

(1992) 07 PAT CK 0008
In the Patna High Court
Case No : C.W.J.C. No. 3624 of 1991

Indu Rani

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 07-07-1992

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Citation : (1993) 1 BLJR 37

Hon'ble Judges : Satya Brata Sinha, J; Binod Kumar Roy, J

Bench : Division Bench

Judgement

Binod Kumar Roy, J

1. The petitioner through this writ application prays for issuance of a direction to the Respondent to appoint her as an Auxiliary Nursing Mid-wife (hereinafter referred to as A. N. M. for the sake of brevity).

2. Relevant facts as stated by the petitioner in her writ application and four supplementary affidavits are to this effect. Raj A. N. M. Training School, Muzaffarpur is a recognized institution. The recognition was granted by the Government of Bihar, Patna vide memo No. 397(6), dated 29-3-1989 (as contained in Annexure-2) of the Joint Director, Health Government of Bihar, Patna. In view of the aforementioned recognition the Bihar Nurses "Registration Council, Patna also accorded permission to the Students of Raj A. N. M. Training School, Muzaffarpur to appear in the examination. The Bihar Nurses Registration Council, Patna also accorded temporary recognition (affiliation) vide memo No. OON. No. 22/B N. R. C., dated 31-7-1990 (as contained in Annexure-12). Under the Bihar and Orissa Nurses Registration Act, 1935, the State Government is empowered to recognize nurses training institute. The Bihar Nurses" Registration Council is empowered to affiliate a recognized Institute for the purpose of conducting Nursing examination. Vide notification bearing memo No. 17832, dated 18-6-1955 of the Health Department, Government of Bihar (as contained in Annexure-13) all successful trainees are entitled to be absorbed in the services

of the State Government against the posts of A. N. M. The trainees of Kurji Holy Family Hospital A. N. M. School, Patna were appointed on the post of A. N. M. earlier which is also a recognized Institution. In the State of Bihar the examination of A. N. M. course and General Nursing and Midwifery Course are being conducted by the Bihar Nurses' Registration Council, Patna. In the nursing cadre (A. N. M. and Staff Nurse Grade "A" Post) the appointments are being made batch wise on the basis of the marks obtained in the examination. Earlier the appointments of A. N. M. was State Government vide Health Department Teleprinter Message No. 144, dated 10-5-1990 which, however was withdrawn vide Health Departments letter No. 19, dated 11-1-1991. In view of this withdrawal, Respondent No. 3, the Deputy Secretary, Health Government of Bihar, Patna vide memo No. 166(6), dated 7-2-1991 (as contained in Annexure-7) directed all the Civil Surgeons of the State of Bihar to appoint the trainee A. N. M. on the posts of A. N. M. since the Central Government was also pressing. About 2500 posts of A. N. M. are vacant in the State. In view of the directions contained in Annexure-4, the Civil Surgeons are appointing trained A. N. Ms. The candidates who have passed in April, 1990 batch having lesser marks than the petitioner have been appointed. The process for appointment of A. N. Ms. is that the Civil Surgeon cum-Chief Medical Officer of the district prepares a panel of the trained A. N. Ms. of the candidates passing from the A. N. M. Training School situated in the district in order of merit and thereafter the Civil Surgeon of the district appoints the trained A. N. Ms. against the vacant posts and in case of more or less posts than the trained A. N. Ms. he informs the Director in Chief Health Services, Government of Bihar, Patna (Respondent No. 4) who in his turn directs other Civil Surgeons of the districts to appoint them. For appointment of G. N. M. (Staff Nurse Grade "A") list of trained G. N. Ms. are sent by the Bihar Nurses' Registration Council, Patna to Respondent No. 4, who prepares a panel in accordance with the marks obtained in the G. N. M. final examination and the trained G. N. Ms. are appointed marks-wise and batch-wise by Respondent No. 4 vide Memo No. 19, dated 11-1-1991 Respondent No. 2, the Secretary, Health Government of Bihar, Patna (as contained in Annexure-8) constituted a Committee at the district level for appointment against the post of Class III and IV categories which include the posts of A. N. M. which is also known as Grade "B" in the nursing cadre. Under Clause. *** of the Advertisement (as contained in Annexure-9) for admission in A. N. M. course, the State Govt. is duty bound to appoint the trained A.N. Ms. on the post of A.N.M. in any district and that the candidates selected for admission in A. N. M. course have to fill up bonds that after completing the training they have to mandatorily serve the State Government for atleast five years, After lifting the ban on appointment to the posts of Class III and Class IV categories, the Additional Director, Health Services, Government of Bihar.. Patna (Respondent No. 5) directed the Civil Surgeon cum-Chief Medical Officer, Darbhanga vide memo No. 308(6), dated 5-4-1991 (as contained in Annexure-10) to appoint one Smt. Anjani Kumari, Roll No. 657 of October, 1989 batch and similarly, Civil Surgeon cum-Chief Medical Officer, Godda, vide memo No. 1151, dated 3-8-1991 (as

contained in Annexure-10/1 appointed one Smt. Hiramani Kumari of April, 1990 batch, who got 685 and 701 marks respectively. The procedure for appointments on the post of A. N. Ms. are made by the State Government through Civil Surgeon cum-Chief Medical Officer batch-wise and according to the marks obtained in the A. N. M. examination conducted by the Bihar Nurses Registration Council, Patna. The petitioner is a trainee of Raj A. N. M. Training School, Muzaffarpur. She appeared in the A. N. M. examination held in April, 1990 conducted by the Bihar Nurses' Registration Council, Swasthya Bhavan, Sultanganj, Patna. She topped amongst the first Divisioners in the said examination securing 741 out of 900 marks. The petitioner has also prayed for grant of similar relief in relation to other trainees of Raj A. N. M. Training School, Muzaffarpur. The petitioner has been denied appointment violating Articles 14 and 16 of the Constitution of India.

3. Counter affidavit has been filed only by Respondent No. 5, in which it has been stated as follows : That the petitioner has no legal right to be appointed; that appointments are made from the Government Institutions and not from the private Institutions; that there is no question of violation of Articles 14 and 16 of the Constitution; that Kurji Holy Family Hospital is a Government approved Institution; that the Government appoints only those A. N. Ms. who have passed from Government Institutions sanctioned by the Government; that Raj A.N.M. Training School, Muzaffarpur is not recognised by the Government; that the Government has only recommended the Institution for recognition and regularisation vide memo No. 397 (6), dated 29-3-1984 (Annexure-2) and the trainees were allowed to appear in the examination; that the A. N. Ms. getting training were not ordered for their appointment by the Government; that the trainees are not entitled for appointments; that the trained A. N. Ms. of Raj A. N. M. Training School, Muzaffarpur has no right to claim for appointment; and that the writ application is fit to be dismissed.

The submissions:

4. Mr. Chandra Shekhar learned Counsel appearing for the petitioner, submits as follows :

(i) The petitioner who had obtained highest marks in April, 1990 examination of A. N. M. examination conducted by Raj A. N. M. Training School, Muzaffarpur a private but recognized Institution, the action of the Respondents in not appointing her was apparently illegal, arbitrary and un-constitutional.

(ii) No distinction can be made between those candidates who have passed their examination from a private institution vis-a-vis any Government recognized Institutions;

(iii) In view of the instructions issued by the Government as contained in Clause No. 422 of the Bihar Health Manual, the appointment as A. N. Ms. is a matter of course.

5. Learned Standing Counsel No. II appearing on behalf of the Respondents on the other hand, contends that the Government is well within its right in making appointments of A. N. Ms. only from those Institutions which are recognised by it and the petitioner having secured Diploma from a private Institution, her case has rightly not been considered. This is a matter of policy adopted by the State Government which cannot be questioned petitioner or by by this court.

The Findings

6. The most question, however, is whether the appointments in question can be made against the posts of A. N. Ms. de hors of Articles 14 and 16 of the Constitution. The answer must be in the negative.

7. Clause 422 of the Bihar Health Manual runs as follows :

422. Auxiliary Nurse Mid-wives training.--The object of this training is to prepare workers who would combine domiciliary nursing and midwifery with simply health teaching. The period has been reduced to two years so that large number of workers can be trained in a short time. The curriculum is simple, with emphasis on domiciliary nursing and midwifery.

The training is imparted at present in Darbhanga, Gaya and Ranchi. Another training centre has been opened at Bettiah. The qualification required and facilities offered are--

(i) Qualification Middle Passed. (ii) Minimum age 17 years. (iii) Training period 2 years. Facilities--During the training period the trainees get the following allowances besides free accommodation:

Stipend... Rs. 28 per month Messing allowance,... Rs. 40 per month Dhobi allowance... Rs. 2-8-0 per month Uniform allowance... Rs. 43-12-0 per annum. After successful completion of the training, Auxilliary Nurse Midwives are absorbed in the service of State Government in the scale of pay Rs. 60-2-80-E. B.-2-100 plus allowances.

8. This clause has been strongly relied upon by the learned Counsel for the petitioner stating that after successful completion of her training, the petitioner should have been absorbed. I, however, on a bare perusal of the aforementioned clause, find that it is applicable only in regard to those trainees, whose training have been imparted at Darbhanga, Gaya, Ranchi and Bettiah and only they are to be absorbed in the services of the State Government and in the pay scale as mentioned therein. I also fail to appropriate the stand of Respondent No. 5 in regard to Kurji Holy Family Hospital inasmuch as in Clause 422 the said Institution does not figure. However, I do not want to disturb the appointments already made in terms of Clause 422 above.

9. Clause 422 of the Bihar Health Manual (supra), in my view, appears to violate the constitutional mandate enshrined in Articles 14 and 16 of the Constitution of India but since the petitioner has not challenged its vires, I need not struck it

down.

10. I find some policy decision taken by the State in the documents as contained in Annexures-7, 8 and 9. During hearing it was contended by the learned Standing Counsel No. II that there is one more policy decision of the Government, who despite our repeated queries to furnish sufficient materials before us on 18-5-1992 and 21-5-1992 to justify existence of the alleged policy decision failed to produce before us. Even Respondent No. 4. was present in Court on 21-5-1992 when the hearing took place in Chambers and judgment reserved but no such decision was produced. In the said view of the matter, it is a high time that the Respondents should make a policy decision taking into account the legal position that they cannot discriminate between those trainees whose trainings have been imparted at Darbhanga, Gaya, Ranchi and Bettiah vis-a-vis such trainees who have obtained training from a private recognized Institution.

11. For the reasons aforementioned, I allow this writ application in part but without cost with a direction to the Respondents to evolve an uniform policy within three months in regard to the appointments of A. N. Ms. irrespective of the fact that they have been imparted trainings at Darbhanga, Gaya, Ranchi and Bettiah or for the matter of that at Karji Holy Family Hospital vis-a-vis those trainers who have imparted training in private recognized Institutions and consider the case of the petitioner for her appointment as A. N. M.

12. If for any reason the State of Bihar in its Health Department fails to come out with such a policy decision within three months, in that event also the Respondents are commanded to consider the case of the petitioner for appointment as A. N, Ms. without making any distinction in regard to the fact that she had imparted training at Raj A. N. M. Training School.

S. B. SINHA, J.--The fact of the matter has succinctly been stated in the judgment prepared by my learned Brother B. K. Roy, J. thus it is not necessary to re-state the same once over again.

13. It is not in dispute in view of Annexure-2 to the writ application that the petitioner and other students of Raj A. N. M. Training School, Muzaffarpur were allowed to sit in A. N, M. Examination by Nurses Registration Council. It is also not in dispute that the said institution was granted temporary recognition.

14. It is further not in dispute that in the examination held in April, 1990, the petitioner obtained 741 marks out of 900 marks. The petitioner has brought on records appointment letters of several candidates who passed in A. N. M. Examination from Kurji Holy Family Hospital (Annexure-5).

15. From a perusal of Memo No. 166(6), dated 7-2-1991 (Annexure-7), it appears that State had withdrawn the embargo earlier but in the matter of appointment of A, N. M. vide Teleprinter Message No. 144, dated 10-5-1990.

16. The petitioner in paragraph 14 of the writ application had further contended

that the Civil Surgeon of various districts have been making appointments of other persons who have obtained their training from Raj A. N. M. Training School.

17. It has further been contended by the petitioner in paragraph 2 of the supplementary affidavit that nurses securing less marks than the petitioner have been appointed by the Civil Surgeon in the district of Bihar.

18. The petitioner has further brought on records that after issuance of the aforementioned Memo No. 7-2-1991 (Annexure-7), Smt. Anjani Kumari of October, 1989 batch has been appointed by the Civil Surgeon-cum-Chief Medical Officer, Darbhanga and Smt. Hiramani Kumari of April, 1990 batch has been appointed by the Civil Surgeon-cum-Chief Medical Officer, Godda vide Memo No. 308 (6), dated 5-4-1991 and Memo No. 1151, dated 3-8-1991 respectively (Annexures, 10 and 10-A to the Supplementary affidavit).

19. In the third supplementary affidavit, the petitioner has further asserted that one Sabina Murmu who got 612 marks and passed the examination held in April, 1990 was appointed by Civil Surgeon-Cum-Chief Medical Officer, Godda vide Memo No. 1169, dated 5-8-1991 (Annexure-11).

20. These assertions of the petitioner have not been controverted and thus would be deemed to have been admitted. However, from a perusal of a circular letter dated 11-1-1991 which is contained in Annexure-8 to the writ application, it appears that the State made a substantial change in the recruitment rules in so far as appointments were directed to be made by the Health Department at the district level, wherefor a committee has been constituted. In the said circular letter, it had further been provided that if any objection is raised with regard to the appointments recommended by the said committee.

21. From a perusal of Annexure 10/1 it appears that Hiramani Kumari was appointed pursuant to the direction of the Health Department dated 7-2-1991 (Annexure-7) and the committee constituted at the district level for the aforementioned purpose.

22. In my opinion, therefore, there was absolutely no reason as to why the candidature of the petitioner was not considered for appointment by the district level committee in terms of Annexures-7 and 9 aforementioned. Denial or deprivation of the petitioner from an opportunity of being considered for appointment in view of the appointment of other candidates would normally attract the wrath of Articles 14 and 16 of the Constitution of India.

23. In terms of Articles 14 and 16 of the Constitution of India, every citizen of India is entitled to be considered for appointment provided, he/she holds the requisite qualifications therefor.

24. The State of Bihar issued a Notification dated 17th February, 1959 whereby and whereunder it framed rules regarding nursing services in the State Commonly known as "Bihar Nursing Services Rules, 1959.

By reason of the said rules, a cadre of nursing services was constituted known as the Bihar Nursing Services. The said rules evidently had been framed in terms of the proviso appended to Article 309 of the Constitution of India.

25. So far as the appointment in the posts of Auxiliary Nature Midwives are concerned, in terms of Rule 3(xiv) of the said rules, the minimum qualification prescribed therefore is: "Basic educational qualification VII standard. Vernacular pass plus A. N. Midwifery Certificate from a recognised Midwifery School."

26. As noticed hereinbefore, it is not in dispute that the petitioner has the minimum qualification for appointment in the said post inasmuch as she obtained training from a recognised institution and passed the A. N. Midwifery examination held by the Bihar Nurses Registration Council.

27. The aforementioned Council has been constituted u/s 3 of the Bihar and Orissa Nurses Registration Act, 1935.

Section 2(e) of the said Act defines "midwife" to mean a person who has been granted a diploma of midwifery recognised by the Council or who has been registered under clause (b) of Sub-Section (2) of Section 10.

Section 2(f) defines "nurses" to mean a person who holds a certificate in nursing from any institution recognised in this behalf by the State Government.

28. It is, therefore, clear that the petitioner fulfils the conditions for getting herself registered as midwife and nurse.

29. Section 10 of the said Act provides for registration of nurses, health visitors, midwives, trained dais and dais, if the conditions laid down therefore are fulfilled.

30. It is, therefore, also clear that the Bihar Nurses Registration Council is a statutory authority and has a wide power relating to grant of registration of nurses, etc.

31. As it has not been denied or disputed by the State in its counter affidavit that the petitioner has obtained highest marks in the examination held by the Bihar Nurses Registration Council in April, 1990, thus there cannot be any doubt whatsoever that she was entitled to be considered for appointment.

32. It is true that in terms of clause 422 of the Bihar Health Manual, the trainees who were to be imparted training in Darbhanga, Gaya, Ranchi and Bettiah Nursing College Schools were directed to be absorbed automatically.

33. However, as noticed hereinbefore, the A. N. Ms. who obtained training from Kurji Medical Hospital were also directed to be appointed automatically by the State of Bihar.

34. The State in its counter-affidavit has contended that Kurji Holy Family Hospital is a Government approved institution. There is a marked distinction between a Government run training institution and an institution approved by the Government. All institutions which are recognised by the State must be held to

be Government approved institutions. No distinction, thus, could be made by the State amongst the institutions which are run by private bodies i.e., other than the Government.

35. Thus, if the students who had passed from Kurji Holy Family Hospital could be appointed; I fail to see any reason as to why the petitioner who had also been imparted training as an Auxiliary Nurse and Midwife from a recognised institution would be denied appointment.

36. Clause 422 of the Bihar Health Manual is an administrative instruction. Such administrative instructions can be supereded by subsequent administrative institutions.

37. From the Office order dated 7-2-1991 (Annexure-7) it appears that a new policy decision has been adopted in view of existence of a large number of vacancies. A direction was issued to all Civil Surgeons by the State in view of the fact that the Union Government has been pressing the authorities to appoint the Auxiliary Nurse and Midwives in the State of Bihar and as a large number of vacancies existed.

38. Further, as noticed hereinbefore, the Circular letter dated 11-1-1991 as contained in Annexure-8 also suggests to how such appointments are to take place.

39. Once an examination is held by a statutory authority appointments have to be made on the basis of the diploma granted pursuant thereto without taking into consideration as to whether the candidate obtained training from a Government institution or otherwise. Marks obtained by a candidates in an examination held by a statutory body may not be the only but certainly is one of the factors for considering the merits of the candidates.

40. It may be that in the year 1955 there were only four institutions where the training to nurses, midwives etc., were being imparted and in view of shortages in the availability of the candidates, those were being imparted training in those institution were directed to be absorbed directly. Such a provision had been made at that point of time evidently in order to give incentive to the women to come forward and adopt the profession of Nursing. The situation must have changed after creation of several institutes which are either run by the Government or are recognised by it.

Once an institution is recognised by the State, any candidate passing an examination held by a statutory body like Bihar Nursing Registration Council cannot be discriminated against only on the ground that they did not obtain training from a Government running institution. If such a construction is put, the same may be questioned as violative of Articles 14 and 16 of the Constitution of India.

41. However, as in this case the vires of the aforementioned provision has not been questioned but it has merely been contended that the petitioner should be

provided with the same opportunity for being considered for appointment along with those who were imparted training in the Government run institution; it is not necessary for this court to consider the said question at this stage inasmuch as in absence of foundational facts have been pleaded and as the State was not given an opportunity to rebut the said contention, this Court should not declare the said provision as unconstitutional.

42. However, there cannot be any doubt that it is open to this Court to construe clause 422 of the Bihar Health Manual in the light of the subsequent policy decision of the State as mentioned hereinbefore and give appropriate relief to the petitioner.

43. Rule 442 of the Bihar Health Manual came into existence prior to framing of Bihar Nursing Services Rules, 1959.

Cadre, as is well known, represents the strength of service. A cadre constituted under a rule framed under proviso to Article 309 of the Constitution of India must conform the provisions of Articles 14 and 16 of the Constitution of India, whenever thus a cadre has to be constituted, the requirements of Article 16 of the Constitution of India have to be complied with.

It must therefore, be presumed that only in that view of the matter the State adopted a policy decision relating to a manner of recruitment of all Class III and Class IV staffs under the Health Department of the State of Bihar which includes the Auxiliary Nurses and Midwives.

44. It is, further relevant to note that in the advertisement as contained in Annexure-9 to the writ application, all the candidates who intended to seek admission in any of the training institutes situated at Arrah, Gaya, Bhagalpur, Ranchi, Monghyr, M. J. K. Hospital, Bettiah, Madhubani, Muzaffarpur, Chapra, Hazaribagh, Daltonganj, Hajipur, Motihari, Sitamarhi, Begusarai, Jamshedpur, Giridih, Dumka, Simdega, Badh, Sasaram, Hathua, Samastipur, Saharsa, Purnia, Katihar, Kisanganj, Chaibeas, Deoghar, Bihar-shariff, Dhanbad and Ladies Health Training, Patna City, were directed to furnish an undertaking that they would serve the State for a period of five years. The said advertisement as contained in Annexure-9, thus, is not limited to those institutions which are only run by the State or as mentioned in Rule 422 of the Bihar Health Manual.

45. Taking thus all facts and circumstances into consideration. I am of the opinion, that the State must implement its own policy decisions in relation to appointment of the petitioner as Auxiliary Nurses and Midwives in terms of Annexures-7, 8 and 9 aforementioned. The consideration of the petitioner's appointment by the competent authority must take place within a period of three months from the date of receipt of a copy of this judgment.

46. Before parting with this case, however, I may observe that it is necessary that the State should come out with a clear-cut policy decision as early as possible that in future any confusion in this regard may not arise enabling the

authorities of the State of Bihar may not act indiscriminately and on their whims and caprices.