

(2019) 04 PAT CK 0037

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 14826, 16472, 16693 Of 2017

Kumari Sunita Singh And Ors

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 08-04-2019

Acts Referred:

Juvenile Justice (Care And Protection Of Children) Act, 2015 — Section 2, 2(10), 2(14), 2(22), 4, 27, 27(2), 27(4), 27(5), 110, 110(2)(xiv)
Juvenile Justice (Care And Protection Of Children's) Rules, 2017 — Rule 4, 5, 15, 15(2), 15(4), 16, 27(5), 87, 88(2)
Constitution Of India, 1950 — Article 15(4), 16, 16(4)

Citation : (2019) 2 PLJR 936

Hon'ble Judges : Jyoti Saran, J; Ashutosh Kumar, J

Bench : Division Bench

Advocate : Prabhakar Singh, Sunil Kumar Mandal, Ravi Ranjan Kumar Singh, Bipin Kumar, Arjun Prasad, Rajendra Narayan, Krishna Sinha, Durga Narayan, Pushkar Narayan Shahi, Manish Kumar

Final Decision : Dismissed

Judgement

Ashutosh Kumar, J

1. Heard Mr. Rajendra Narayan, learned Senior Advocate, and Mr. Prabhakar Singh, learned Advocate, appearing on behalf of the petitioners. The State is heard through Mr. P.N. Shahi, learned AAG-6, Mr. Sunil Kumar Mandal, learned SC-3, and learned AC to SC-10.

2. These batch of writ petitions have primarily been filed for declaration of Rules 4, 5, 15 and 16 of the Bihar Juvenile Justice (Care and Protection of Children) Rules, 2017 (hereinafter referred to as the Rules of 2017) as ultra vires on the ground that the State Government has travelled beyond its competence in framing such clauses in the Rules of 2017, referred to above.

3. It may not be necessary for us to recount the status of the writ-petitioners and their respective grievances for the reason that the attack is primarily on the

vires of the aforesaid clauses of the Rules of 2017; though all the petitioners in the aforesaid writ petitions are either the members of the Child Welfare Committee or Juvenile Justice Board, whose appointments were made under the erstwhile Rules of 2012 and 2015. As such, they have prayed for being allowed to continue on such posts in the Juvenile Justice Board or the Child Welfare Committee till the age of sixty five (65) years or of giving remuneration to them as per the rules made by the Government as well as for payment of arrears of salary. It may not be necessary for us to deal with their respective grievances and prayers, for the reason that the issues would stand resolved by noticing the arguments on vires of the clauses of the Rules of 2017 and deciding the aforesaid core issue.

4. Before the grounds urged on behalf of the writ-petitioners are adverted to, it may however be noted that under the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the Act of 2015) and the dictionary provided in Section 2 thereof, defines "child in need of care and protection" [Section 2(14)]; "Board" meaning a Juvenile Justice Board constituted under Section 4 of the Act [Section 2(10)]; and "Committee", which is Child Welfare Committee (hereinafter referred to as the CWC) constituted under Section 27 of the Act [Section 2(22)].

5. Though the challenge in these batch of writ petitions have been made with respect to Rules 4, 5, 15 and 16 of the Rules of 2017, which includes Composition of the Juvenile Justice Board (Rule 4); Terms of Members of the Board (Rule 5); Composition and Qualifications of Members of the CWC (Rule 15) and Rules and Procedure of the CWC (Rule 16), but the challenge, after some arguments, has been limited to the vires of the Rule 15 of the Rules of 2017 and especially sub-Clause (2) thereof.

6. Hence, the discussions hereinafter shall only be with respect to the vires of Rule 15(2) of the Rules of 2017.

7. Section 27 of the Act of 2015 reads as follows: (it may be noted here that the aforesaid section is being extracted only for the sake of completeness and for ready reference:)

27. Child Welfare Committee.-(1) The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committee in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification.

(2) The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on the matters concerning children.

(3) The District Child Protection Unit shall provide a Secretary and other staff

that may be required for secretarial support to the Committee for its effective functioning.

(4) No person shall be appointed as a member of the Committee unless such person has been actively involved in health, education or welfare activities pertaining to children for at least seven years or is a practicing professional with a degree in child psychology or psychiatry or law or social work or sociology or human development.

(5) No person shall be appointed as a member unless he possesses such other qualifications as may be prescribed.

(6) No person shall be appointed for a period of more than three years as a member of the Committee.

(7) The appointment of any member of the Committee shall be terminated by the State Government after making an inquiry, if-

(i) he has been found guilty of misuse of power vested on him under this Act;

(ii) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii) he fails to attend the proceedings of the Committee consecutively for three months without any valid reason or he fails to attend less than three-fourths of the sittings in a year.

(8) The District Magistrate shall conduct a quarterly review of the functioning of the Committee.

(9) The Committee shall function as a Bench and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(10) The District Magistrate shall be the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders.

(emphasis provided)

8. On a reading of Section 27 of the Act of 2015, the intention of the Parliament gets reflected with respect to the composition of the CWC. The State Government has been given the power to constitute, for every district, one or more CWC for exercise of powers and to discharge duties in relation to children in need of care and protection. The composition would comprise of a Chairperson and four other members; of whom, one shall be a woman and another, an expert on the matters concerning children.

9. It is also necessary to especially note the provisions contained in Section 27 (4) and (5) of the Act of 2015, which lists the necessary qualifications for a

member of the Committee to be appointed by the State Government with a specific negative covenant in sub-Clause (5) of Rule 27 of the Act, indicating that without such qualification, no member of the CWC shall be appointed by the Government. Hence, the qualifications prescribed by the Central Legislation, viz., Act of 2015 are that minimum of one such member shall be a woman and another would be an expert on the matters concerning children.

10. The other qualificatory tests for appointment of Members of CWC are that he should have been actively involved in: (i) Health and (ii) Education; or (iii) Welfare Activities of Children for seven years; or (iv) has worked as a Professional with a degree in - (a) Child Psychology; or (b) Psychiatry; or (c) Law; or (d) Social Work; or (e) Sociology; or (f) Human Development. The qualification, thus, appears to be exhaustive, so far as the Central Act is concerned.

11. Section 110 of the Act of 2015 provides the State Government with the power to make rules, invoking which power, the impugned Rules of 2017 has been framed.

It would be necessary to cull-out some part of Section 110 of the Act, referred to above, for looking at the contentions raised on behalf of the writ-petitioners, which reads as follows:-

110. Power to make rules.-(1) The State Government shall, by notification in the Official Gazette, make rules to carry out the purposes of this Act:

Provided that the Central Government may, frame model rules in respect of all or any of the matters with respect to which the State Government is required to make rules and where any such model rules have been framed in respect of any such matter, they shall apply to the State mutatis mutandis until the rules in respect of that matter are made by the State Government and while making any such rules, they conform to such model rules.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely :-

(i) x x x x x x

(ii) x x x x x x

(iii) x x x x x x

(iv) x x x x x x

(v) x x x x x x

(vi) x x x x x x

(vii) x x x x x x

(viii) x x x x x x

(ix) x x x x x x

(x) x x x x x x

(xi) x x x x x x

(xii) x x x x x x

(xiii) x x x x x x

(xiv) qualifications of the members of the Child Welfare Committee under sub-section (5) of Section 27.

12. By virtue of Section 110 of the Act of 2015, a State Government has been empowered to make rules to carry out the objectives of the Act. In the absence of any rule framed by the State Government, the model rules framed by the Union shall apply in the respective State mutatis mutandis, but only till such time the rules are made by such State. A restriction has been imposed upon the State Government for making such rules which would conform to the model rules framed by the Central Government and any rule so framed shall be without prejudice to the generality of the provisions contained in the Act of 2015. In the aforesaid context, the realm in which rules could be made in addition to the conditions/contents of the model rules referred to above and while defining the specific domain, the State Government has been given the powers to make rules for drawing qualifications of the members of the CWC under sub-Clause (5) of Section 27 of the Act of 2015 (Section 110(2)(xiv)).

13. This, therefore, obviously means that apart from the qualifications prescribed for the members of the CWC, viz., one person being a woman and the other being an expert in the matter concerning children and the qualification of having been actively involved in Health, Education, Welfare Activities pertaining to children for seven years or a Professional with a degree in - (a) Child Psychology; (b) Psychiatry; (c) Law; (d) Social Work; (e) Sociology and (f) Human Development, some other qualifications could also be prescribed by the State Government.

14. Under the powers granted to the State Government under Section 110 of the Act of 2015, referred to above, the Government of Bihar has framed Rules of 2017. Rule 15 thereof spells out the composition and qualifications of the members of the Committee.

15. Rule 15 of the Rules of 2017 is being extracted hereinbelow for ready reference:-

15. Composition and Qualifications of the Members of the Committee.-(1) There shall be one or more Committees in each district to be constituted by the State Government through a notification in the Official Gazette.

(2) The Committee shall consist of a Chairperson and four other members including at least two women from the district concerned for which the

Committee has been constituted, and out of the five members including Chairperson, at least one member shall be from SC/ST and one from EBC/OBC communities.

(3) The Chairperson and members of the Committee shall be appointed by the State Government on the recommendation of the Selection Committee under Rule 87 of these rules.

(4) The Chairperson and the members shall be above the age of thirty years and not more than sixty five years and shall have following qualifications:-

(i) post-graduate degree in any discipline and having at least seven years of experience of working with children in the field of education, health, welfare or protection activities; or a practicing professional with a post-graduate degree in psychology or psychiatry or sociology or in the field of law with at least 5 years of experience or a retired judicial officer or a retired Gazetted officer from the Department of the State Government concerning children's development, health, protection and education.

(ii) in the absence of candidates possessing eligibility criteria mentioned in clause (i) of the sub-rule (4) as aforementioned, the following may be considered-

(a) graduate in social work/ health/ education/ psychology/ sociology/ rural development/ women studies/ development studies// public administration and having at least five years of experience of working with children in the field of education, health, welfare or protection activities; and

(b) graduate in any discipline along with diploma or certificate in child protection/ counseling/ child development/ child rights/ human rights/ women studies/ criminology/ anti human trafficking/ health or public health/ mental health and having at least five years of experience of working with children in the field of education, health, welfare or protection activities;

(5) Not more than two members selected for a Committee shall be from same fields of practice or profession or academic qualification.

(6) A member of the Committee shall be eligible for appointment of maximum of two terms, which shall not be continuous.

16. The impugned clause of the aforesaid Rules of 2017 is sub-Clause (2), which lays down that the Committee (CWC) shall consist of a Chairperson and four other members including at least two women from the district concerned for which the Committee has been constituted and out of five members including the Chairperson, at least one member shall be from the SC/ST and one from the EBC/OBC communities.

(emphasis provided)

17. It has been submitted on behalf of the writ-petitioners that as opposed to the Central Act of 2015 and the model rules which prescribe the minimum of one

woman Member of the CWC, the Rules of 2017 makes it compulsory for two of such members to be women and the rest two, apart from the Chairperson, to be from the SC/ST and EBC/OBC category. This, it has been submitted, results in 100% reservation, leaving no room for appointment of any person of general category, even though he has the requisite qualification as mentioned in Section 27(4) and (5) of the Act of 2015, which is not permissible in the eyes of law.

18. Apart from the aforesaid, it has also been urged on behalf of the writ-petitioners that the aforesaid qualification is also not in consonance with the earlier rules framed by the Government of Bihar in the years 2012 and 2015 as also the model rules framed under the Act of 2015.

19. The other ground of challenge is that by virtue of Section 110(2)(xiv) of the Act of 2015, a State Government is only competent to add, in addition to the qualifications prescribed in Section 27(4) and (5) of the Act of 2015, other qualifications. Gender and caste, it has been vehemently argued, are no qualifications, which could be added by the State Government in the rules with respect to the qualification required for the members of the CWC.

20. Mr. Rajendra Narayan, learned Senior Advocate, assisted by Mr. Prabhakar Singh, learned Advocate, therefore, raised an issue that additional qualifications could definitely be added to the list of the qualifications already provided in the Act [refer to Section 27(4) and (5) of the Act of 2015], but the State Government does not have the liberty to provide any other category, which cannot be called a qualification, as it would be opposed to the policy and scheme of the Act and doing so would be *contretemps* and prejudicial to the generality of the purpose of the Act of 2015.

21. Defending the aforesaid rule, viz., Rule 15(2) of the Rules of 2017, Mr. P.N. Shahi, learned AAG-6, has submitted that in tune with Rule 88(2) of the Rules of 2017, for selection of members of the Juvenile Justice Board and Chairperson as well as the members of the CWC, the State Government has already constituted a Selection Committee under the Chairmanship of Hon'ble Justice Ms. Mridula Mishra (Retd.) and five other persons vide Notification No. 127 dated 20.01.2017. It has further been submitted on behalf of the State Government that the Selection Committee as well as the State Government are aware of their responsibilities and constitutional limitations of not reserving posts beyond 50%. It was averred by Mr. Shahi that the qualification, term etc. of the members of CWC have been framed in the light of the Act of 2015 with the intention to provide a child friendly environment for children and only those persons who have expertise/experience in the field of child care would be selected by the Committee which has been constituted for the purpose.

22. After having heard the learned counsel for the parties and noticing the relevant provisions of the Act of 2015 and the Rules of 2017, we are of the view that the State Government, while prescribing under Rule 15(2) of the Rules of 2017 that out of the four members of the CWC, apart from its Chairperson, two

shall be women members and one each would be from the categories of SC/ST and EBC/OBC, did not exceed its jurisdiction as bestowed upon it by virtue of Section 27(2) and Section 110(2)(xiv) of the Act of 2015. By prescribing two women members and one member from each category of SC/ST and EBC/OBC, the generality of the provisions of the Act of 2015 and the scheme thereof is neither breached nor the qualification for the members of CWC provided under Section 27(4) and (5) of the Act of 2015 is infringed. This is no reservation, but only broad basing the composition with the widest possible participation of people towards effective implementation of the policy of the Act of 2015, viz., the Child Welfare.

Women, by their gender, have a dispensation towards taking care of children and since, as urged on behalf of the State, the maximum numbers of child in need of care and protection are from the categories of SC/ST and EBC/OBC, it was only necessary that some of the members of the CWC be from the same category, so as to provide a more child friendly atmosphere in the Committee. By prescribing the aforesaid categories, no attempt has been made by the State Government to do away or avoid selecting only such persons who have the qualifications provided under Section 27(4) and (5) of the Act of 2015.

23. We have also taken note of the fact that appointing members of the CWC is not an appointment in the regular sense of the term as the appointment is not on any post under the public service. The appointment is more in the nature of nomination which becomes evident from the constitution of the Committee, the manner of selection by the Search Committee and that only remuneration is admissible to the members so nominated. The tenure of the members is fixed with a further stipulation of maximum of two terms, which shall not be continuous. Section 15(4) of the Rules of 2017 further specify that in the absence of candidates possessing eligibility criteria, other persons with somewhat lesser qualifications can be considered.

24. Thus, induction of persons in the CWC is not akin to employment in public service and hence, the provisions of Article 16 of the Constitution of India with respect to reservation would not at all be applicable. Reservation in public service has the sanction of law as it is considered to be protective discrimination for the persons seeking employment, if they are socially and educationally backward and do not have adequate representation. The members of the CWC, on the contrary, are to look after the welfare of the children and not their welfare and, therefore, the necessity of their experience in the field of Child Welfare.

25. The principles that have been evolved for conferring benefits of reservation contemplated by Articles 15(4) and 16(4) of the Constitution of India, cannot be mechanically applied to the appointment of the members of the CWC under the Juvenile Justice Act and Rules. The nature and purpose of the constitution of the CWC is different and nomination of members in such Committee cannot be said to be an employment. There is a distinct unviability of the analogy between a reservation for employment in public service in terms of Article 16(4) of the

Constitution of India and providing in the Rules of 2017 that some of the members of the CWC shall be from particular categories of persons.

26. The aforesaid issue can be looked at from another angle as well. Stipulating that two of the four members of the CWC shall be women does not tantamount to reservation. Women, by their very nature and dispensation are adept at rearing up children and, therefore, the impugned rule cannot be faulted with. The argument of proscription of 100% reservation, thus, fails miserably. The qualifications, as prescribed under Section 27(4) and (5) of the Act of 2015, have not at all been diluted/watered down by Rule 15(2) of the Rules of 2017.

27. Thus having noticed that the State Government has the power to frame rules in terms of Section 27(2) and Section 110 of the Act of 2015, Rule 15(2) of the Rules of 2017 does not lack the vires as the State Government has not exceeded its jurisdiction nor has framed the rules so as to contravene the generality of the provisions contained in the Central Act of 2015 nor would it in any way oppose or be antithetical to the reach and ambit of the policy behind enacting Juvenile Justice Act of 2015.

28. The issue in all the writ petitions, viz., vires of Rule 15(2) of the Rules of 2017, which only was argued on behalf of the petitioners, having been upheld by us, the writ petitions perforce fail and are dismissed.

29. Needless to state that all previous orders with respect to stay of the operation of the Rule in question stand vacated.