

(2019) 12 PAT CK 0072

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 22551 Of 2019

Sanjeev Kumar Mishra

APPELLANT

Vs

State Of Bihar Through The Principal Secretary And Ors

RESPONDENT

Date of Decision : 10-12-2019

Acts Referred:

Constitution Of India, 1950 — Article 309
Bihar Pharmacist Cadre Rules, 2014 — Rule 2(vii), 2(viii), 6
Kerala State And Subordinate Services Rules, 1958 — Rule 10(a)(ii)
Uttar Pradesh Pharmacists Service Rules, 1980 — Rule 8
Pharmacy Act, 1948 — Section 10, 18

Citation : (2019) 12 PAT CK 0072

Hon'ble Judges : Chakradhari Sharan Singh, J

Bench : Single Bench

Advocate : Mrigank Mauli, Prince Kumar Mishra, Sanket, Himanshu Kumar Akela, K.K. Sinha, Shashi Shekhar, Surendra Kumar Singh, Shashi Bhushan

Final Decision : Allowed

Judgement

1. Whether a candidate, possessing degree of Bachelor of Pharmacy, is eligible for selection to the basic category post of Pharmacist by direct recruitment under Bihar Pharmacist Cadre Rules, 2014 (hereinafter referred to as 'the Rules'), is the only question, which the present writ application involves.

2. I have heard at length Mr. Mrigank Mauli, learned counsel appearing on behalf of the petitioner, Mr. Himanshu Kumar Akela, learned A.C. to PAAG-2 and Mr. K.K. Sinha, learned counsel appearing on behalf of the Bihar State Health Society.

3. An application for intervention has been filed by one Arvind Kumar, who holds the qualification of Diploma in Pharmacy, to oppose the relief sought for in the writ application.

4. I.A. No. 1 of 2019, filed by the said Arvind Kumar, is allowed and, accordingly, let Arvind Kumar, intervener-petitioner, be impleaded as respondent No.3.

5. I have heard Mr. Surendra Kumar Singh, learned counsel appearing on behalf of the intervener-respondent.

6. This case has been heard out of turn, considering the urgency of the matter, which relates to a recruitment process to a public post under the State Government and the dispute relates to question of eligibility of aspiring candidates.

7. Since the question relates to interpretation of the provisions under the Rules, relevant provisions need to be noticed first. Rule 6 of the Rules lays down the minimum qualification, which reads as under :

6. Qualifications. - (1) For appointment by direct recruitment to the basic category posts, minimum educational qualification shall be Intermediate/10+2 (Science) pass and passing in all parts (part I, II & III) of Diploma-in Pharmacy from the institution recognised by the Government and a certificate to that effect shall be necessary.

(2) It shall be necessary for the candidate to be registered with Bihar Pharmacy Council.

(3) For direct recruitment in the Pharmacist Cadre, minimum age limit shall be 21 years and maximum age limit shall be the same as may be determined reservation categorywise, from time to time, by the Government.

(4) 1st August of the concerned year shall be deemed to be the cut off date for determination of age.

8. There is Appendix-1, appended to the said Rules, relevant portion of which reads thus : -

Appendix - 1

[See Rules 2 (viii), 4, 13, 16, 17]

Chain of posts, qualification etc. of Bihar Pharmacist Cadre

Sl.

No.

Category

Name of Posts

Direct Recruitment or Promotion

Requisite qualification

Remarks

1.

Basic Category

Pharmacist

By Director Recruitment

(i) Intermediate/+2

(Science) pass

(ii) Pass in all parts

(part I, II & III) of

Diploma in Pharmacy.

(iii) It shall be

necessary to be

registered with the

Bihar Pharmacy

Council.

(Note - B.Pharm and

M. Pharm pass may

In all Hospitals, Dispensaries, Health Centres.

also apply

(Underlining for emphasis)

9. A process of recruitment has been initiated for the appointment to the post of Pharmacist (Basic Category) with the issuance of an Advertisement No.07/2019 by the State Health Society, Bihar (hereinafter referred to as 'the Society'). The qualification and experience (essential) has been prescribed in the said advertisement, which reads thus : -

"Qualification & Experience (Essential) :

(I) Intermediate/+2 (Science) pass

(ii) Pass in all parts (Part I, II & III) of Diploma in Pharmacy.

(iii) It shall be necessary to be registered with the Bihar Pharmacy Council.

(NOTE - B.Pharm and M.Pharm pass may also apply)"

(Underlining for emphasis)

10. If part of the Appendix-1 of the Rules, as quoted above, is compared with the qualification and experience (essential), prescribed in the Advertisement in question, it can be easily noticed that the qualification prescribed in the advertisement is in tune with what is prescribed in Appendix-1, except for the

expression 'Requisite Qualification', Qualification and Experience (Essential) has been mentioned in the advertisement.

11. The petitioner holds qualification of B.Pharma, which is a degree qualification. It is his case that in terms of the Rules and even the Advertisement No.07/2019, he is eligible for making application against the post of Pharmacist (Basic Category), for the reasons that the note, under the heading 'Qualification and Experience', clearly prescribes that B.Pharma and M.Pharma pass candidates may also apply.

12. It is his further case that applications, pursuant to the said advertisement, were required to be submitted on-line and when he attempted to submit his application on-line, he failed to do so because the Society mandatorily required giving the details of Diploma in Pharmacy qualification in the on-line application form. It is his case that if a candidate was not able to fill-in/mark against the qualification 'Diploma in Pharmacy', in the on-line application form, the subsequent drop down boxes were found not appearing, for filling-up other details and, therefore, the petitioner, despite having the qualification of B.Pharma, could not apply.

13. It is his further case that despite representations made to the authorities, the glitch could not be taken care of by the respondents, which compelled the petitioner to approach this Court by filing the present writ application. It has been stated that there is no option in the web portal of the Society, for the purpose of filling of on-line application form, for entering details of passing of B.Pharma/M.Pharma, as a valid qualification for the post.

14. It is the case of the respondent State of Bihar, which has been supported by the Bihar Health Society, that Rule 6 of the Rules, prescribes essential qualifications for appointment to the post in question, according to which, pass in all parts (Part I, II & III) of Diploma in Pharmacy from a Government recognized institution is essential. It is the case of the respondent State of Bihar that a candidate, who does not hold the qualification, as prescribed in Rule 6 of the Rules, cannot be held to be eligible for appointment through direct recruitment, against the said post.

15. It is the further case of the State of Bihar that it is albeit true that B.Pharma and M.Pharma are higher qualifications than Diploma in Pharmacy, since Diploma in Pharmacy is an essential qualification, those, who do not hold such qualification, cannot claim to be qualified for the post on the basis that they hold higher qualification.

16. It is accordingly the stand of the State of Bihar that since the petitioner does not hold the essential qualification, as prescribed under Rule 6 of the Rules, he is not eligible for the post and the system for submission of on-line application has accordingly and rightly been structured.

17. It has further been stated in paragraph 13 of a supplementary counter

affidavit filed on behalf of the State respondents that the Diploma in Pharmacy qualification holders have two years experience of hospital training, whereas B.Pharma degree holders have two years industrial training, which is the reason why B.Pharma degree holders have not been allowed to participate in the selection process, because of the nature of work of Pharmacist is hospital work and not the industrial work. Similar stand has been taken by the intervener-respondent in the application seeking intervention.

18. Mr. Mrigank Mauli, learned counsel appearing on behalf of the petitioner, has submitted that, in terms of Rule 6 of the Rules, Diploma in Pharmacy from an institution recognized by the Government and possession of a certificate to that effect is minimum educational qualification. He has submitted that a higher qualification can, therefore, also be treated to be a qualification for appointment against the post of Pharmacist (Basic Category) under the Rules and it is not impermissible under the Rules to prescribe a higher qualification also than what has been prescribed under Rule 6 of the Rules as eligibility condition for recruitment and appointment.

19. He has submitted that the note, under Appendix-1 of the Rules, to the effect that B.Pharma and M.Pharma pass may also apply, shall be rendered completely ineffective, if the interpretation of Rule 6 of the Rules, as is being suggested on behalf of the respondents, is accepted. He has argued that the note in Appendix-1, prescribing requisite qualifications, enables B.Pharma and M.Pharma pass candidates also to apply. He contends that by making the said note in Appendix-1 of the Rules, the qualification of B.Pharma and M.Pharma have been recognized under the Rules to be a valid qualification for appointment against the post in question.

20. He has drawn my attention to Appendix-III of Pharmacy Practice Regulations, 2015, which gives the details of position title and job responsibility of Pharmacist at Hospital Pharmacy Practice Site and prescribes the knowledge and skill requirement in terms of level of education, knowledge, skill and ability and which recognizes Diploma in Pharmacy/Bachelor of Pharmacy as the minimum requirement of a Pharmacist having job responsibilities at Hospital Pharmacy Practice. He has submitted that the said regulations have been framed in exercise of powers conferred by Sections 10 and 18 of the Pharmacy Act, 1948, by the Pharmacy Council of India. The Pharmacy Act, 1948, regulates provisions and practices of pharmacy and he accordingly argues that the plea, taken on behalf of the State respondents, that persons, having B.Pharma qualification, do not have the expertise/experience/training of work at Hospital Pharmacy, is not acceptable. He has also relied on a notification dated 16.07.2019 issued by the Department of Health and Family Welfare, Government of India, published in the gazette of India, which declares that a person, holding Pharma D. qualification, being higher qualification, shall automatically become eligible for appointment to various posts, where a person, holding Diploma in Pharmacy or Bachelor of Pharmacy and Master of Pharmacy qualification, is eligible to be appointed.

21. Mr. Surendra Kumar Singh, learned counsel appearing on behalf of the Intervener-respondent, has submitted that in view of the clear language of Rule 6 of the Rules, there is no scope of interpretation that a person, without holding qualification of Diploma in Pharmacy, can also be held to be eligible for appointment against the post on the basis that he holds a higher qualification. He has submitted that a higher qualification cannot replace the requirement of essential qualification for a post, if prescribed under statutory provisions. He has relied on a Supreme Court's decision in case of Zahoor Ahmad Rather and Others vs. Sheikh Imtiyaz Ahmad and Other, reported in (2019) 2 SCC 404, to bolster his contention that a candidate cannot become eligible on the ground of holding higher qualification if he does not possess the essential qualification as prescribed under statutory Rules for appointment to a post.

22. He has also referred to a decision of this Court, rendered on 18.09.2019 in C.W.J.C. No. 18218 of 2019 and other analogous cases (Amlesh Kumar & Another vs. The State of Bihar and Others), where the Court refused to recognize higher B.Sc. qualification in Nursing course for appointment as Staff Nurse Grade-A in respect of which the minimum educational qualification was prescribed as pass in General Nursing Midwifery (GNM) training course. He has referred to a Division Bench decision of Uttarakhand High Court, rendered on 26.08.2016 in Special Appeal No. 309 of 2015 (Nandan Ban Goswami and Others vs. Vinod Kumar and Others), wherein, dealing with Uttar Pradesh Pharmacists Service Rules, 1980, Rule 8 of which prescribed Diploma in Pharmacy qualification as the academic qualification for recruitment to the post of Pharmacist, the Court has held that a candidate, having no such qualification of Diploma, cannot be held to be eligible. He has also referred to a Division Bench decision of this Court dated 18.12.2018 passed in L.P.A. No. 1416 of 2018 (Bihar State Power (Holding) Company Limited and Others vs. Md. Asif Hussain and Others) in support of his contention that if qualification of diploma is requisite qualification, a person cannot claim his eligibility on the ground that he possesses higher qualification than what has been prescribed. He has referred to a Notification of the Government of India, Ministry of Finance, dated 18.11.2009, which deals with revised pay structure of the common category posts of Pharmacist cadre in remarks column of which the essential minimum qualification has been prescribed as Diploma in Pharmacy and registration with State Pharmacy Council.

23. Learned A.C. to PAAG-2, appearing for the State of Bihar, has referred to the averments in the counter affidavit and has vehemently argued that Diploma in Pharmacy being the qualification prescribed in Rule 6 of the Rules, a person, holding degree qualification, though higher than prescribed diploma qualification, cannot be held to be eligible. He has submitted that the note of Appendix-1, to the effect that B.Pharm and M.Pharm pass candidates may also apply, is only clarificatory in nature and, according to him, in terms of the said note, such diploma holders, who possess qualification of B.Pharm and M.Pharm, may also apply in terms of Appendix-1 and the qualification prescribed in the advertisement. He has submitted that the said note cannot be read to mean that

a candidate, having B.Pharma and M.Pharma qualification, but not having Diploma in Pharmacy qualification, is also eligible.

24. Mr. K.K.Sinha, learned counsel appearing on behalf of the Society, has submitted that the Society has acted under instructions of the State Government, while refusing to entertain such candidates, who did not have diploma qualification in pharmacy as required in the advertisement. He has submitted that since the State Government advised the Commission not to accept the applications of persons holding Bachelor of Pharmacy qualification, the Society did not entertain such applications and entertained applications of only such candidates, who held Diploma in Pharmacy qualification.

25. There should not be any dispute over the legal proposition that a person must hold a qualification, which is prescribed and requisite for a post under the Rules. However, interpretation or meaning of a requisite qualification requires case to case examination. If the Rules prescribe a qualification to be the minimum qualification for a post, it is permissible for the employer or the competent authority to permit persons holding higher qualifications to seek employment against the post, unless such decision is contrary to the statutory rules itself. If a qualification is essential qualification for a post under the Rules, no person can claim to be eligible for that post on the ground that he holds a higher qualification. A question would arise in present case as to whether the qualification prescribed in Rule 6 is 'minimum qualification' or 'essential qualification'.

26. In case of Zahoor Ahmad Rather and Others (supra), the question related to the qualification for the post of technician in the Development Department of the State of Jammu and Kashmir. The qualification, which was prescribed for the said post, was "Matric with I.T.I.". The persons holding Diploma in Electrical Engineering (Electronics and Communication) had claimed their eligibility on the ground that they held higher qualification than I.T.I. certification. They did not possess the I.T.I. certification. A writ petition preferred by the Diploma holders was allowed by learned single Judge of the High Court of Jammu and Kashmir, noting that a candidate possessing a Diploma (Electrical) was entitled to appointment to the post of Junior Engineer, which ranked higher than the post of Technician. With this line of reasoning, learned single Judge had held that Diploma in Electrical presupposed the acquisition of lower qualification of Matric with I.T.I.. The Division Bench of the High Court of Jammu and Kashmir, in appeal, reversed the decision of the learned single Judge and held that the advertisement mandated I.T.I. in the relevant trade as a condition of eligibility and, therefore, it was only a I.T.I. in the relevant trade with a matric qualification that could meet the prescribed qualification. Approving the said Division Bench decision of the High Court of Jammu and Kashmir, the Supreme Court held in paragraph 27 as follows : -

"27. While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the nature of the job, the

aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the acquisition of a qualification. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision making. The state as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily. That is why the decision in Jyoti KK must be understood in the context of a specific statutory Rule under which the holding of a higher qualification which presupposes the acquisition of a lower qualification was considered to be sufficient for the post. It was in the context of specific Rule that the decision in Jyoti KK turned."

27. It has to be borne in mind that the Supreme Court in case of Zahoor Ahmad Rather and Others (supra), referred to, with approval, an earlier decision in case of Jyoti K.K. vs. Kerala Public Service Commission, reported in (2010) 15 SCC 596 and State of Punjab vs. Anita, reported in (2015) 2 SCC 170 [Para 25].

28. In case of State of Punjab vs. Anita (supra), the Supreme Court noted the circumstance in which Rule 10(a)(ii) of Kerala State and Subordinate Services Rules, 1958, was considered in case of Jyoti K.K. (supra). In case of Jyoti K.K. (supra), following Rule 10(a)(ii) had fallen for consideration :-

"10. (a)(ii) Notwithstanding anything contained in these Rules or in the Special Rules, the qualifications recognised by executive orders or standing orders of Government as equivalent to a qualification specified for a post in the Special Rules and such of those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be sufficient for the post."

29. Construing the said provision, the Supreme Court held in case of Jyoti K.K. (supra), in paragraphs 7 and 8, as under:-

"7. It is no doubt true, as stated by the High Court that when a qualification has been set out under the relevant Rules, the same cannot be in any manner whittled down and a different qualification cannot be adopted. The High Court is also justified in stating that the higher qualification must clearly indicate or presuppose the acquisition of the lower qualification prescribed for that post in order to attract that part of the Rule to the effect that such of those higher qualifications which presuppose the acquisition of the lower qualifications prescribed for the post shall also be sufficient for the post. If a person has acquired higher qualifications in the same Faculty, such qualifications can certainly be stated to presuppose the acquisition of the lower qualifications prescribed for the post. In this case it may not be necessary to seek far.

8. Under the relevant Rules, for the post of Assistant Engineer, degree in Electrical Engineering of Kerala University or other equivalent qualification recognised or equivalent thereto has been prescribed. For a higher post when a direct recruitment has to be held, the qualification that has to be obtained,

obviously gives an indication that such qualification is definitely higher qualification than what is prescribed for the lower post, namely, the post of Sub-Engineer. In that view of the matter the qualification of degree in Electrical Engineering presupposes the acquisition of the lower qualification of diploma in that subject prescribed for the post, shall be considered to be sufficient for that post."

30. In the present case, Rule 6 of the Rules prescribes Diploma in Pharmacy from the institution recognized by the Government and a certificate to that effect as 'minimum educational qualification'. Appendix-1 is part of the Rules. The Rules regulate appointment and other service conditions in the Pharmacist Cadre. Pharmacist has been defined under Rule 2(vii) of the Rules. It is evident, on reading of Appendix-1, that it refers to Rule 2(viii), which defines appendix. Appendix-1 is thus part of the Rule framed under the proviso to Article 309 of the Constitution of India.

31. In that view of the matter, for arriving at a conclusion, as to what is the eligibility condition in terms of the educational qualification, the Rules would be required to be read as a whole. In my view, an interpretation, that the expression 'B.Pharma and M.Pharma pass may also apply' present with note in Appendix-1, allows only such persons, who hold higher qualification in addition to the minimum qualification, as prescribed under Rule 6 of the Rules, would render the said expression nugatory and superfluous for the reason that even otherwise a candidate, having Diploma in Pharmacy, as indicated in Rule 6 of the Rules, with higher qualification, would have been eligible, sans any such note.

32. In my opinion, by making a provision in Appendix-1 of the Rules, that 'B.Pharma and M.Pharma pass may also apply', makes it clear that the State Government of Bihar, while framing statutory Rules under the proviso to Article 309 of the Constitution of India, considered 'B.Pharma and M.Pharma qualifications' also to be a valid qualification, which is not inferior to rather higher than the qualification prescribed under Rule 6 of the Rules for appointment to the post of Pharmacist (Basic Category). It was in this background that in the advertisement also, the note, that 'B.Pharma and M.Pharma pass candidates may also apply', found place. What is minimum prescribed under the Rules cannot be held to be essential qualification, if a higher qualification has been recognized under the Rules (appendix thereto) as valid qualification for the post in question.

33. This Court cannot ignore altogether the said expression in the note to Appendix-1 to render it otiose. The said expression in Appendix-1 of the Rules makes B.Pharma and M.Pharma pass candidates eligible to apply for the post, if it is read with Rule 6 of the Rules.

34. The decision of the Division Bench of this Court in case of Bihar State Power (Holding) Company Limited and Others (supra) and a single Judge judgment in case of Amlesh Kumar and Another (supra) shall have no application in the facts and circumstances of the present case, where the Rules allow B.Pharma and

M.Pharma pass candidates to apply for the post and thus make them eligible for the post.

35. My attention has been drawn to a decision of this Court rendered on 23.12.2009 in M.J.C. No.1750 of 2008 and other connected matters (Pramod Kumar vs. The State of Bihar and Others), where, at one stage, the Court has observed that the qualification, Matric with Diploma in Pharmacy, is the minimum and, as such, candidates, possessing higher educational qualification, cannot be said to be ineligible and, therefore, the candidates having higher qualification are equally entitled to receive consideration for appointment in question in terms of the advertisement. The said observations, which were made in relation to process of selection for appointment as Pharmacist, in case of Pramod Kumar (supra), before framing of the Rules in 2014, are not of much significance. The respondents are now duty bound to adhere to the statutory Rules framed under the proviso to Article 309 of the Constitution of India.

36. At the cost of repetition, I reiterate that the decisions of the Supreme Court, this Court and Uttarakhand High Court, noted above, on the point that a candidate cannot claim eligibility on the ground of holding higher qualification than the qualification prescribed, have no application in relation to the recruitment for the post of Pharmacist under the Rules, which contains a note to the effect that B.Pharma and M.Pharma qualification holders may also apply for the post. The said note under the Rules distinguishes this case from other cases, which have been relied on by learned counsel for the intervener-respondent and the State of Bihar. This Court cannot lose sight of the said provision under Appendix-1. On conjoint reading of Rule 6 of the Rules and the qualification prescribed under Appendix1 to the Rules, I have no hesitation in reaching a definite conclusion that the persons, holding B.Pharma/M.Pharma pass qualification, are also entitled to participate in the process of selection initiated through Advertisement No.07/2019 in question.

37. It is ordered accordingly.

38. I must notice, at this stage, that whereas Rule 6 of the Rules lays down the Diploma in Pharmacy as minimum qualification, in the advertisement, the word 'essential' has been used in place of minimum. That, however, does not make any difference for two reasons. Firstly, in the advertisement also, persons holding B.Pharma and M.Pharma qualification have been allowed to apply. Secondly, it has been rightly submitted on behalf of the petitioner that any part of the advertisement, which is contrary to the Statutory Rules, has to give way to the statutory prescription. [See Ashish Kumar vs. State of Uttar Pradesh, reported in (2018) 3 SCC 55, paragraph 27].

39. The respondents are accordingly directed to allow the petitioner and other similarly circumstanced persons, holding B.Pharma/M.Pharma qualification, to apply against the said post. It has been stated at the bar that last date for submission of application form has expired on 21.11.2019. The Bihar State

Health Society is, therefore, directed to make necessary arrangement/changes in its software and extend the last date of submission of application forms at least by a fortnight from today for candidates holding B.Pharma/M.Pharma qualification.

40. This writ application is allowed with the aforesaid observations and directions.

41. There shall be no order as to cost.