
(2011) 05 CAL CK 0039

In the Calcutta High Court

Case No : Writ Petition No. 3244 (W) of 2011

Krishna Rana (Pramanik)

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 18-05-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 16(3), 77

Citation : (2011) 05 CAL CK 0039

Hon'ble Judges : Patherya, J

Bench : Single Bench

Advocate : Saurav Banerjee and Sariful Islam Mallick, for the Appellant; Chameli Majumder and Swarup Pal, Jayanti Dhar Quader and Madhumita Datta for State, for the Respondent

Final Decision : Dismissed

Judgement

Patherya, J.—The Petitioner seeks to challenge the residence criteria in the advertisement dated 6th August, 2008 for appointment of Auxiliary Nurse-cum-Midwife as ultra-vires the Constitution of India.

2. The case of the Petitioner is that one of the criteria for appointment of Auxiliary Nurse cum Midwife (ANM) is that the applicant has to be local resident of the Health Sub-Center. The said criteria is hit by Articles 14, 15 and 16 of the Constitution of India. Article 16(3) of the Constitution of India postulates enactment of legislation and no restriction can be imposed by a mere notification. The notification dated 5th September, 2006 has been issued by the State and incorporates the criteria of local resident. This cannot be found in the National Rural Health Mission Scheme, (Scheme) which has been introduced by the Central Government. As the State notification is de-hors an enactment, the same is violative of the Constitution of India and liable to be set aside. Reliance is placed on Harshendra Choubisa and Others Vs. State of Rajasthan and Others, 2002 (6) SCC 562. Section 16(1) of the Constitution of India has granted equality for "employment" and "appointment" to any office under the State. The

term "employment" is applicable in the case of ANM and its meaning has been enlarged in *Gazula Dasaratha Rama Rao Vs. The State of Andhra Pradesh and Others*, . The unreported judgment in WP 4689(W) of 2009 will not apply on the principle of Sub-silentio as held in *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*, . In view of 2007 10 SCC 82, no precedential value can be given to the unreported judgment wherein the issue has not been decided. For all the said reasons, therefore, and in view of the decision cited, the local resident criteria in the State notification dated 5th September, 2006 be held ultra-vires the Constitution of India.

3. Counsel for the Advocate General, submits that the Scheme, is of the Central Government, which aims to reach out to the rural people. The State is the implementing agency and the scheme postulates that AN Ms should be within the reach of the rural people of the local area. The scheme is not a piece of legislation and there exists no reasonable nexus between the object and the classification. Reliance is placed on 2007(11) SCC 681. For the said reasons, this writ petition warrants no interference and no order be passed thereon.

4. Having considered the submission of the parties the Central Government in 2005 introduced the Scheme aimed at reducing neo-natal mortality. For such purposes two AN Ms were to be appointed in the villages where health Sub-Centers would be set-up. Apart from fulfilling other criteria the Scheme of the Central Government emphasized on the ANM being a resident of a village falling under the jurisdiction of the sub-center. The said scheme was extended to the states who were the implementing agency.

5. The State of West Bengal has also taken steps to implement the Scheme and in doing so, issued Notifications wherein the eligibility criteria of ANM was specified. As the Central Government emphasized on the local resident criteria, the same was included as an eligibility criteria by the State Government too.

6. This eligibility criteria of local residence is sought to be challenged on the touch stone of Articles 14, 15 and 16 of the Constitution of India.

7. The post of ANM is created under a scheme, which is not in exercise of powers under Article 77 of the Constitution of India. AN Ms do not discharge any function of the State nor under a statute. Recruitment Rules applicable to employees of a State are not applicable to their case. Therefore the provisions of Articles 14 and 16 of the Constitution of India as held in 2007 11 SCC 681 will not be applicable.

8. The State as the implementing agency enters into a Memorandum of Understanding (MOU) with the Ministry of Health and Family Welfare Department of the Central Government. By Clause 11.3 of the MOU the State Government is to agree to abide by all the existing guidelines, instructions and circulars issued for implementation. Clause 11.3 is set-out hereunder:

11.3 The State Government agrees to abide by all the existing manuals, guidelines, instructions and circulars issued in connection with implementation of

the NRHM, which are not contrary to the provisions of this MOU.

9. Therefore all that the State Government did was to implement the guidelines and Scheme of the Central Government and under Clause 13.1 in case of non-compliance the MOU can be suspended or cancelled. Clause 13.1 is set out hereunder:

13.1 Non compliance of the commitments and obligations set hereunder and/or upon failure to make satisfactory progress may require Ministry of Health & Family Welfare to review the assistance committed through this MOU leading to suspension, reduction or cancellation thereof. The MoH & FW commits to issue sufficient alert to the State Government before contemplating any such action.

10. The cases relied on by the Petitioners viz and Kailash Chand Sharma Vs. State of Rajasthan and Others, are distinguishable as in each case the circulars were issued on the basis of statutory Rules.

11. The Scheme cannot also be equated with the control orders which are issued under a statute.

12. For all the said reasons this writ application merits no order and is accordingly dismissed.

13. As the vires of the eligibility criteria relating to residence was being decided, no affidavit in opposition has been filed and the allegations contained in the petition are not admitted.