

(2000) 03 PAT CK 0051
In the Patna High Court
Case No : C.W.J.C. No. 6668 of 1998

Kausalaya Devi and Others	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 10-03-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) 2 PLJR 656

Hon'ble Judges : Shashank Kumar Singh, J

Bench : Single Bench

Advocate : Ganesh Prasad Singh, for the Appellant; S.K. Ghosh, for State and Ashok Kumar Choudhary, for B.P.S.C., for the Respondent

Judgement

Shashank Kumar Singh, J.—After hearing learned Counsel appearing for the Petitioners, State and the Bihar Public Service Commission, present application with the consent of the parties is being disposed of finally at this stage itself.

2. Present application under Article 226 of the Constitution of India has been filed for quashing the advertisement No. 59/98 of Bihar Public Service Commission (hereinafter to be referred to as "B.P.S.C.") inviting application forms to the post of Auxiliary Nurse Midwifery (hereinafter to be referred to as "A.N.M.") on the district level vacancies and a further direction has been sought for directing the Respondents to appoint the Petitioners to the post of A.N.M., as according to learned Counsel, Petitioners fell under the category of those A.N.M. who had been directed by this Court to be appointed on that post on the vacancies which fell vacant prior to coming of the new rules, after calculating such vacancies.

3. The grievance of the writ Petitioners is that against the publication of above mentioned advertisement No. 59/98 dated 17.8.98 whereby B.P.S.C. on receipt of requisition from the Health Department had invited applications from the desirous and eligible candidates to fill up the post of Auxiliary Nurses Midwifery within the different hospitals and allied institutions in the State of Bihar, the

advertisement in question has been impugned and assailed by the Petitioners on the solitary ground that the new mode of selection adopted by the State Government, for such appointment to the post of A.N.M./Lady Health Visitor/Staff Nurse Grade "A" vide resolution dated 10.6.96, was not applicable in so far the same related to the Petitioners as according to learned Counsel, Petitioners had become eligible for being appointed on the post of A.N.M. prior to coming in force of the said resolution dated 10.6.96 and as such, they are liable to be appointed in conformity with the earlier selection process under which the procedure laid down in Bihar Health Manual to be taken recourse to which contemplates that on successful completion of training from a recognized institution, the candidates are to be absorbed on such various posts, after the eligibility and suitability are properly scrutinised and verified by a validly constituted selection committee by the District Magistrate.

4. The factual matrix of the case between the parties are quite plain and simple. The writ Petitioners are the trained A.N. Ms. who had successfully completed their training and had also emerged successful in the examination conducted by the Bihar Nurses Registration council. It has been contended by the Counsel for the Petitioners that the State Government vide Annexure-1, had laid down the procedure for appointment of class-III and IV employees and had thereby resolved to constitute a selection committee at the district level duly headed by the District Magistrate. On the strength of direction issued by the State Government to all Civil Surgeons of the district vide letter No. 166(6) dated 1.2.91 (as contained in Annexure-2) by which the latter were requested to take needful steps in the direction to fill up all existing vacant posts of A.N. Ms; and accordingly vide Annexure-3 within the surgency of Vaishali 38 ANM's were even provided with the appointment letters. Simultaneously it was contended, a waiting list was also prepared wherein the names of Petitioners have been included. According to the own showing of the writ Petitioners apart from the said 38 appointments other 29 seats were left vacant to be filled up from the candidates hailing from the reserved categories. A categorical reference has been made by the writ Petitioners to the order dated 3.10.94 passed in respect of batch of writ applications as contained in Annexure-6; whereby and where under, the Petitioners of the said writ applications, who had agitated their grievance that prior to 1993 the mode of selection to such posts in question was to appoint the candidates on their mere completion of training subject to availability of vacancies which was altered since 1993 to the extent that on such successful completion of training a candidate was required to pass the examination conducted by Nurses Registration Council. This Court while disposing of the batch of the said writ applications had directed the concerned Respondents that in respect of the vacancies occurring earlier to the revised procedure, the mode of selection shall be the same as was in existence prior to the revised procedure and in terms of the said direction the cases of the respective writ Petitioners were ordered to be considered within the stipulated time frame. At this juncture this Court may usefully refer to the several decisions of the Apex Court, as

reported in A.A. Calton Vs. Director of Education and Another, besides there are several other decisions which have gone to perpetually settle the law in this regard that once a process of selection starts the mode of appointment is to be followed on the basis of the Rule as was existing at the time of initiation of such selection, if the rule is not given any retrospective effect. It is equally well settled that a valid selection process will be deemed to have commenced with the publication of an advertisement, which only, goes to confer a legal right to an eligible candidate to consider his candidature on merit. In the instant case at hand, no attempt has been made by the Counsel for the Petitioners to demonstrate that any advertisement was published to fill up such posts in question within the surgency of Vaishali; obviously for the reason that since there was no such factual pleadings made in the writ application and there was nothing brought on record to conclusively uphold as to whether any advertisement was brought forth to effect the appointments of 38 A.N. Ms or to prepare a waiting list of candidates for such appointment on the basis of which the writ Petitioners are staking their claim for such appointment. In respect of such contention it has already been well settled that mere empanelment is only a condition of eligibility for being considered for any appointment; it certainly does not go to create any indefeasible right to be appointed, unless the relevant rules indicate to the contrary. No such rule has been brought to my notice and hence this Court bound by the law laid down by the Apex Court as reported in Shankarsan Dash Vs. Union of India, whereby and where under in respect of some aggrieved successful candidates it was held that their inclusion in the select list does not confer any indefeasible right on them to be appointed and moreover it was also held that any decision to adopt a different reservation policy can be a justifiable cause for halting further appointments from the panel or select list. Such an action cannot be condemned on the ground of arbitrariness or illegal discrimination. In the said reported decision selection had been set in motion pursuant to a valid advertisement and on its basis the panel or select list were prepared whereas in the case of present writ petitions as a for stated, no end eavour has been made to show whether any valid advertisement was published prior to appointing the said 38 AN Ms or in empanelling the names of writ Petitioners in the said waiting list as contained in Annexure-4 to the present writ application, which was admittedly prepared in the year 1994 and after much delay and after the said waiting list had already spent its force and significance the present writ application was filed in the year 1998. This Court must" further not lose sight of the fact that new procedure for appointment to such posts had already come into force with effect from 10.6.96.

5. It has been brought to the notice of this Court by Counsel appearing for B.P.S.C., that in a batch of writ applications, being C.W.J.C. No. 6870 of 1996 and analogous cases (Sudha Kumari and Ors. v. The State of Bihar and Ors.) disposed of on 25.7.97 this Court had the occasion to test the legality and validity of the said new mode of appointment as laid down in resolution in memo No. 435(6) dated 10.6.96 by which new procedure for appointment to such posts

in question by way of direct recruitment and promotion was outlined. This Court vide order dated 25.7.97 in the above mentioned case, while upholding the validity of the said resolution had directed the Respondents as follows:

(i) The Respondents will make appointment to the post of A.N.M. in the district cadre of Katihar, Godda, Saharsa and Darbhanga in pursuance of advertisement published on 9.3.96 (Newspaper "AAJ") 10.3.96 (Newspaper "HINDUSTAN"), 4.2.96 (Newspaper "HINDUSTAN") and 27.5.96 (Newspaper "HINDUSTAN") respectively.

If any such advertisement was published for appointment to the Post of A.N.M. for any other district cadre, then they will be filling up the post out of such advertisement.

The candidates, who have applied in pursuance of such advertisement only their cases are to be considered.

(ii) The Respondents will follow the mode of selection as was existing at the time of advertisement. That means if the appointment used to be made on the basis of marks obtained by a candidate in the relevant examination/interview/written test, the same mode will be applicable for appointment out of those advertisement.

(iii) So far as procedure of appointment is concerned, such procedure of appointment is to be followed in terms with resolution dated 10.6.96. That means if the selection is to be made through a committee but not made prior to 10.6.96 then such selection will be through Bihar Public Service Commission as laid down under the said resolution dated 10.6.96. Similarly, the appointment order is to be issued by an authority who has been empowered to issue such order of appointment by resolution dated 10.6.96 and not in terms with the earlier guideline.

(iv) For such selection and scrutiny, the applications already received by the Respondents are to be forwarded to the B.P.S.C. The Respondents will take immediate step for the same and will forward such applications filed in such districts to the B.P.S.C. within a period of three months from the date of receipt/production of a copy of this order. This order is to be produced before the Commissioner and Secretary of the Health Department.

(v) The process of selection is to be concluded and appropriate order is to be passed relating to such appointment, if there is no bar for such appointment, within a total period of one year from the date of receipt/production of a copy of this order (the same has been underlined for emphasis)

So far as appointment to the post of staff nurse grade "A" is concerned, in absence of any specific evidence that the process of selection earlier started, this Court is not passing any positive direction on the Respondents. However, it is made clear that if the Petitioners bring to the notice of the Health Commissioner that the process of selection for appointment to the post of staff nurse grade "A"

started prior to the resolution dated 10.6.96 and panel had already been prepared then the said Commissioner will follow the same principle as mentioned above. It is made clear that if any panel was issued prior to 1995 that should not be given effect having lost its force in the meantime.

6. It was further made clear in the concluding portion of the said order which is also reproduced hereunder:

It is made clear that if any panel was issued prior to 1995 that should not be given effect having lost its force in the meantime. (underlining done by me for the needed emphasis)

7. Subsequently, at behest of other aggrieved candidates, whose grievances were dentically at par with the present writ Petitioners, this Court vide order dated 21.4.98 passed in C.W.J.C. No. 7549 of 1996 heard along with C.W.J.C. No. 7717, of 1996 had endorsed and subscribed the earlier order passed by this Court by order dated 25.7.97 in C.W.J.C. No. 6870 of 1996 and other analogous cases as referred to above and the only direction which was issued by this Court in its order 21.4.98 was to consider their cases in terms or guidelines as indicated in the order dated 25.7.97, which was quoted above. This Court also is neither persuaded nor tempted to take a different view than what has been already laid down by this Court.

8. The writ Petitioners have also attempted to show that a contempt application was also filed for the alleged non-compliance of the order as contained in Annexure-6 to this writ petition and this Court under its contempt jurisdiction was satisfied that order stood complied, inasmuch as, the alleged vacancies were earmarked for reserve category candidates to which the said Petitioners, who belong to the general category, can claim no legal right for being appointed. In this background of fact too the Petitioners' case was set at rest and stood already decided and turned down by virtue of orders as contained in Annexures-6 and 7, in so far as their substantive prayer for being appointed on the said posts, was concerned. In fact, the writ Petitioners in the instant writ application have sought to mould the prayer by way of putting challenge to the legality of publication of the Advertisement No. 59/98 dated 17.8.98 made by the B.P.S.C. for filling up the posts in question, by way of holding a competitive test in the light of the provisions as contained in the aforesaid resolution dated 10.6.96, which was admittedly brought into existence in due compliance of the directions issued by this Court by which the State Government was directed to frame rules prescribing the mode and procedure for selection and promotion to such posts in question. I am afraid no such positive relief can be granted to the writ Petitioners in the backdrop of the facts and circumstances of the case.

9. It has also been pointed out by the learned Counsel for the B.P.S.C. that the impugned advertisement was published pursuant to the receipt of requisition sent by the Health Department and its role comes into play only in the matter of holding a competitive test and sending the recommendation of successful

candidates in accordance with their relative merits. The B.P.S.C. has obviously a limited and specified role in so far the main prayer of the writ Petitioners is concerned and as such, no direction is warranted to be given to them under factual background of the case as adverted above.

10. The writ Petitioners have lastly contended In regard to existence of vacancies for the alleged period, that is, for 1989-90 which continuously existed in want of availability of suitable candidates from reserved categories and the alleged vacancies were being carried forward for the subsequent years and ultimately after the lapse of 3 recruitment years the same ought to have been deemed to be released for being filled from amongst the candidates belonging to the general category. This factual aspect of the matter having not been specifically dealt in the counter affidavit of the State, the only order, in the aforesaid premises, which prompts this Court to pass is to direct the Respondents 4, 6, and 7 to entertain the representation to be filed by writ Petitioners" along with a copy of this order and to further find out the correctness of the alleged fact in regard to existence of vacancies of the said period. It should also be ascertained as to whether any advertisement in the said district was published or not on the strength of which the Petitioners name was included in the waiting list (Annexure-4) as claimed by them. The Respondents are further directed to consider the fact as to whether the existing vacancies were from prior to 10.6.96 which remained unfilled for one or the other reason and whether for filling up such post a valid selection process was set in motion by way of issuing advertisement. It is needless to further state and clarify that in respect of any vacancy which fall vacant or stood created after 10.6.96 the writ Petitioners cannot stake any claim whatsoever to such posts.

11. This writ application stands disposed of with the above observation and direction.