

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.8800 of 2020

1. Rajneesh Ranjan Son of Kamal Nayan Gopal, Resident of Khawa Chandra Tola, Khawa Rajpur, P.O.- Kiranpur, P.S.- Mednichauki, District- Lakhisarai.
2. Aminur Rashid Khan Son of Dr. Haroon Rashid Khan Resident of Khalilpura Road, Ward No. 03, Near FCI Boring, P.S.- Phulwarisharif, District- Patna.
3. Suman Daughter of Brajnandan Prasad Resident of Bari Dargah, P.O. and P.S.- Lakhisarai, District- Lakhisarai.

... .. Petitioner/s

Versus

1. The State of Bihar through the Additional Chief Secretary, General Administration Department, Govt. of Bihar, Patna.
2. The Principal Secretary, Health Department, Govt. of Bihar, Patna.
3. The Secretary, Bihar Technical Service Commission, Harding Road, Patna.
4. The Examination Controller, Bihar Technical Service Commission, Harding Road, Patna.
5. Dr. Harendra Prasad Singh Son of Sri Krishna Mahto Resident of Village and Post- Bhadwar, P.S.- Bagen Gola, District- Buxar.
6. Dr. Randhir Kumar Singh Son of Late Rajeshwar Prasad Singh Resident of Urmila Palace, Flat No. 408, P.S.- Rupaspur, District- Patna.
7. Dr. Sant Kumar Son of Late Sipahi Bhagat Resident of Saketpuri, Hanuman Nagar, P.S.- Patrakarnagar, District- Patna.
8. Dr. Lalji Prasad Son of Late Awadhesh Kumar Sinha Resident of Budha Nagar, Road No.2, Chiraiyatar, P.S. Kankarbagh, District- Patna.
9. Dr. Uday Kumar Mishra Son of Sri Ugra Narayan Mishra Resident of Village- Kharkhura Bhatbigha, Road No.5, P.S.- Delha, District- Gaya.
10. Dr. Md. Azam Khan Son of Md. Badruddin Khan Resident of Village and Post- Neura, P.S.- Bihta, District- Patna.
11. Dr. Shatrudhan Kumar Son of Ram Pravesh Ram Resident of Village- Kandi, P.S.- Chandauti, District- Gaya.
12. Dr. Md. Ekhlague Ahmad, son of Md. Rajjak Ahmad, resident of Villge- Chamelichak Mozamchak, P.S. Habibpur, District- Bhagalpur.
13. Dr. Ajeet Kumar Singh, son of Keshaw Singh, resident of Village and P.O. Hasaua, P.S. Nantan, District Siwan.
14. Rupesh Kumar, Son of Ramashray Singh, resident of Ward No. 26, Near Middle School, Panhas, Suhird Nagar, P.S. Town, District- Begusarai.

... .. Respondent/s

Appearance :



For the Petitioner/s : Mr. Mrigank Mauli, Sr. Advocate
Mr. Rakesh Kumar Sharma, Advocate
Mr. Sanket, Advocate
Mr. Alok Anand, Advocate
Mr. Navin Kumar Singh, Advocate
For the State : Mr. Birju Prasad, G.P. 13
Mrs. Shweta Anand, Advocate
Mr. Ravi Kumar, Advocate
For the Commission : Mr. Nikesh Kumar, Advocate
For the Intervenor
Respondents 5 to 11 : Mr. Prashant Sinha, Advocate
Mr. Rishi Raj Ranjan, Advocate
Mr. Kunal, Advocate
For the Intervenor
Respondents 13 & 14 : Mr. Chakrapani, Advocate
Mr. Madhuresh Singh, Advocate
Mr. Dipak Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 08-05-2024

The present petition has been placed before us pursuant to the order dated 01.10.2021 passed by the learned Single Judge, whereby the learned Single Judge has referred the matter to the Hon'ble The Chief Justice for placing this matter before a larger Bench. Hon'ble The Chief Justice, therefore, directed the office to place this petition before the present Division Bench.

2. The petitioners have preferred the present petition under Article 226 of the Constitution of India in which they have prayed for the following relief/s:-

“(i) For issuance of writ in the nature of mandamus for a direction to the respondent authorities to



hold competitive written examination in place of selection on marks basis for the post of Ayush Medical Officer advertised by the Bihar Technical Service Commission, Patna vide Advertisement No. 04/2020 to 09/2020.

(ii) For issuance of writ in the nature of Certiorari for read down/struck down the Clause-4 of Advertisement No. 4/2020 to 09/2020 which relates to selection process on marks basis.

(iii) For any other relief/reliefs if petitioner found entitle in the facts and circumstances of the present case.”

3. The factual matrix of the present case is as under:-

3.1. Petitioners claim to be holding the degree of Bachelor of Homeopathic Medicine and Surgery (B.H.M.S.) from recognized institutions.

3.2. The Bihar Technical Service Commission (for the sake of convenience hereinafter referred to as Commission), on the basis of the requisition sent by the Health Department, Government of Bihar, has issued a notice containing advertisement Nos. 4 of 2020 to 9 of 2020 inviting applications for filling up the posts of Ayurvedic Medical Officer, Unani Medical Officer, Homeopathic Medical Officer, Ayush Physician (Ayurvedic), Ayush Physician (Unani), Ayush Physician (Homeopathy) in the pay-scale of Rs.9300-34800 with grade-pay of Rs. 5400/L-9. A total of 3270 posts have been advertised.



3.3. Clause-4 of the advertisement provides the process of selection from which it is revealed that the merit-list is to be prepared on the basis of the marks secured by the candidates in their qualifying examination, i.e. B.A.M.S., B.U.M.S., B.H.M.S., Post Graduation (M.D./M.S. or Higher Education) and the points of work experience acquired by them while working on their engagement on contractual basis in recognized Government Hospitals/Institutions. Following is the break-up of weightage as mentioned in the advertisement against the 3 attributes:-

(i)	Weightage on the basis of score in BAMS/BUMS/BHMS	60 Marks
(ii)	Weightage on the basis of Post Graduation degree, higher qualification (MD/MS Ayurvedic, Unani and Homeopathy or higher degree)	15 Marks
(iii)	Weightage for work experience after appointment on contractual basis in Government institutions/hospitals (5 marks for each year of completion of work experience, maximum 25 marks)	25 Marks
	Total	100 Marks

3.4. The petitioners have, therefore, preferred the present petition challenging the aforesaid advertisement and the process of selection disclosed by the respondent authorities in the aforesaid advertisement.



4. Heard Mr. Mrigank Mauli, learned Senior Counsel for the petitioners assisted by Mr. Rakesh Kumar Sharma, Mr. Sanket, Mr. Alok Anand and Mr. Navin Kumar Singh, Mr. Birju Prasad, G.P. 13 for the respondent State assisted by Mrs. Shweta Anand and Mr. Ravi Kumar, Mr. Nikesh Kumar, learned counsel for the respondent Commission, Mr. Prashant Sinha, learned counsel for intervenor respondent Nos. 5 to 11 assisted by Mr. Rishi Raj Ranjan and Mr. Kunal, Mr. Chakrapani, learned counsel for the respondent Nos. 13 and 14 assisted by Mr. Madhuresh Singh and Mr. Dipak Kumar.

Submissions on behalf of the petitioners

5. Learned Senior Counsel for the petitioners has mainly raised the following contentions-

5.1. Learned Senior Counsel has referred Bihar District Ayush Medical/State Ayush Medical Service (Appointment on Regular/Contract Basis and Service Conditions) Rules, 2010 (hereinafter referred to as 2010 Rules). Learned Senior Counsel has referred Rule-4 to 7 of the aforesaid Rules and has contended that as per Rule- 7 of 2010 Rules the basic cadre to State Ayush Medical Cadre is Ayush Medical Officer and the said Rule provides for appointment to State Cadre through the open competitive examination.



5.2. Learned Senior Counsel thereafter referred Bihar District Ayush Medical/State Ayush Medical Service (Appointment on Regular/Contract Basis and Service Conditions) (Amendment) Rules, 2017 (hereinafter referred to as 2017 (Amendment) Rules). It is contended that by way of 2017 (Amendment) Rules, Rule-4(e) of the 2010 Rules has been amended. By way of the said amendment, selection procedure has been prescribed for the appointment to the post of Ayush Medical Officer.

5.3. At this stage, it is also submitted that thereafter Bihar District Ayush Medical/State Ayush Medical Service (Appointment on Regular/Contract Basis and Service Conditions) (Amendment) Rules, 2019 (hereinafter referred to as 2019 (Amendment) Rules) have been framed. By way of 2019 (Amendment) Rules, once again the amendment has been made and thereby the weightage of marks obtained at under graduate level, Higher Education and Post work experience has been changed. By way of 2019 (Amendment) Rules, the marks for interview was deleted.

5.4. Learned Senior Counsel submits that by way of 2017 (Amendment) Rules or 2019 (Amendment) Rules, Rule-7 of 2010 Rules has never been amended and, therefore, the



provision for appointment through open competitive examination still remains.

5.5. It is contended that now, by way of advertisement which has been issued by the respondent Commission, it is provided that the candidates would be selected on the basis of the 2019 (Amendment) Rules which provide for weightage of marks obtained at various levels on the basis of the work experience. However, there is no reference with regard to selection on the basis of the competitive examination in the impugned advertisement. Thus, the prescribed qualification is manifestly erroneous and violative of Article-14 and contrary to Rule-7 of 2010 Rules.

5.6. It is submitted that the previous two judgments rendered by the Division Bench of this Court in C.W.J.C. Nos. 19278 of 2017 and 3471 of 2021 are *per incuriam*. In the said judgments passed by the Division Bench of this Court, Rule-7 of 2010 Rules has not been considered. Thus, when the said judgments are passed in ignorance of the statutory provision, the said decisions can be termed as *per incuriam*.

5.7. It is contended that during the course of hearing of the present petition, now it has been pointed out by the learned counsel appearing for the respondent State that Rule-



7 has already been deleted vide notification dated 15.06.2021. However, the said amendment made in 2010 Rules is after initiation of process of appointment, i.e. after the issuance of the advertisement and, therefore, the same will not regulate the current selection process and would have prospective application.

5.8. Learned Senior Counsel has placed reliance upon the following decisions:- **(2020) 4 SCC-1 (Dr. Shah Faesal & Ors. Vs. Union of India & Ors.), (2005) 4 SCC-154 (Secretary, A.P. Public Service Commission Vs. B. Swapna & Ors.), (2020) 20 SCC 680 (Assam Public Service Commission & Ors. Vs. Pranjal Kumar Sarma & Ors.)** and the order dated 29.04.2024 passed by the Division Bench of this Court in **L.P.A. No. 238 of 2024 (The State of Bihar through the Additional Chief Secretary, Health Department, Bihar, Patna Vs. Archana Kumari & Ors.)** and allied matters.

5.9. Learned Senior Counsel has, therefore, urged that the present petition be allowed and thereby the impugned advertisement be set aside and the respondent authorities be directed to conduct the competitive examination for the post in question and thereafter the appointments be made.

Submissions on behalf of the respondent State -1



& 2.

6. Learned counsel for the respondent State has referred the averments made in the 2nd supplementary counter affidavit filed on behalf of respondent No. 1 and 2 and thereafter submitted that amendment in Rule-4(e) of 2010 Rules by way of 2017 (Amendment) Rules was challenged before this Court in C.W.J.C. No. 19278 of 2017. It is submitted that the Division Bench vide order dated 16.07.2018 dismissed the said writ application. Learned counsel for the State has referred the order passed by the Division Bench of this Court in the said matter.

6.1. It is further submitted that the amendment made in Rule-4 of 2010 Rules by Amendment Rules of 2017 and Amendment Rules of 2019 was challenged by the concerned petitioners. In the said petition, the advertisement impugned in the present petition was also under challenge. The concerned petitioners filed C.W.J.C. No. 3471 of 2021.

6.2. It is submitted that the Division Bench of this Court dismissed the said petition vide order dated 31.05.2021. Learned counsel for the State has referred the said order, copy of which is placed at page-253 of the compilation.

6.3. At this stage, learned counsel for the respondent State has referred the 2nd supplementary counter



affidavit filed on behalf of respondent Nos.1 and 2. It is submitted that the said affidavit is filed on 28.06.2021. In the said affidavit, it has been specifically pointed out that in exercise of powers under Proviso to Article-309 of the Constitution of India, His Excellency the Governor of Bihar has been pleased to make necessary amendment in the 2010 Rules. The said amendment has been notified as Bihar District Ayush Medical/State Ayush Medical Service (Appointment on Regular/Contract basis and Service Condition (Amendment) Rules, 2021 (hereinafter referred as 2021 (Amendment) Rules.

6.4. It is submitted that by way of the said amendment, now Rule-7 of 2010 Rules has been deleted. Learned counsel, therefore, urged that though 2021 (Amendment) Rules has been issued on 15th of June, 2021, the same was not brought to the notice of the learned Single Judge in the present matter and, therefore, it appears that learned Single Judge has referred the matter to the Larger Bench vide order dated 01.10.2021.

7. It is submitted that in the present petition, no protection has been granted to the present petitioners and, therefore, selection process was continued pursuant to the impugned advertisement. Thereafter, the concerned candidates



filed proceeding before this Court and pursuant to the orders passed by this Court, now the appointments are made on the post in question pursuant to the impugned advertisement.

8. It is further submitted that Rule-7 of 2010 Rules is already amended and the selection is to be made on the post in question pursuant to the 2019 (Amendment) Rules and 2021 (Amendment) Rules. Therefore, the impugned advertisement may not be quashed, as prayed for by the petitioners, otherwise it would be a futile exercise. Therefore, it is urged that the present petition be dismissed.

Submissions on behalf of the intervenor respondents 5 to 11.

9. Learned counsel for the respondent Nos. 5 to 11 mainly submitted that respondent No. 5 to 11 were working on contractual basis in the State of Bihar till their regular appointment pursuant to the result published by the Commission in February, 2024. At present they are working as Ayush Doctors pursuant to the completion of the selection process under challenge. Learned counsel has also referred 2010 Rules, 2017 (Amendment) Rules and 2019 Rules.

9.1. At this stage, learned counsel has referred Bihar District Medical Cadre/Bihar Health Service Cadre



(Appointment on Regular/Contract Basis and Service Condition) Rules, 2008 (hereinafter referred to as 2008 Rules. It is submitted that 2008 Rules contains similar provisions as Rule-4 and Rule-7 of 2010 Rules. It is pointed out that thereafter The Bihar Health Service (Appointment and Service Condition) Rules, 2013 were notified (hereinafter referred to as 2013 Rules).

9.2. At this stage, learned counsel also pointed out that Bihar Health Service (Appointment and Service Condition) (Amendment) Rules, 2019 were notified. Clause-2 and Clause 3 of the same read as under:

“(a) Clause-2 of the amended Rules-

Rule-2(c) of the 2013 Rules are substituted to make definition of Commission as Bihar Technical Service Commission.

(b) Rule-3 of the amended Rules-

Rule-6 of the 2013 Rules were amended and substituted deleting the provision for interview and the entire selection process is to be based upon marks obtained in the academic qualification.”

10. It is also pointed out at this stage that The Bihar Technical Service Commission Selection Procedure Rules, 2018 were notified. Learned counsel has referred Rule-6, 14 and 15 of the said Rules. It is contended that Rule-15 of 2018 Rules makes the amendment in the Rules of State Health Service



applicable on the Ayush Cadre automatically, meaning thereby that the Rules of 2013 framed for Bihar Health Service and its amendment made in the year 2019 which made provision for selection on the basis of marks obtained in the academic qualification became automatically applicable upon Ayush Cadre Rules. Thus, it is submitted that the amendments made in 2017 and 2021 in the Ayush Cadre Rules were in consonance with the Rules of 2013 framed for the Bihar Health Service and its amendment in the year 2019.

11. Learned counsel, therefore, contended that Rule-7 of 2010 Rules was impliedly repealed. Learned counsel has placed reliance upon the decision rendered in the case of **Municipal Council, Palai Vs. T.J. Joseph**, reported in **AIR 1963 SC 1561**.

11.1. Learned counsel has, therefore, urged that the present petition be dismissed.

Submissions on behalf of respondent Nos. 13 and 14.

12. Learned counsels appearing for respondent Nos. 13 and 14 has adopted the contention raised by the learned counsels for respondent Nos. 5 to 11. It is contended that the advertisement in question is not in conflict with Rule-7 of 2010



Rules. It is further submitted that by 2017 (Amendment) Rules, when Rule-4(e) of 2010 Rules has been amended, Rule-7 of 2010 Rules stands impliedly amended.

13. Learned counsel has placed reliance upon the decision rendered by Hon'ble Supreme Court in the case of **Yogendra Pal Singh & Ors. Vs. Union of India & Ors.**, reported in **(1987) 1 SCC 631**. Learned counsel has, therefore, urged that the present petition be dismissed.

Discussion

14. It is pertinent to mention that the present petition was listed before the learned Single Judge. However, during the course of arguments, it was contended before the learned Single Judge that while rendering the decision dated 31.05.2021 in **C.W.J.C. No. 3471 of 2021**, in the case of **Kumar Bhaskar & Ors. Vs. The State of Bihar & Ors.**, the Division Bench was under the wrong impression that Rule-7 of 2010 Rules stood amended/deleted and, therefore, the Division Bench has dismissed the petition. Learned Single Judge was, therefore, of the view that, as per the stand taken by the respondent State, Rule-7 of 2010 Rules is still not amended or still not deleted and the process for deletion of the said Rule is initiated and, therefore, the learned Single Judge referred the



present matter to a larger Bench, as observed hereinabove.

15. 14. We have considered the submissions canvassed by the learned counsel for the parties. We have also perused the material placed on record and the relevant Rules referred by the learned counsels for the parties. We have also considered the decisions upon which reliance is placed by the learned counsels for the parties.

16. It would emerge from the record that the petitioners claim to be holding the degree of B.H.M.S. from recognized institutions. The Commission issued advertisement Nos. 4 of 2020 to 9 of 2020 inviting applications for filling up various posts. Clause-4 of the advertisement discloses the process of selection from which it is evident that the merit-list is to be prepared on the basis of the marks secured by the candidates in their qualifying examination and the points of work experience acquired by them while working on their engagement on contractual basis in recognized hospitals/institutions following which the break-up of weightage has been mentioned against the three attributes.

17. The petitioners have a grievance that the selection procedure laid down in the advertisement is contrary to statutory prescription under Rule-7 of 2010 Rules.



18. Hence, at this stage, we would like to refer the relevant Rules of 2010 Rules:-

“4. (a) All doctors working in Additional Primary Health Centre, Primary Health Centre and State Dispensary (Ayurved, unani & Homeopathic) shall be in District Ayush Medical cadre. All Doctors working in Referral Hospital, Sub-Divisional Hospital, Sadar Hospital, Hospitals of Medical colleges of Ayush sector. State Ayurved & Unani Pharmacy and research unit, Doctors of State Ayush Medical Service.

Specialist Sub-Cadre of clause (b) of Rule-5 of chapter-3, Incharge Medical Officer, Dy Superintendents and first Medical officer of PH.C and Referral Hospital shall be in State Ayush Medical Cadre.

(b) Every year doctors shall be selected having regard to available vacancies as per the prescribed procedure and on the basis of advertisement for which guidelines shall be issued from time to time by the Department separately.

(c) Age limit- the maximum age limit as prescribed by the government (General Administration Department) from time to time shall be applicable.

(d) Reservation- It shall be necessary to follow the reservation rules prescribed by the State Government.

(e) In the District Ayush Medical cadre, doctors shall be selected on contract basis and shall work for at least two years. On their satisfactory services, extension of service may be made. All posts of this cadre shall be filled on contract basis and no permanent/temporary appointment shall be on these posts. The services shall be extended after satisfactory performance. Doctors of this cadre can be transferred any where in the concerned district.

Chapter-3:



State Ayush Medical cadre

5. The following two sub-cadres shall be in State Ayush Medical Cadre:-

(a) State Ayush medical service General Duty sub-cadre and

(b) State Ayush medical service specialist sub-cadre. Doctors of this cadre may be transferred any where in the state.

6. All other posts except the posts identified for the District Ayush cadre, shall be deemed to be post of the State Ayush Medical Cadre.

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.

15. Which ever amendments shall be in the Rules made for the purpose of determining the service condition of the State Medical Cadre shall be deemed to be applicable to the Ayush Sector Automatically.”

19. At this stage, it is required to be noted that 2010 Rules came to be amended by way of 2017 (Amendment) Rules. Relevant provisions of 2017 (Amendment) Rules are as under:

(i)	For Marks obtained in B.A.M.S./B.U.M.S./B.H.M.S.	-	50 Marks
(ii)	For Postgraduate Degree/ Higher Degree (5 marks for M.D./M.Sc. (Ayurveda, Unani &	-	10 Marks



	Homeopathy) and 05 marks for higher degree total 10 marks		
(iii)	For work experience received after appointment on the basis of contract appointed in Hospitals/Dispensaries accredited by the Government of Bihar (5 marks for maximum of full year experience, maximum 25 marks)	-	25 Marks
(iv)	Interview	-	15 Marks
Total			100 Marks

19.1. Thus, from the aforesaid, it is revealed that Rule-4(e) of the 2010 Rules came to be amended and selection procedure has been specifically introduced.

20. It is further required to be observed at this stage that thereafter 2019 (Amendment) Rules came to be issued whereby it has amended certain provisions of 2010 Rules as well as Rules of 2017. In the said Rules, it has been provided that the Bihar Technical Service Commission shall prepare the merit-list in the following manners:-

- (i) Marks obtained in MBBS

- Total 60 Marks
- (ii) Post Graduate or Higher degree

- Total 15 marks
- (iii) Work experience after appointment
in Government hospitals on regular
/contractual basis

- Total 25 marks”

Provided that for each complete one year of work experience 05 marks will be given and thus a maximum of 25 marks will be given.”

21. Now, the impugned advertisement has been issued by the Commission wherein the Commission has



followed the selection process provided under the Rules of 2019.

22. Now, it is the case of the petitioners that though Rule-4(e) came to be amended by way of 2017 Rules as well as 2019 Rules, Rule-7 of 2010 Rules has not been amended. The said Rule provides for competitive examination according to the prescribed procedure. However, it is relevant to note that there is no procedure prescribed for conducting the competitive examination in the said Rules.

23. At this stage, it is relevant to note that the amendment carried out in Rule-4(e) by way of 2017 (Amendment) Rules was challenged by the concerned petitioners in the case of **Himanshu Shekhar & Ors. Vs. The State of Bihar & Ors.** vide **C.W.J.C. No. 19278 of 2017**. A Division Bench of this Court dismissed the said petition vide order dated 16.07.2018. Copy of the said order is placed on record at page-249 of the compilation.

24. At this stage, it is also relevant to observe that Rule-4 of 2019 Rules as well as the advertisement impugned herein were challenged by the concerned petitioners in the case of **Kumar Bhaskar & Ors. Vs. The State of Bihar & Ors.** in **C.W.J.C. No. 3471 of 2021**. The Division Bench of this Court,



after considering the relevant Rules and the decision rendered by Hon'ble Supreme Court, dismissed the said petition. The Division Bench has observed in para-6 to 9 as under:-

“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 application 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.”

25. Now, it is the case of the petitioners that though



Rule-7 of 2010 Rules was not deleted/amended, the Division Bench has observed that the said Rule has been deleted and thereby given the aforesaid decision and, therefore, the said decision can be termed as *per incuriam*. Even the learned Single Judge, while referring the present matter to the larger Bench vide order dated 01.10.2021, was of the opinion that relevant statutory provision was not rightly pointed out to the learned Division Bench of this Court and the learned Single Judge was not agreeable with the view taken by the learned Division Bench in the aforesaid case and, therefore, as observed hereinabove, the present matter is referred to this Bench.

26. At this stage, we would like to observe that Rule-15 of 2010 Rules specifically provided that whichever amendments shall be made in the Rules made for the purpose of determining the service condition of State Medical Cadre shall be deemed to be applicable to the Ayush Sector automatically.

26.1. Therefore, now we would like to refer the Rules of Health Service Cadre Rules of 2008 containing similar type of provisions which are made in Rules-4 and 7 of 2010 Rules. Rules of 2008 came to be amended by way of 2013 Rules. Copy of the said Rules are placed at page 175 of the compilation. Rules-3, 4 and 6 of 2013 Rules provide as under:

“3. Constitution of Service: (1) there shall be following two



sub cadets in Bihar Health Service Cadre:-

- (a) Bihar Health Service General Duty sub-cadre
- (b) Bihar Health Service Specialist sub-cadre
- (2) Doctors of these cadre can be transferred and posted anywhere in the State.

4(1) Appointments to the Bihar Health Service will be made by the Government against the posts of Medical Officer/Specialist Grade-II in view of the available vacancies. Each year they shall be selected according to the procedure prescribed in these rules. The selection shall be made through the Bihar Public Service Commission and it shall be necessary to follow the age limit and reservation rules determined by the government.

(2) In case of non-availability of suitable doctors for appointment/promotion, in the public interest, Government may appoint doctors on contract from outside for a limited period. The procedure for such recruitment would be decided by the govt.

6. For selection of doctors to appointment in General sub-cadre candidates shall be given marks for their educational qualification and work experience. Apart from that, they shall also be given marks for the oral interview.

A total 100 marks shall be for educational qualification, work experience and interview. The break up of these 100 marks shall be as follows:

- | | |
|---|----------------|
| (i) Marks obtained in MBBS. | Total 50 Marks |
| (ii) PG or Higher Degree | Total 10 Marks |
| (iii) Work Experience after appointment in Government hospital on contract/regular basis. | Total 25 Marks |
| Provided that for each complete one year of work experience, candidates will be given 5 and thus maximum 25 marks will be given | |
| (iv) Interview | Total 15 Marks |

27. Thereafter, the aforesaid Bihar Health Service



Cadre Rules 2013 came to be amended in the year 2019. Copy of the said Rules is placed on record at page-180 of the compilation. The said Rules are referred as Bihar Health Service (Appointment and Service Condition)(Amendment) Rules of 2019. Clause-3 of the said Rules provides that Rule-6 of 2013 Rules is substituted by following:-

“3. Rule-6 of the “Bihar Health Service (Appointment & Service Conditions) Rules, 2013 is substituted by the following:-

“For selection of Doctors for appointment in General Sub Cadre, candidates shall be given marks for their educational qualification and work experience.

According to above, a total of 100 determined marks shall be for educational qualification and work experience. These 100 marks shall be determined according to following:-

- | | |
|---|-------------------|
| (i) Marks obtained in MBBS | - Total 60 Marks |
| (ii) Post Graduate or Higher degree | - Total 15 marks |
| (iii) Work experience after appointment
in Government hospitals on regular
/contractual basis | - Total 25 marks” |

Provided that for each complete one year of work experience 05 marks will be given and thus a maximum of 25 marks will be given.”

28. Now it is the contention of the private respondents herein that though the State Government did not specifically amend the provision of Rule-7 of 2010 Rules, in terms of Clause-15 of the same the amendments made in the Cadre Rules for State Medical Cadre automatically became applicable on the Ayush Sector also. Thus, in terms of the



provisions contained in Rule-15 of 2010 Rules, the appointments and selection to the post of Ayush Medical Officer is to be made on the basis of preparation of merit list and this merit-list has to be prepared on the basis of the marks obtained in Graduation, Post Graduation and the experience marks for working in the Government Hospitals in Bihar. Thus, in view of Rule-15 of 2010 Rules and the provisions contained in Bihar Health Service Cadre Rules of 2013 and amendment in the said Rules in the year 2019, the effect of Rule-7 of 2010 Rules stands diluted. It is also contended that by way of the aforesaid, Rule-7 of 2010 Rules is impliedly repealed.

28.1. At this stage, it is relevant to note that the Government of Bihar, in exercise of its powers conferred by Section-14(I) of Bihar Technical Service Commission Act, 2014, has framed Bihar Technical Service Commission Selection Procedure Rules of 2018. Copy of the said Rules are placed at page-200 of the compilation. In Rule-2(iii), the word “Commission” is defined as “Commission means Bihar Technical Service Commission.” Rules-6, 14 and 15 of the said Rules provide as under:

“6. The selection of candidate shall be made on the basis of marks obtained in minimum academic qualification as prescribed in the concerned Service Cadre Rules and marks prescribed for work experience (if



provided in the concerned Service Cadre Rules) against the requisitioned vacancies. In case of grade instead of marks in certificate/mark sheet of educational qualification, grade shall be converted into marks as per formula prescribed in concerned Rules/by Concerned Departments.

14. The provision related to selection process in concerned Service/Cadre Rules of the Posts mentioned in annexure shall deemed to be amended up to this extent.

15. Bihar Technical Service Commission shall be competent to fix Standard and procedure of selection, subject to the provisions of the Bihar Technical Service Commission Act, 2014. The Bihar Technical Service Commission Rules, 2015 and these Rules.”

29. In view of the aforesaid, it was contended by the learned counsel for the private respondents that Rule-7 of 2010 Rules is impliedly overruled.

Findings

30. We are of the view that the said contention deserves to be accepted in view of the aforesaid provisions made in the relevant Rules. Even otherwise, it is now well settled that 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. The



Division Bench of this Court in the case of Kumar Bhaskar (supra) has referred the decision rendered by the 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) P.L.J.R. 916**. In the said case, this Court has observed in para Nos. 6 and 7 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.”

31. In the case of **Dr. (Major) Meeta Sahai Vs. State of Bihar & Ors.**, reported in **(2019) 20 SCC 17** Hon’ble Supreme Court has observed in para Nos. 33 to 36 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 of Municipalities or by the Central Government and its instrumentalities in the territory of



Bihar vis-a-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. Rule 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.”

32. Keeping in view the aforesaid decisions, if the facts of the present case are examined, we are of the view that the selection procedure prescribed by the recruiting agency while issuing the impugned advertisement cannot be termed as arbitrary or in violation of Article-14 of the Constitution of India, as contended by the petitioners.

33. Now, it is the contention of the petitioners that the decision rendered in the case of **Kumar Bhaskar (supra)** is *per incuriam*. Learned counsel has placed reliance upon the decision rendered in the case of **Dr. Shah Faizal (supra)**. Paragraph-28, 29 and 32 of the said decision read as under:-

“28. The rule of *per incuriam* has been developed as an exception to the doctrine of judicial



precedent. Literally, it means a judgment passed in ignorance of a relevant statute or any other binding authority. The aforesaid rule is well elucidated in *Halsbury's Laws of England* in the following manner:

“1687...the court is not bound to follow a decision of its own if given *per incuriam*. *A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of a coordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords.* In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords.”

(emphasis supplied)

29. In this context of the precedential value of a judgment rendered *per incuriam*, the opinion of Venkatachaliah, J., in the seven-Judge Bench decision of *A.R. Antulay v. R.S. Nayak* assumes great relevance: (SCC p. 716, para 183)

“183. But the point is that the circumstance that a decision is reached *per incuriam*, merely serves to denude the decision of its precedent value. Such a decision would not be binding as a judicial precedent. A coordinate Bench can disagree with it and decline to follow it. A larger Bench can overrule such decision. *When a previous decision is so overruled it does not happen-- nor has the overruling Bench any jurisdiction so to do-- that the finality of the operative order, inter partes, in the previous decision is overturned. In this context the word “decision” means only the reason for the previous order and not the operative order in the previous decision, binding inter partes.* .. Can such a decision be characterised as one reached *per incuriam*? Indeed, Rangnath Misra, J. says this on the point:(para 105)

‘Overruling when made by a larger Bench of an



earlier decision of a smaller one is intended to take away the precedent value of the decision without effecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger Bench.”

(emphasis supplied)

32. The view that the subsequent decision shall be declared per incuriam only if there exists a conflict in the ratio decidendi of the pertinent judgments was also taken by a five-Judge Bench decision of this Court in *Punjab Land Development & Reclamation Corpn. Ltd. v. Labour Court*: (SCC pp. 706-07, para 43)

“43. As regards the judgments of the Supreme Court allegedly rendered in ignorance of a relevant constitutional provision or other statutory provisions on the subjects covered by them, it is true that the Supreme Court may not be said to “declare the law” on those subjects if the relevant provisions were not really present to its mind. But in this case Sections 25-G and 25-H were not directly attracted and even if they could be said to have been attracted in laying down the major premise, they were to be interpreted consistently with the subject or context. *The problem of judgment per incuriam when actually arises, should present no difficulty as this Court can lay down the law afresh, if two or more of its earlier judgments cannot stand together.*”

(emphasis supplied)

34. We are of the view that the aforesaid decision rendered by the Hon’ble Supreme Court would not render any assistance to the petitioners in the facts of the present case.



Further, the question whether the decision rendered in the case of Kumar Bhaskar (supra) can be termed as per incuriam or not is not required to be gone into in view of the subsequent development which has taken place, i.e. deletion of Rule-7 of 2010 Rules on 15.06.2021.

35. At this stage, it is important to observe that by way of 2nd supplementary counter affidavit filed by respondent Nos. 1 and 2, it has been pointed out that that Rule-7 of 2010 Rules has been deleted by way of notification dated 15.06.2021. Copy of the same has been placed on record at page No.286 of the compilation. It is relevant to note that the 2nd supplementary counter affidavit has been filed on behalf of respondent Nos. 1 and 2 on 28.06.2021, despite which the aforesaid important aspect was not brought to the notice of the learned Single Judge and, therefore, it appears that the learned Single Judge has referred the present matter to the larger Bench vide order dated 01.10.2021. In the said referral order, learned Single Judge has specifically observed that till the date of passing of the said order, State only amended Rule-7 of 2010 Rules and the State is in the process of amending the said provision. However, as observed hereinabove, in fact Rule-7 was deleted on 15.06.2021 itself i.e. much prior to the order dated 01.10.2021. Thus, we are



of the view that the reference to the larger Bench itself is in ignorance of the 2nd supplementary counter affidavit filed. However, the fact remains that in the present petition no interim relief was granted by this Court in favour of the petitioners and, therefore, respondent Nos. 1 and 2 continued with the selection process pursuant to the advertisement impugned in the present petition. The concerned candidates have been selected pursuant to the relevant Rules and as per the advertisement. When the appointment was not given to the said selected candidates, they initiated proceeding before this Court and it is not in dispute that pursuant to the direction issued by this Court, now the appointments have already been made pursuant to the impugned advertisement. Thus, the selection process is already over.

36. Learned counsel for the petitioners has placed reliance upon the decision rendered in the case of **Secretary, A.P. Public Service Commission Vs. B. Swapna & Ors.**, reported in **(2005) 4 SCC 154**, wherein the Hon'ble Supreme Court has observed in para-14 as under:-

“14. The High Court has committed an error in holding that the amended rule was operative. As has been fairly conceded by learned counsel for Respondent 1 applicant it was the unamended rule which was applicable. Once a process of selection starts, the prescribed selection criteria cannot be changed. The logic behind the same is based on fair play. A person who did not apply because a



certain criterion e.g. minimum percentage of marks can make a legitimate grievance, in case the same is lowered, that he could have applied because he possessed the said percentage. Rules regarding qualification for appointment if amended during continuance of the process of selection do not affect the same. That is because every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the rules showing the intention to affect existing rights the rule must be held to be prospective. If the rule is expressed in a language which is fairly capable of either interpretation it ought to be considered as prospective only.”

37. Thereafter, learned counsel has placed reliance upon the decision rendered in the case of **Assam Public Service Commission (supra)**, wherein the Hon’ble Supreme Court has observed in para-15 as under:-

“15. The law with regard to applicability of the Rules which are brought anew during the selection process have been crystalised by this Court. It has been held that the norms existing on the date when the process of selection begins, will control the selection and the alteration to the norms would not affect the ongoing process unless the new Rules are to be given retrospective effect. Similarly in *N.T. Devin Katti v. Karnataka Public Service Commission*, this Court held that a candidate has a limited right of being considered for selection in accordance with the Rules as they existed on the date of advertisement and he cannot be deprived of that limited right by amendment of the Rules during the pendency of the selection, unless the Rules are to be applied retrospectively.”

38. The Division Bench of this Court in the order dated 29.04.2024, passed in **L.P.A. No. 238 of 2024**, has



observed in para-46 and 47 as under:-

“46. At this juncture appropriate would be reference to **A.A. Calton (supra)** and paragraph 5 therefrom which is extracted hereunder: -

“5. It is no doubt true that the Act was amended by U.P. Act 26 of 1975 which came into force on August 18, 1975 taking away the power of the Director to make an appointment under Section 16-F(4) of the Act in the case of minority institutions. The amending Act did not. However, provide expressly that the amendment in question would apply to pending proceedings under Section 16-F of the Act. Nor do we find any words in it which by necessary intendment would affect such pending proceedings. The process of selection under Section 16-F of the Act commencing from the stage of calling for applications for a post up to the date on which the Director becomes entitled to make a selection under Section 16-F(4) (as it stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or the other of the candidates. Section 16-F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the legislature may pass laws with retrospective effect subject to the recognised constitutional limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the



recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned counsel for the appellant that the law as amended by the U.P. Act 26 of 1975 should have been followed in the present case.”

47. The situation is identical here and despite the Rules of 2023 having come into effect, the proceedings commenced and continued for selection of ANM as per the Rules of 2018 have to be taken to its logical conclusion. The selection and mode of marks have to be as prescribed under the Rules of 2018; which for the restricted purpose of the instant selection commenced prior to the Rules of 2023, stands validated by the saving clause in the Rules of 2023 despite the Rules of 2018 having been repealed by the very same clause.”

39. Looking to the facts and circumstances of the



present case, we are of the view that the said decision would not render any assistance to the petitioners.

39.1. Now, it is not in dispute that Rule-7 of 2010 Rules has been deleted in June, 2021, no doubt, after issuance of the impugned advertisement. Even if the contentions of the petitioners are accepted that the said amendment cannot have retrospective effect, even then, in the facts and circumstances of the present case, once the appointments are already made pursuant to the impugned advertisement, as per the Rules of 2019 and now if the said advertisement is set aside and if the direction is issued to the respondent authority to issue fresh advertisement for the post in question, even then the respondent will issue the advertisement as per the present Rules which exist as on date. Thus, Rules as exist as on today do not provide for competitive examination, as provided by Rule-7 of 2010 Rules which stands deleted in June, 2021 and, as such, respondent Nos.1 and 2 would not be in a position to issue the advertisement containing the clause for conducting the competitive examination. Naturally, the respondent Nos. 1 and 2 will issue the advertisement as per the Rules existing as on date which provides for the procedure for selection which is already there in the impugned advertisement. Thus, in the facts and



circumstances of the present case, it would be a futile exercise to set aside the advertisement and to give direction to the respondent authority to issue fresh advertisement as per the Rules existing as on date, which provide for preparation of merit-list on the basis of marks secured by the candidates in their qualifying examination at Graduate and Post-Graduate level and on the basis of work experience and not on the basis of any competitive examination.

40. Thus, on this ground also, we are not inclined to entertain the present petition.

41. Accordingly, the present petition stands dismissed.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

K.C.Jha/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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