Resident Doctors and Registrars shall stand converted into the post of Lecturers, whereas the other posts would remain intact.

4. The Rules further provide that in the event such officers of the Bihar State Health Service Cadre who want to be included in the Cadre will have to give their option or else they would stand repatriated to their original Cadre. Correspondingly, those Medical Officers who do not possess the minimum qualifications and eligibility for being included in this combined cadre, they would also stand repatriated to their original cadre.

5. Clause 6 categorically provides that the Bihar Medical Education Service Cadre would be an entirely different cadre as against Bihar State Health Services Cadre. The constitution of the cadre would be accordingly governed by these rules and for the purpose of appointments the first entry point by direct

recruitment would only be as a Lecturer that would be based on a written competitive examination to be conducted by the Bihar Public Service Commission subject to availability of posts.

6. The qualifications laid down, and the relevant part of the rule that has also been made the basis of the challenge raised by the writ-petitioners, is the clause relating to the prescription of age bar for entry into the service. Clause 8 (gha) of the rules provides that the minimum and maximum age limit to be applicable to the cadre would be governed by the age limits prescribed for Government servants. There are other provisions also which need not be discussed as they are not relevant for the present controversy. The purpose for detailing the background of the 1997 Rules, which has already been repealed, is to indicate the attempt made for constituting a Medical Education Teaching Cadre in the State of Bihar for manning the Medical Colleges throughout the State.

7. Then comes the turning point with the introduction of the Senior Resident, Tutor and Bihar Medical Education Service Cadre Recruitment, Appointment and Promotion Rules, 2008 notified on 10th October, 2008. Rule 14 thereof repeals the 1997 Rules, but notwithstanding such repeal anything done or action taken under the 1997 Rules was saved prohibiting any disadvantage to the holder of the post retrospectively. This brought about a sea change with the exclusion of the post of Resident Doctors and Registrars from the main cadre. Thus, under the 1997 Rules, these posts which were described as Junior Teaching Posts and were labelled as Lecturers, was completely excluded and they were given the caption of Senior Resident/Tutors with the status of ex cadre posts under Rule 6 described as Tenure Teaching Posts of four years duration. The rest of the posts from Assistant Professors upwards and onwards that were there in the 1997 Rules were maintained as cadre posts in Clause 3 of the said Rules.

8. Clause 6 also provides that out of four years, one year will have to be spent on rural posting. It was also specifically indicated in the criteria clause that the tenure posts of Senior Residents and Tutors will not be considered to be the posts of Medical Education Cadre as defined in Rule 3 of the Rules.

9. However, for the purpose of appointment as an Assistant Professor, a three years teaching experience as Senior Resident or Tutor in specified subject after Post Graduation is the minimum eligibility prescribed under Clause 7 of the said rules. Clause 7(D) which is relevant for the present controversy relates to there being no age bar for Doctors already serving in the Health Cadre of the State of Bihar. Thus, the age limit for entry which was prescribed as equal to that of Government servants in the 1997 Rules, was replaced by providing no age bar for Doctors already serving in the Bihar Health Cadre Services of the State.

10. Vide notification dated 28th November, 2013, 2008 Rules were amended with the introduction of Senior Resident/Tutor and Bihar Medical Education Service Recruitment Appointment and Promotion (Amendment) Rules, 2013. By virtue of this amendment, a new clause was added along with the note of Rule 6 as Clause

(f) providing that the age limit for appointment on the post of Senior Resident/ Tutor shall be the same as determined by the Government (General Administration Department) from time to time for appointment on Government posts provided that there shall be a relaxation of five years in the age limit for the members of the Bihar State Health Service Cadre.

11. Simultaneously, Rule 7 (D) came to be amended and the maximum age limit for appointment on the post of Assistant Professor was prescribed as 45 years for the Un-reserved Category, 48 years for the B.C/E.B.C. Category, 48 years for Female candidates of all classes and 50 years for Scheduled Castes and Scheduled Tribes candidates. The age limit for doctors working in the Health Service Cadre was fixed as 50 years. It is this age limit of 50 years prescribed for the doctors working in the Bihar Health Service Cadre that has given rise to the present controversy.

(1). C.W.J.C. No. 7531 of 2017 (Dr. Pawan Kumar Jha & 3 others Vs. The State of Bihar and others) has been filed praying for restraining the process of selection under Advertisement No. 7 to 31 of 2017 dated 24.04.2017 followed by a corrigendum dated 03.05.2017 and to allow the petitioner also to participate in the selection process for the post of Assistant Professors. The advertisement is for 1171 posts in all. The advertisement provides for the maximum age of 50 years. Another clause was included for providing five years relaxation to the members of the Bihar Health Services Cadre doctors but the same was deleted by the corrigendum issued on 3rd of May, 2017. Thus, the maximum age for the doctors of the Bihar Health Services Cadre remained 50 years.

(2). C.W.J.C. No. 7748 of 2017 (Dr. Bijendra Kumar Mishra and 30 others Vs. the State of Bihar & Ors.) also raises the same issue and has additionally taken a ground that the petitioners were appointed on contract basis under the advertisement dated 05.03.2014 where the maximum age indicated was 67 years for the post of Assistant Professors.

(3). C.W.J.C. No. 7973 of 2017 (Dr. Kamlesh Tiwari Vs. The State of Bihar and others) has been filed by the petitioner who is of the female category and has challenged the age limit of 48 years fixed for the Un-reserved Female Category candidates on the same grounds as the other petitioners.

(4). C.W.J.C. No. 8388 of 2017 (Dr. Narendra Kumar and three others Vs. The State of Bihar & Ors.) also raises the same issue. A reply has been filed by the Medical Council of India in this writ petition asserting that the minimum qualifications prescribed by the Medical Council of India has to be observed while making appointments. In this case also all the petitioners are of the Bihar Health Cadre Services and had been appointed on contract basis in the year 2014.

(5). C.W.J.C. No. 8413 of 2017 (Dr. Mrs. Jyoti Srivastava Vs. The State of Bihar and Ors.)

12. The petitioner who is working on contract basis is also aggrieved by the same

imposition of the age cap. She has also claimed that in the past in the year 2009 certain teachers who were appointed on ad hoc basis have been regularized without facing selections by the Bihar Public Service Commission. The Medical Council of India has also filed an affidavit in this case asserting that the Minimum Qualification Regulations are applicable and all appointments have to be made in conformity with the same.

13. The argument advanced on behalf of the petitioners is that after the advertisement was issued in October, 2013 the impugned amendment was brought about on 28th November, 2013. This resulted in prejudice being caused to the appointments that were made on contract basis in the year 2014 and which was said to be demonstrated on the basis of the provisional list and the notified merit-list. The contention is that if the appointments had been made as per the merit-list, no prejudice would have been caused and some of the petitioners would have gained the requisite experience of three years therein for appointment on the post of Assistant Professor.

14. Some of the petitioners crossed the age bar of 50 years and, therefore, on both counts prejudice was caused to them and they would stand eliminated from the zone of consideration. The argument is that if the repository of eligible candidates for the initial entry remains with the Bihar Health Services Cadre, then the creation of two separate classes by introducing an age bar would serve no purpose and there is no rationale to deprive those doctors who are still in Bihar Health Services but are above 50 years of age. The contention is that this situation has arisen because of no steps being taken timely for selections, which is evident that in the past 16 years only twice attempts were made to fill up the post on regular basis otherwise the Government continued with appointments on contract basis. This delay in the process of regular appointments has thereby affected the availability of a fair chance to the petitioners of being considered for appointment. The contention is that this fact had been realized by the State Government and it is for this reason that the cap of age bar for the doctors of the Bihar Health Services Cadre had been completely removed in the 2008 Rules. It is submitted that even though the same was introduced through the 2013 Rules, yet the State Government continued to make engagements on contract basis including the petitioners and all those teachers who were up to the age of 67 years which is evident from the advertisement dated 5th of March, 2014. It is, therefore, submitted that there is no rationale for not allowing those who have attained the age of 50 years in participating for regular selections. The learned counsel have, therefore, pressed into service the argument based on Heydon's rule of purposive interpretation to contend that the State Government clearly intended and continued to engage doctors in the Bihar Health Services Cadre who were above the age of 50 years consciously and, therefore, to now apply the rule with the age bar of 50 years violates Article 14 of the Constitution of India and does not serve any purpose. It is also the argument of the petitioners that the power of relaxation is available and rules have been framed by the Government under Article 309 that has been notified on 28th November, 1956

and explained in the notification dated 20th November, 1959 and 25th July, 1962. The same are extracted hereinunder:-

"[Government of Bihar, Appointment Department notification, From Sri V. Balasubramaniam, Deputy Secretary to Government]

No. III/RI-2010/55A-11505 the 28th November, 1956- In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, and in supersession of previous order on this subject the Governor of Bihar hereby makes the following Rules.

Where the State Government are satisfied that the operation of any rule regulating the conditions of service of State Government servants, or any class of such Government servants, causes undue hardship in any particular case, they may by order dispense with or relax the requirement of that rule to such extent and subject to such conditions as they may consider necessary for dealing with the case in a just and equitable manner."

"[Government of Bihar, Appointment Department memo no. III/RI-2031/59A-14813 dated 20th November, 1959. From K.A. Ramasubramaniam, Deputy Secretary to Government. To all Department of Government/All Heads of Departments.]

Subject- Relaxation of rule in certain cases of exceptional hardship.

The undersigned is directed to invite your attention to Appointment Department's Notification no. III/RI- 2010/55A- 11505, dated the 28th November 1956 (copy published above) on the above subject and to say that the power of the Government to relax any rule should be invoked only in very exceptional cases where the operation of any rule causes undue hardship to any Government servant.

2. Before any order of relaxation is passed, the Department concerned should consult the Appointment Department and Finance Department and also take the approval of the Council of Ministers. While full justification for the relaxation should be given on the file itself, the reasons should be briefly mentioned in the formal order issued by the Department concerned in this behalf. The order should be authenticated as an order of the Governor in accordance with the requirement of Article 166(1) of the Constitution."

"[Government of Bihar, Appointment Department memo no. III/RI-1019/61A-10270 dated 25th July, 1962. From Sri B.L. Das, Under- Secretary to Government, To All Departments of Government/All Heads of Departments.]

Subject.- Relaxation of statutory rules in certain cases of exceptional hardships.

The undersigned is directed to invite a reference to order contained in Appointment Department Memo No. III/RI- 2031/59-14813, dated the 20th November, 1959 (Copy published below) wherein it has been laid down that before any order of relaxation of any statutory rule is passed the Department

concerned should consult the Appointment Department and Finance Department and also take the approval of the Council of Ministers. Doubts have been expressed as to whether the above order should be made applicable in all cases of relaxation of rules.

It is therefore clarified that the provision made under the proviso to Article 309 of the Constitution published with Appointment Department Notification No. III/RI-2010-55A-11505, dated the 28th November, 1956 (copy published below) is intended to apply only to such rules relating to service condition in which there are no express provisions for relaxation. Where there is a provision for relaxation in the relevant rule itself, the procedure envisaged in the Memo No. III/RI-2031/59-14813, dated the 20th November, 1959, of this Department will not apply. Also for relaxation of the rules enumerated in the annexed schedule the procedure outlined in the above mentioned memo will not apply."

15. The argument is that this power of relaxation can be exercised in the wake of the fact that the imposition of the minimum age of 50 years is causing undue hardship to all the petitioners who are otherwise qualified and capable of discharging their teaching assignments and have been serving the Bihar Health Services Cadre for long. It has been re-emphasized that the delay caused in the holding of regular selections for which advertisement was made once in the year 2002 and then again in 2011 itself explains that the State Government on account of its own laxity cannot impose an unreasonable condition so as to defeat the very purpose of engagement of otherwise qualified and eligible doctors from the Bihar Health Services Cadre.

16. Shri Vinod Kanth, learned senior counsel has led the arguments and has cited the judgment in the case of R.M. D. Chamarbaugwalla and another Vs. Union of India and another, reported in AIR 1957 Supreme Court 628, Shri Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and others, reported in AIR 1958 Supreme Court 538 and Shailesh Dhairyawan Vs. Mohan Balkrishna Lulla, reported in (2016) 3 SCC 619.

17. It is also the submission of Shri Vinod Kanth that the scarcity of Associate Professors can be met if the said age bar is reasonably relaxed and that would cause no extra financial burden on the State. He has also cited the judgment in the case of D.S. Nakara Vs. Union of India, reported in (1983) 1 SCC 305 in support of the arguments of irrational classification.

18. Adopting all the aforesaid arguments Shri Y.V. Giri, learned senior counsel appearing in C.W.J.C. No. 7748 of 2017 has cited the decision in the case of GRIDCO Limited and Another Vs. Sadananda Doloi and others, reported in 2012 (1) PLJR SC 321 Paragraphs 3 and 26 to contend that all the petitioners deserve to be regularized. He has also cited the judgment in the case of Ramesh Chandra Sankla and others Vs. Vikram Cement and others, reported in (2008) 14 SCC 58 Paragraphs 90 to 98 to advance his submissions.

19. Shri Chitranjan Sinha, learned senior counsel has questioned the validity of

the rule in C.W.J.C. No. 12945 of 2017 and has invited the attention of the Court to the 2008 and 2013 Rules to contend that by imposing the age cap, merit is being compromised and more qualified and experienced doctors are being excluded from the zone of consideration. Additionally, he has advanced the argument that reservation, which has been provided for, exceeds the 50 per cent quota trenching upon the opportunities of the General Category Candidates. As an illustration, he has invited the attention of the Court to the number of posts being in excess of the 50% quota reserved in the subject of Orthopaedics.

20. For the Respondent State, learned Advocate General contends that there is no applicability of the purposive rule of interpretation, inasmuch as, the rule making authority in its wisdom has rightly prescribed the age bar for appointment as an Assistant Professor and the mischief rule will not apply, inasmuch as, there is no error which deserves to be corrected. The age bar of 50 years has been kept in mind as a rationale, inasmuch as, once a person is appointed with the age cap of 50 years, such a candidate will get promotional avenues to be further promoted as Associate Professor and a Professor. He further submits that all the petitioners who have challenged the rule have been appointed on contract basis and none of their rights are affected. He contends that there is no vested right in the petitioners to claim that they should be given relaxation or should also be extended the benefit of regularization. The action of the State in applying the rule which exists since 2013 is not arbitrary nor the rule would get invalidated merely because there has been a delay in the advertisement for regular appointments. There is no accrual of any rights in favour of the petitioners nor is there a legitimate expectancy for which relief as prayed for can be claimed. He, therefore, submits that there is no reason to strike down the rules as it has not been successfully challenged either on the ground of legislative competency, or being ultra vires any of the rules already existing or violating any other Constitutional provision. In the absence of any such ground available to challenge the vires of the rules, all the petitions are misconceived and they deserve to be dismissed.

21. He further submits that the alleged delay in the holding of the regular selections by itself does not label the age cap of 50 years as arbitrary. He submits that there is no nexus at all established nor is there any logic in this argument that the age cap of 50 years is arbitrary. There is, therefore, no reason to invalidate it on the ground of violation of Article 14 of the Constitution of India. The criteria, therefore, cannot be struck down or even read down for a purposive convenience to facilitate the writ-petitioners. The petitioners have prayed for a tailoring of the rules in their favour by removing the upper age limit cap on the ground that it serves no purpose. This argument as per the learned Advocate General is unwarranted, inasmuch as, the State being the employer it has brought about a rule for fixing the upper age limit of 50 years for appointment. The petitioners have been unable to establish as to how it is arbitrary. Their engagement on contract basis where the age prescription is different cannot legitimize a challenge on the basis of any convenience or

inconvenience so as to invoke the Heydon's Rule. He has emphasized that there is no basis for claiming relaxation or regularization over and above the age cap already prescribed. Replying to the arguments of undue hardship, he submits that the rules of 2013 were very much in existence and they cannot be termed as being irrational merely because they do not serve the purpose of the petitioners. That cannot be a ground for a purposive interpretation so as to favour the candidature of the petitioners.

22. The rule of mischief as explained in Heydon's case and explained subsequently in various decisions of the Supreme Court is applied as a rule of interpretation in order to avoid a manifest absurdity or incongruity. This rule of interpretation has to be applied after examining as to what was the previous law that was sought to be subsequently remedied by the Legislature and for that the true intent of the two legislations is to be gathered.

23. In the instant case, the age bar was absent, and was later on introduced with a view to prescribe an eligibility condition for regular appointment. The introduction of an age bar cannot by itself be said to be absurd or incongruous.

24. The delay in the holding of selections is not because of the prescription of the rule and, therefore, there is no mischief in the rule nor the introduction of age bar can be said to be incongruous to the purpose for which the rule was introduced. In our opinion, there is no scope of applying Heydon's rule in the matter.

25. Shri P.K. Shahi, learned Senior Counsel while addressing the Court in C.W.J.C. No. 3433 of 2018 had advanced his submissions and has further proceeded to address the Court in L.P.A. No. 407 of 2019 contending that the age of 50 years has been reasonably fixed and there is nothing on record to indicate that the cause of the State would suffer for dearth of candidates by placing an age cap.

26. The writ petitioners have come forward claiming that the action of the State is arbitrary and violative of Article 14 of the Constitution of India as they have a right to be considered for the post of Assistant Professors even if they have crossed the age bar of 50 years. For this they have supported their contention that the contractual appointments also give a right of continuance as they have been performing their teaching duties on the basis of such appointments, where they have been considered to be eligible for appointment. Thus, it is urged that if they have been found fit or are otherwise eligible for being appointed on contract basis, they cannot be treated to be a different class and excluded on the basis of an age cap.

27. In our opinion, a contractual appointment may not necessarily result in any right so as to give rise to a legitimate expectation. A right is an interest which is recognized and protected in law and is also known as a legal or just claim. A person should be possessed of a right so as to enforce it and therefore in order to demonstrate and establish that there exists such a right it will have to be seen

as to whether the contractual appointment results in the accrual of any such rights. A right possessed and recognized in law cannot be taken away. In our opinion, there is no such right which vested in the writ petitioners so as to give rise to a legitimate expectation to claim appointment on a regular basis or any relaxation on that count in future. A person has to have an accrued right and not a mere abstract right. It has to be capable of being enforced and not just inchoate. There are no positive recitals in the appointments of any of the petitioners on contract basis which may indicate a positive intent that they would be appointed on regular basis or would be entitled to any relaxation on account of such appointments. Thus, their appointment on contract basis by itself does not result in any accrual of such rights. The contractual appointment of the petitioners is defined by terms and conditions contained in the contract. Any variation therein would amount to altering the terms of the contract. There is no concluded contract between the Government and the petitioners to claim regularization. The acceptance of the contractual appointment by the petitioners and their continuance does not allow them to claim status of ad hoc continuance for a substantive period or even something similar to long continuance like work charge or temporary employees. The engagements being contractual in nature, the same cannot be modified by a judicial intervention to extend any such benefit.

28. We may also emphasize that keeping in view the theory of legitimate expectation and of hope in the broader sense the general rule is that a person is entitled to a remedy only if there is an existence of a right. Legitimate expectation is an exception to general rules. However, the action of an authority can be questioned if it defeats the consequence of a legal expectation which is a kind of a check on the administrative authorities so that the powers conferred on them are not exercised in an arbitrary manner. However, this legitimate expectation should be in conformity with the law and has to be a reasonable expectation. It is here that we would like to emphasize that an expectation to go even beyond the legally enforceable rights may not be the basis for claiming any benefit. A mere hope and aspiration has to be distinguished from a vested right. The Government has never assured the petitioners either in their contractual appointments or in the rules prescribing eligibility condition that they would be granted any relaxation or promising any regularization.

29. On the other hand, the power of rule making authority to prescribe an age cap of 50 years for appointment on regular basis has not been demonstrated to be an irrational or perverse criteria. The caption of an age is to ensure that a person entering a service has the capacity to occupy the office so as to render a reasonable period of service against the post for which he is appointed. An Assistant Professor has to have sufficient experience as prescribed in a teaching job of at least three years. This experience has to be achieved before the candidate reaches the maximum age prescribed whereafter he has chance of getting promoted as an Associate Professor and then as a Professor. This continuity in the teaching line with a hierarchy has not been established to be

unreasonable or impracticable. The contention of the petitioners that a person who has already attained the age of 50 years can also be appointed as an Assistant Professor is to ask for a prescription in addition to what has already been given and is not a ground which can establish that the age cap of 50 years is unreasonable or arbitrary or beyond the competence of the rule making authority. It is not even contrary to any of the rules already in vogue. Consequently, this Court cannot assume on any logic that the fixation of the upper age limit is otherwise arbitrary and, therefore, the argument of the creation of a different class does not stand to reason.

30. The other argument of undue hardship also cannot withstand the scrutiny of law, inasmuch as, if the said logic is extended then a person who may have attained more experience and would be even above the 70 years of age can always contend that his exclusion would cause undue hardship to him. A prescription of an age in Government service and the age of retirement are governed by well settled principles. It cannot be termed to be merely arbitrary simply because it is inconvenient to a person. The question of undue hardship is also misconceived, inasmuch as, the fixing of the age cap does not result in the deprivation of the writ petitioners from their livelihood. They still continue to be the doctors of the Bihar Medical Health Services Cadre and, therefore, their exclusion on account of the age cap does not render them job-less so as to destroy their expectations and hopes. The fixing of the maximum age cap of 50 years simply makes them ineligible for the teaching post and does not in any way disqualify them to continue as an employee in the existing cadre. This, in our opinion, is neither a hardship much less an undue hardship. The entire edifice of this argument, therefore, has no legs to stand and consequently we are unable to accept the aforesaid contention on behalf of the writ-petitioners.

31. The argument that the State Government should regularize the services of the petitioners also has no legs to stand, inasmuch as, there is neither any scheme for the regularization of the doctors appointed on contract basis, and any stray example of the year 2009 i.e. prior to the coming of the amended rules of 2013 cannot be a precedent so as to convert it into a right to claim regularization more so after the law declared by the Apex Court in the case of Secretary, State of Karnataka & Ors. Vs. Umadevi (3) reported in (2006) 4 SCC 1 and subsequent judgements. Even otherwise keeping in view the nature of the post were regular appointments have to be made with no rule for regularization, the said argument has to be rejected.

32. Much emphasis was laid on the fact that State Government has been relaxing the upper age limit in the past even while making contract engagements and if the petitioners have been found fit for being appointed on giving relaxation, then there is no reason as to why the Health Department cannot extend the benefit of relaxation by invoking its powers as referred to above.

33. We can only comment that the power to relax cannot be claimed as a matter of right, inasmuch as, it is not the case of the petitioners that such relaxation has

been granted to identically situated persons pursuant to the impugned advertisement. There is no clause of relaxation in the advertisement as well. The power of relaxation can be exercised by the government only in cases of undue hardship depending upon the circumstances which can lead to the conclusion of an existing undue hardship. The phrase "undue hardship" involves subjectivity but it has to be rationally interpreted. This will depend upon the facts of a particular case. Hardship is something "that which is hard to bear". It causes mental or physical fatigue or pain. It produces an oppressive feeling of injustice. Hardships are encounters on the road to fortune. But all hardships are not undue. A person chooses his career willingly or by a choice amongst compulsive options. In this adventure one does not get to achieve everything. One has a choice to aspire but by itself a desire or a choice is not necessarily a legal right. A compelling vested interest if chased, and if obstacles come by in the shape of a hardship, then the blame cannot be transferred on somebody else. One's own choice that may limit future aspirations is not somebody else's deliberate intent or oppression. The rule of age cap by the government is not an act of deliberate oppression or designed to put anyone to a deliberate disadvantage. The hardship complained of is not undue, and in our analysis on the facts of the present case is not a hardship at all. A prescription of age to limit an opportunity is widely accepted in all services. The power to fix it or vary it lies with the employer. If the argument is accepted then any prescription would be liable to struck down.

34. It appears that the Government has been varying the age prescription as urged by the petitioners. We, however, find that the statutory age continues to be the same for regular appointments. Delay in regular selections has resulted in the hardship as claimed by the petitioners. The petitioners have to remind themselves of a famous quote "In the long run we shape ourselves. The process never ends until we die. And the choices we make are ultimately our own responsibility." The petitioners contend that they were hoping and expecting the selections to be held timely but the slackness on the part of the Government in not holding selections promptly should not adversely affect their right to participate in the selections for which the age bar needs to be relaxed or varied as was done in the past. While considering their argument on the anvil of Article 14 of the Constitution of India, if the inaction of the Government and its decision to relax the age for contract appointments is treated as a valid benchmark, then this would perpetuate ad hocism in a regular selection. The seeds of concession to gain a short term measure would be detrimental for staffing the teaching faculties of medical institutions. Even otherwise we are unable to fathom as to why the rules provide for a compulsory experience of a candidate as a member of the Bihar Health Services Cadre when the rules clearly describe the two cadres of Health Services and Medical Education Services to be separate. A Teaching Cadre is ordinarily a pure academic stream but here we find that even though the entry point as of now in the Medical Education Cadre is that of Assistant Professor yet a provision of experience has been introduced that requires a candidate to have certain years of experience in the Bihar Health Services Cadre.

This arrangement appears to be somewhat a messy compromise that may require a revisit by the rule making authority or the Medical Council of India. Care should be taken to have the best of talents as Medical attendance is as important to human life as air, water and food. The argument advanced with the aid of the ratio in the case of Ram Krishna Dalmia (*supra*) is that the petitioners should be protected against such State action as the consequence of the impugned notification results in discrimination. The argument appears to be that the Government itself had earlier not prescribed any age cap but later on altered the rule, the purpose whereof would be frustrated on account of no selections having been held timely. It is, therefore, contended that if the State Government failed in its attempt to make regular selections timely, then it should not preclude those persons from participating in the selections who could have participated and got selected had the selections been held earlier. The submission is that on the other hand realizing its own deficient conduct the Government itself relaxed the age in matter of contractual appointment and consequently fixing of the maximum age cap now for regular selections serves no purpose by eliminating those who are otherwise eligible.

35. Article 14 of the Constitution inheres in it the principles of equality so as to prevent discrimination. The prescription of an age bar by a rule is neither arbitrary nor discriminatory and in the instant case the petitioners have been unable to establish that the rule is *ultra vires*. At the same time, the effort is to seek relaxation in the rule as the petitioners have crossed the age bar and are now not within the eligibility zone. In our considered opinion, a delayed action or prolonging of regular selections by itself cannot invalidate the rule. The prescription is correct but while executing selections the Government delayed the holding of selections. This cause of delay by itself cannot result in a prescription of a right in the petitioners to seek employment in violation of the rule which otherwise is valid. A disadvantage accrued on account of the inaction of the Government in holding regular selections does take away an opportunity to seek better employment, but then the rule treats everyone equally. The rule is not intended or directed to generate hostile discrimination. It is intended to maintain uniformity in conditions of eligibility. We are unable to comprehend as to how there is failure of any purpose or rationality of any nexus with the object of prescribing a rule. The petitioners even otherwise are members of the Bihar Health Services Cadre and a limited work experience makes them eligible for being appointed as an Assistant Professor. It is, however, subject to the age prescription which does not appear to be irrational, arbitrary or unconstitutional. Once the *vires* of the rule is protected then any mischief in its execution by the government by causing delay will neither render the rule invalid nor will it bring about any accrual of right in favour of the petitioners to claim a different treatment.

36. The petitioners, therefore, in essence, want relaxation in age which is the discretion of the Government provided it is permissible under the rule. This Court does not find any mischief in the rule so as to iron out any creases on the ground

of discrimination or arbitrariness.

37. We may add that we do not approve a broad band variation in the prescription of age so as to give leverage for granting relaxation as and when it may be convenient or suitable. There should be rational thinking behind the prescription of an age and should not appear to have been tailored for only convenience but then the same is not a subject of adjudication by this Court which can be best determined by the Government itself looking into the requirement of faculties for medical education. We, therefore, do not find any reason to accept the arguments advanced on this score.

38. The principle on which regularization was considered in the case of GRIDCO Limited (*supra*) would not apply in the present case keeping in view the peculiar facts that most of the petitioners are continuing in the Bihar Health Services Cadre and their attempt is to get regularized in the Medical Education Cadre. In absence of any rules of regularization this is not permissible, and even otherwise the petitioners are already in their job in their regular cadre services. They therefore cannot claim a right of employment in a more suited manner of their choice for which they are not eligible under the rules to be considered for regular appointment because of the age cap.

39. We, therefore, cannot compel the government to exercise its power of relaxation when we have come to the conclusion that the argument of the petitioners on the strength of undue hardship cannot be sustained. We are, therefore, not inclined to command the government through a mandamus for grant of such relaxation. It is for the government to take a decision on this score for which a writ need not issue.

40. We may, however, clarify that the State Government will adhere to the rules of reservation without crossing constitutional bars and while proceeding to prepare a list, care would be taken in this regard of the arguments that have been advanced by Sri Chittranjan Sinha, learned senior Advocate in C.W.J.C. No. 12945 of 2017 and the illustrations pointed out therein.

41. Thus, for all the aforesaid reasons, we find that the age cap of 50 years as fixed in the rule does not suffer from want of legislative competence, or is otherwise ultra vires the existing rules or is contrary to any of the constitutional provision including Article 14 of the Constitution of India. The same does not result in any unreasonable classification and the rationality of the upper age limit cannot be questioned merely because it causes inconvenience or some hardship to the writ petitioners. The case of undue hardship as set up by the petitioners, therefore, is unsustainable and, therefore, a challenge raised to the vires of 2013 Rules in all the writ petitions fails and the writ petitions are hereby dismissed.

42. In so far as L.P.A. No. 407 of 2019 is concerned, the very maintainability of this appeal had been challenged and vide our order dated 10.05.2019, we had rejected the contention raised on behalf of the respondent.

43. Shri Vinod Kanth, learned Senior Counsel for the respondent has urged that to contest the petition cannot be taken away and therefore, there is no consent on behalf of the answering respondent to hear the main writ petition for the purpose of this appeal.

44. On the facts of the present case, what we find is that the challenge raised in the writ petition before the learned Single Judge is to the advertisement which is based on the 2013 Rules and the subject matter of challenge remains the same. In the present set of cases which have been heard by us, all analogous matters had been earlier directed to be clubbed together and heard finally. The writ petition giving rise to this appeal has been filed later on to the passing of the aforesaid orders and, therefore, the writ petition did have a separate existence. We are however, unable to accept this contention of Shri Kanth on the peculiar facts in the present case where the main issue stands resolved by us by the judgment delivered in all the other writ petitions relating to the validity of the rule of the upper age limit of 50 years as narrated above. There would be no purpose served now for leaving the said writ petition to be decided by the learned Single Judge when all the legal issues have been determined in the judgments referred to above. The maintainability of this appeal has already been upheld by us vide our dated 10.05.2019. We affirm the same and the said order shall form part of this final judgement in this appeal.

45. The prayer made in the writ petition giving rise to this appeal being concluded by the findings recorded in relation to the other writ petitions challenging the same rules, we see no reason to keep the said writ petition surviving and it does not, therefore, require a consent for its final disposal.

46. L.P.A. No. 919 of 2017 has been filed assailing the judgment dated 24.05.2017. The age relaxation granted to in-service Doctors by five years has been withdrawn. The learned Single Judge has recorded ample reasons to support the said withdrawal and we see no reason to interfere with the same. L.P.A. No. 919 of 2017 is, therefore, dismissed.

47. We accordingly, for the reasons disclosed in the judgment in respect of the other writ petitions find that the challenge raised being identical, the same deserves to be answered on the same terms. Accordingly, L.P.A. No. 407 of 2019 is allowed and C.W.J.C. No. 2434 of 2019 is also hereby dismissed and stands disposed of.