

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 3471 of 2021

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1. Kumar Bhaskar, Gender – Male, aged about – 29 years, Son of Bhagwan Prasad Thakur, Resident of Mirchalbari, Near Sai Baba Mandir, Barmasia, P.S.– Katihar, District – Katihar, Bihar.
 2. Raghwendra Singh, Gender – Male, aged about – 34 years, Son of Om Prakash Narayan, Resident of Madhurapur, Near Middle School, P.O.- Bakarpur Jagat, P.S.– Pipra, District- East Champaran.
 3. Nitish Raj, Gender – Male, aged about – 29 years, Son of Bishundeo Mandal, Resident of Village Bhairopur, Near Gramin Gold Store, P.O.- Sahzadpur, P.S.–Habibpur, District- Bhagalpur, Bihar.
 4. Surendra Kumar, Gender – Male, aged about – 34 years, Son of Day Lal Mahto, Resident of Village-Kataharwarwa, Hornatar, Near Wireless Tower, P.O.- Naraipur, P.S.–Bagha, District- West Champaran.
 5. Mohammad Amir, Gender – Male, aged about – 27 years, Son of Mohammad Mahbubun Nabi, Resident of Village – Belwa, Millat Nagar, P.O.- Araria, P.S.-Araria, District- Araria, Bihar.

...PETITIONERS

-Versus-

1. The State of Bihar through the Principal Secretary, Health Department, Government of Bihar, Patna.
2. The Principal Secretary, Health Department, Government of Bihar, Patna.
3. The Bihar Technical Service Commission through its Chairman, Harding Road, Patna.
4. The Secretary, the Bihar Technical Service Commission, Harding Road, Patna.

..... Respondents

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Appearance :

For the Petitioner/s : Mr. Lal Babu Singh, Advocate
Mr. Sanjay, Advocate
For the Respondent/s : Mr. Pushkar Narain Shahi, AAG-6
Mr. Sanjeet Kumar Singh, A.C. to AAG-6

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

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(The proceedings of the Court are being conducted by Hon'ble the Chief Justice/ Hon'ble Judges through Video Conferencing from their residential offices/residences. Also, the Advocates and the Staffs joined the proceedings through Video Conferencing from their residences/offices.)

Date : 31-05-2021

Petitioners have prayed for the following relief(s):

- (i) For, a declaration that Rule 4 of the Bihar District Ayush Medical/State Ayush Service Appointment on Regular/Contractual Basis and Service Conditions (Amendment) Rule, 2019 vide Notification bearing Memo No. 16/M, 1-03/2008-25 dated 06.01.2020 is ultra vires to the Bihar District Ayush Medical/State Ayush Service Appointment on Regular/Contractual Basis and Service Conditions, 2010 and its (Amendment) Rule, 2017 and also unconstitutional as violative of Article - 14 to the Constitution of India.
- (ii) Consequently, for quashing of the Advertisement No. 04/2020 to 09/2020 for appointment on the vacant post of Ayush Medical Officer.
- (iii) For, a direction to the respondents to hold the written examination and interview in selection process and recruit the Ayush Medical Officers on the basis of merit only.
- (iv) For, any other relief(s) or consequential relief(s) to which the petitioners may be found entitled to in the facts and circumstances of this case.

2. The Challenge to the petition is opposed by Shri



P.N. Shahi, learned Additional Advocate General No. 6 inviting attention of this Court to the judgment rendered by a coordinate Bench of this Court in the case of **Dr. Dharmbir Kumar & Ors. Vs. The State of Bihar through the Chief Secretary, Bihar, Patna & Ors.**, reported in **2015 (2) PLJR 916**.

3. It is not in dispute that the petitioners are degree holders in Ayurvedic Medicine and Surgery, duly registered under Central Council of Indian Medicine, New Delhi. They passed their degrees during different period of time. It is also not in dispute that by virtue of Article 309, the State Government has enacted Rules termed as Bihar District Ayush Medical/State Ayush Medical Service (Appointment on Regular/Contract basis and service conditions) Rules, 2010 [hereinafter referred to as 2010 Rules]. Clause 7 of the 2010 Rules notified on 21st December, 2010 reads as under:-

7. Appointment in the State Health Ayush Cadre shall be made by the state Government on the posts of Ayush Medical officer/ Ayush Specialist grade II. They shall be selected every year having regard to available vacancies through a competitive examination according to prescribed procedure. The selection shall be made through commission and it shall be necessary to follow the reservation rules prescribed by the state Government.

4. With the passage of time, the 2010 Rules stood amended vide notification dated 20th of November, 2017



substituting the aforesaid clause which reads as under:

2. नियम-4 का खंड ड को निम्नलिखित द्वारा प्रतिस्थापित किया जाएगा :-

(i) भर्ती :- इस सेवा में नियुक्ति मूल कोटि में आयुष (आयुर्वेद, यूनानी एवं होमियोपैथी) चिकित्सा पदाधिकारी के पद पर, सीधी भर्ती से, आयोग की अनुशंसा के आधार पर की जाएगी। नियमित नियुक्ति में विलम्ब होने की दशा में, आवश्यकतानुसार लोकहित में, सरकार द्वारा संविदा के आधार पर सीमित अवधि के लिए नियुक्ति की जा सकती। संविदा के आधार पर नियुक्ति, सामान्य प्रशासन विभाग द्वारा किनिश्चित मापदंड के अनुसार की जाएगी।

(ii) अर्हताएँ :- (1) इस सेवा में नियुक्ति के लिए न्यूनतम शैक्षणिक अर्हता आयुर्वेद, यूनानी एवं होमियोपैथी चिकित्सा पद्धति क्रमशः बी०ए०एम०एस०/बी०यू०एम०एस०/बी०एच०एम०एस० की डिग्री होगी, जो विधि द्वारा स्थापित विश्वविद्यालय से निर्गत एवं सी०सी०आई०एम०/सी०सी०एम० के द्वितीय अनुसूची में सम्मिलित हो :

परन्तु आयुष (आयुर्वेद, यूनानी एवं होमियोपैथी) चिकित्सा विज्ञान के किसी विषय में स्नातकोत्तर अथवा उच्चतर उपाधि धारकों एवं बिहार के किसी सरकारी अस्पताल में नियमित/अनुबंध के आधार पर नियुक्त चिकित्सकों को कार्यानुगम के लिए अविनाशता दी जा सकती।

(2) अभ्यर्थी को राज्य सरकार द्वारा विधि द्वारा स्थापित संबंधित विधा के बोर्ड/परिषद से स्थायी निबंधन प्राप्त होना आवश्यक होगा।

(3) नियुक्ति के लिए आयुसीमा बही होगी, जो सरकार द्वारा समय-समय पर, अवधारित की जाय।

परन्तु अनुबंध के आधार पर नियुक्ति चिकित्सक अभ्यर्थियों को, अधिकतम आयुसीमा में छूट देने की शक्ति प्रशारी विभाग में निहित होगी।

(iii) भर्ती की प्रक्रिया :- (1) विभाग, वर्ष की 15 अप्रैल की स्थिति के आधार पर रिक्तियों की गणना कर एवं रोस्टर क्लीयरेंस कराकर, आरक्षण कोटिवार अधियाचना आयोग को 30 अप्रैल तक भेजेगा।

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(2) आयोग, विभाग से सीधी भर्ती द्वारा भरी जानेवाली रिक्तियों की सूचना एवं भर्ती की अधियाचना घण्टा होने पर, सीधी भर्ती से भरी जानेवाली रिक्तियों की सूचना ऐसी रीति से विज्ञापित करेगा जैसा वह अधिकतम सगुं और पांच उम्मीदवारों से आवेदन आमंत्रित करेगा तथा मेधासूची निम्नलिखित आधार पर तैयार करेगा :-

(i)	बी०ए०एम०एस०/बी०यू०एम०एस०/बी०एच०एम०एस० में प्राप्तांक के लिए	50 अंक
(ii)	स्नातकोत्तर उपाधि/उच्चतर उपाधि के लिए (एम०डी०/एम०एस०, आयुर्वेद, यूनानी एवं होमियोपैथी के लिए 5 अंक तथा इससे उच्चतर उपाधि के लिए 5 अंक मूल 10 अंक)	10 अंक
(iii)	बिहार सरकार द्वारा मान्यता प्राप्त अस्पतालों/औपचारिकों में नियुक्ति/अनुबंध के आधार पर नियुक्ति के उपरान्त प्राप्त कार्यानुगम के लिए (प्रत्येक पूर्ण वर्ष के अनुभव के लिए 5 अंक, अधिकतम 25 अंक)	25 अंक
(iv)	सामान्यता के लिए	15 अंक
	कुल	100 अंक

स्वायत्तीकरण :- (a) बी०ए०एम०एस०/बी०यू०एम०एस०/बी०एच०एम०एस० परीक्षा के लिए किसी अभ्यर्थी को प्रदान किया जाने वाले अंकों का अनुपातण प्रत्येक वर्ष की परीक्षा में प्राप्त कुल अंकों के प्रतिशत के 0.5 के गुणक से रखा जाएगा। यद्यपि, यदि किसी अभ्यर्थी द्वारा 50% अंक प्राप्त किया गया हो तो उसे 50x0.5=25 अंक दिये जाएंगे।

(b) नियुक्ति हेतु विचारण के लिए न्यूनतम अर्हतांक 40 होगा।

(c) सामान्यता की प्रक्रिया का अनुपातण आयोग के द्वारा किया जाएगा।

(d) आयोग, मेधासूची तैयार करने के पश्चात्, सीधे अनुशंसा विभाग को भेजेगा। विभाग के पक्ष पर ही विभाग पक्ष पूर्व शास्त्र में जीव को उच्चतर अनुशंसा अभ्यर्थियों के पूर्ववृत्त का सम्पादन कर लिया जाएगा।

(e) आयोग द्वारा उचितवार मेधासूची तैयार कर माहित अधियाचना के विन्दु अपनी अनुशंसा विभाग की उपस्थापित करेगा।

5. The said 2017 Rules stand amended vide notification

dated 6th of January, 2020 substituting the aforesaid clause which



reads as under:

4. 'बिहार जिला आयुष चिकित्सा/ राज्य आयुष चिकित्सा सेवा (नियमित/अनुबंध के आधार पर नियुक्ति एवं सेवाशर्त)(संशोधन) नियमावली 2017' के नियम-2(iii) (2) को निम्नलिखित द्वारा प्रतिस्थापित किया जाएगा :-

(1) बिहार तकनीकी सेवा आयोग, विभाग से सीधी भर्ती द्वारा भरी जाने वाली रिक्तियों की सूचना एवं भर्ती की अध्याचना प्राप्त होने पर, सीधी भर्ती से भरी जाने वाली रिक्तियों की संख्या ऐसी रीति से विज्ञापित करेगा जैसा वह उचित समझे और पात्र उम्मीदवारों से आवेदन आमंत्रित करेगा तथा मेधासूची निम्नलिखित आधार पर तैयार करेगा :-

- | | |
|--|--------------------|
| (i) बी०ए०एम०एस०/ बी०यू०एम०एस०/ बी०एच०एम०एस० में प्राप्तांक के लिए | -60 अंक |
| (ii) स्नातकोत्तर उपाधि/ उच्चतर उपाधि यथा एम०डी०/ एम०एस०, आयुर्वेद, यूनानी एवं होमियोपैथ या इससे उच्चतर उपाधि के लिए | -15 अंक |
| (iii) बिहार सरकार द्वारा मान्यता प्राप्त अस्पतालों/ औषधालयों में नियुक्ति/ अनुबंध के आधार पर नियुक्ति के उपरांत प्राप्त कार्यानुभव के लिए (प्रत्येक पूर्ण वर्ष के अनुभव के लिए 5 अंक, अधिकतम 25 अंक) / | -25 अंक |
| | <u>कुल=100 अंक</u> |

टीकरण:- (क) बी०ए०एम०एस०/ बी०यू०एम०एस०/ बी०एच०एम०एस० परीक्षा के लिए किसी अभ्यर्थी को प्रदान किये जाने वाले अंकों का अवधारण उक्त कोर्स की परीक्षा में प्राप्त कुल अंकों के प्रतिशत को 0.6 के गुणक से गुणा करके होगा। यथा, यदि किसी अभ्यर्थी द्वारा 50% अंक प्राप्त किया गया हो तो उसे $50 \times 0.6 = 30$ अंक दिये जायेंगे।

परन्तु यह भी कि चिकित्सा पदाधिकारी के पद पर नियुक्ति हेतु साक्षात्कार का प्रावधान नहीं रहेगा। शैक्षणिक योग्यता एवं कार्यानुभव के आधार पर प्राप्त अंकों के आधार पर ही आयोग द्वारा मेधासूची तैयार कर नियुक्ति हेतु अनुशंसा की जायेगी। साथ ही सामान्य प्रशासन विभाग के संकल्प संख्या-12535, दिनांक-17.09.2018 (समय-समय पर यथासंशोधित) में निहित प्रावधान के अनुरूप बिहार राज्य के अन्दर अवस्थित चिकित्सा महाविद्यालयों से उत्तीर्ण अभ्यर्थियों के लिए सभी आरक्षण कोटि में 50 प्रतिशत क्षैतिज आरक्षण भी लागू होगा।

6. It is this amendment which is challenged by the petitioners primarily on the ground that it ousts the petitioners from the zone of consideration as also it compromises with the original text of inviting best of the talent, may be by way of competitive examination.

7. On both counts, we find the submission made by learned counsel for the petitioners to be misplaced on facts



and law. The amended Rule does not, in any manner, oust the petitioners from consideration. It only prescribes the criteria for selection on merit, which squarely falls within the domain of legislature.

8. The legislature in their wisdom have only thought it prudent to invite applications and choose the best of the talent not only on the basis of academic qualification but also experience. The pattern for selection is best suited, in the wisdom of the legislature, to cater the need necessitating appointment of persons with experience. This Court cannot sit over the wisdom of the legislature, unless of course, such legislation can be held to be violative of Constitution of India.

9. It is seen that earlier the prescribed process of selection was through competitive examination to be held every year. As per the amended provision, perhaps to avert any delay, the criteria stood changed by adopting a uniform yardstick in awarding marks based on educational qualification and experience. We do not find such procedure to be violative of Articles 14, 16 and 21 of the Constitution of India.

10. In fact, the issue is no longer *res integra* and



stands settled by a coordinate Bench of this Court in **Dr. Dharmbir Kumar (supra)** wherein the Court observed as under:-

“6. Basically, it is for the recruiting agency to stipulate the procedure for selecting the candidates. It is only when the procedure is found to be patently illegal, that the Court would interfere. For selecting candidates, written test can certainly be treated as a good method, but there is nothing in law which mandates that written test is the only method to select the candidates.

7. Awarding of marks for experience is not uncommon. The candidates who have been engaged on contractual basis served the Government Hospitals at a time when their other colleagues have been pursuing their green pastures. The State can certainly recognize the service of such candidates, subject, of course, to certain limits.”

11. At this juncture, we may also take note of the decision rendered by Hon’ble the Apex Court in **Dr. (Major) Meeta Sahai Versus State of Bihar & Ors., (2019) 20 SCC 17**, wherein the Court observed as under:

“33. It is hence irrational to urge that the work experience in any such hospital is different from that in a Government of Bihar hospital. Hence, it would be constitutionally unjust to allow differentiation between the experience gained by doctors at these hospitals established by Panchayats or Municipalities or by the Central Government and its instrumentalities in the territory of Bihar vis-à-vis those run by the Bihar Government. Any attempt to discriminate between hospitals run by the State Government and the Central



Government or Municipalities/Panchayati Raj Institutions is bound to hit the very ethos of our constitutional governance set-up.

34. Having said so, we are not oblivious to the fact that equality does not imply that there can be no classification. Instead, sometimes it may be necessary to treat unequals unequally, for equal treatment of persons with unequal circumstances creates an unjust situation. [*Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, para 415 : 1992 SCC (L&S) Supp 1] Such classification, however, must not be arbitrary but rationally founded on some quality or characteristics which are identifiable within the class of people so created and absent in those excluded from such classification.

35. We are of the view that the purpose behind formulation of the Rules was to recognise the unique challenges of hospitals in Bihar and incentivise doctors to work in non-private hospitals. There is some substance in the submission of the learned counsel for the respondents that Bihar is predominantly poor and thus requires doctors having exposure to such challenging environment as compared to their counterparts in private hospitals. Experience in a non-private hospital instils sensitivity in its doctors, making them more adept to understand the ail and agony of poor patients. Such experience will undoubtedly be useful in furthering the object of government hospitals and must be given due weightage while selecting suitable candidates. Interpreting “government hospitals” to include only a small class of persons who have worked under the Government of Bihar, is thus clearly erroneous and anti-merit. Such an objective would not be defeated by the understanding of the Rules as has been construed by us.

Conclusion

36. For the reasons stated above, the appeal is allowed. Rules 5 and 6(iii) of the Bihar Health Service (Appointment and Service Conditions) Rules, 2013 are construed to include the experience gained by a doctor in any hospital run by the Bihar Government or its instrumentalities, as well as any other non-private hospital (including those run by the Central Government, Municipalities and Panchayati Raj



Institutions; or other public authorities) within the territory of Bihar. The respondents are accordingly directed to rework and prepare a fresh merit list by granting due weightage to the appellant and other similarly placed candidates, within two months. We however clarify that grant of weightage on the basis of work experience shall have no bearing on the suitability of a candidate.”

12. Hence, for all the aforesaid reasons, the present petition devoid of any merit and stands dismissed.

13. Interlocutory Application(s), if any, shall stand disposed of.

(Sanjay Karol, CJ)

(S. Kumar, J)

Sujit/PKP-

AFR/NAFR	
CAV DATE	
Uploading Date	06.06.2021
Transmission Date	

