

Reeta Singh And 6 Others vs State Of U.P. And 2 Others on 2 February, 2018

Bench: Dilip B. Bhosale, Suneet Kumar

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Chief Justice's Court

Case :- WRIT - C No. - 1715 of 2017

Petitioner :- Reeta Singh And 6 Others

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Santosh Kumar Shukla, Kamal Singh

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 5006 of 2017

Petitioner :- Kamini Chauhan & 8 Others

Respondent :- State Of U.P. & 3 Others

Counsel for Petitioner :- Naresh Kumar Pal

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 2156 of 2017

Petitioner :- Sandhya Singh And 6 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Pankaj Kumar Gupta, Sanjay Kaushik

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 2163 of 2017

Petitioner :- Sushama Singh And 7 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Pankaj Kumar Gupta, Sanjay Kaushik

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 3395 of 2017

Petitioner :- Smt Seema Devi And 13 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Naresh Kumar Pal

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 420 of 2017

Petitioner :- Archana Singh And 14 Others

Respondent :- State Of U.P. 2 Others

Counsel for Petitioner :- Santosh Kumar Shukla, Kamal Singh

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 4769 of 2017

Petitioner :- Pooja Singh & 9 Others

Respondent :- State Of U.P. & 3 Others

Counsel for Petitioner :- Pankaj Kumar Gupta, Sanjay Kaushik

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 5282 of 2017

Petitioner :- Chaya Singh & 15 Others

Respondent :- State Of U.P. & 3 Others

Counsel for Petitioner :- Prashant Singh

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 60434 of 2016

Petitioner :- Bimala Singh And 20 Others

Respondent :- State Of U.P. And 5 Others

Counsel for Petitioner :- Santosh Kumar Shukla

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 60772 of 2016

Petitioner :- Smt. Meena Mishra And 11 Ors.

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Akhilanand Mishra, Anil Bhushan

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 60809 of 2016

Petitioner :- Smt. Beena And 6 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- K. Ajit, Arvind Srivastava Iii

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 8869 of 2017

Petitioner :- Savita Patel And 18 Others

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Santosh Kumar Shukla, Kamal Singh

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 9075 of 2017

Petitioner :- Manju Singh

Respondent :- State Of U.P. & 2 Others

Counsel for Petitioner :- Prashant Singh

Counsel for Respondent :- C.S.C.

AND

Case :- WRIT - C No. - 3894 of 2018

Petitioner :- Pushpa Singh And 3

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Santosh Kumar Shukla

Counsel for Respondent :- C.S.C.

Hon'ble Dilip B. Bhosale, Chief Justice

Hon'ble Suneet Kumar, J.

(Per Suneet Kumar, J.) We have heard Mr. S.K. Shukla, Mr. Akhilanand Mishra, Mr. Naresh Kumar Pal and Mr. Arvind Srivastava, learned Advocates, for the petitioners, Mr. Neeraj Tripathi, learned Additional Advocate General, Mr. Shashank Shekhar Singh, learned Additional Chief Standing Counsel, Mr. G.K. Singh, learned Senior Advocate with Mr. Seemant Singh and Mr. Santosh Kumar Singh Paliwal, Advocates and Mr. Dharam Pal Singh, learned Senior Advocate with Mr. Mangal Rai, Advocate, for the respondents.

Petitioners are working as Health Worker (Female) on contract basis in the State at different Community Health Centres¹. By the instant batch of writ petitions petitioners are raising challenge to the Advertisement issued for recruitment of 5628 Basic Health Worker (Female) on the premise that Rule 5 and Rule 8 of U.P. Medical Health and Family Welfare Department Health Workers and Health Supervisors (Male & Female) Service Rules 1997² is ultravires of Article 14 and 16 of the Constitution, insofar, it limits the consideration of the candidature of persons having passed training course conducted only by Uttar Pradesh Nurses and Midwives Council, Lucknow, thereby, excluding candidates having acquired training certificate from outside the State.

It is not in dispute that petitioners are duly registered with the Uttar Pradesh Nurses and Midwives Council, Lucknow, but have been excluded from the recruitment process for the reason that they have obtained training certificate from outside the State of Uttar Pradesh, hence, in terms of Rule 8 of Rules 1997 do not fulfill the academic qualification prescribed therein.

The third respondent, Director General, National Programme, Supervision & Monitoring Directorate General of Family Welfare, Lucknow, issued an advertisement dated 1 December 2016 inviting application for the post of Basic Health Worker (Female). The qualification required under the advertisement is in terms of Rule 8 of Rules 1997.

Learned counsel for the petitioner submits: (i) that petitioners are duly qualified having qualification prescribed by the Indian Nursing Council under the Indian Nursing Council Act, 1947³; (ii) that petitioners are duly recorded in the register maintained under Section 17 of the United Provinces Nurses, Mid Wives, Assistant Midwives, [Auxiliary Nurse-Midwives and Health Visitors] Registration Act, 1934⁴; (iii) that Rule 5 and Rule 8 of Rules 1997, a subordinate legislation, cannot override the plenary Parliamentary enactment, thereby, excluding petitioners from appointment to the U.P. Medical Health & Family Welfare Department Health Workers and Health Supervisors (Male & Female) Services⁵; (iv) that Rule 5 and Rule 8 is ultravires of Act 1947, Act 1934 and fundamental rights under Article 14 and 16 of the Constitution being discriminatory and arbitrary.

In rebuttal, learned Additional Advocate General appearing for the respondents-State submits that State does not propose to file counter affidavit in the present batch of writ petitions, but would rely on the short-counter affidavit filed in Writ-A No. 54986 of 2013 (Bimla Singh and others Versus State of U.P. and others), wherein, the vires of the same rules are under challenge. Learned counsel makes the following submissions: (i) that State Government in order to impart quality training to the aspirants of Basic Health Worker (Male/Female) promulgated U.P. Health Worker (Male & Female) Training Regulation Directions 2007 prescribing the qualifications, mode of selection and the training to be imparted; (ii) that State Government under Rules 1997, is justified in restricting the recruitment to regular vacancies to persons who fulfill the conditions/qualifications prescribed under Rule 5 and Rule 8 of Rules 1997; (iii) that in order to maintain high standards, persons having successfully completed training conducted by the Uttar Pradesh Nurses and Midwives Council, are alone eligible for regular appointment; (iv) that prescribing eligibility criteria and minimum qualification for a particular post under the government department is within the sole discretion of the State Government; (v) that the Rule 5 and 8 are not violative of Articles 14 and 16 of the Constitution of India, but merely impose reasonable restrictions by providing a particular qualification.

Learned Senior Counsels appearing in support of the intervention applications submit that the applicants are duly qualified in terms of Rule 5 and 8 of Rule 1997, therefore, have a limited right of being considered for selection pursuant to the impugned Advertisement.

Rival submissions fall for consideration.

It would be apposite to scan the statutory provisions governing appointment of Basic Health Worker (Female) before reverting to the rival contentions of the parties.

Act 1947 was enacted to constitute Indian Nurses Council in order to establish a uniform standard of training for nurses, midwives and health visitors. Act 1947 extends to whole of India except State of Jammu and Kashmir. Sub-section (1) of Section 10 mandates that for the purpose of this Act, the qualification included in Part-I of the Schedule shall be recognized qualifications, and qualifications included in Part-II shall be recognized higher qualification. The recognized qualification shall be a sufficient qualification for enrollment in any State register. Section 11 reads thus:

"(a) any recognized qualification shall be a sufficient qualification for enrollment in any State register.

(b) no person shall, after the date of the commencement of this Act, be entitled to be enrolled in any State register as a nurse, midwife, (auxiliary nurse-midwife,) health visitor, or public health nurse unless he or she holds a recognized qualification."

"State council⁶" means the Council (by whatever name called) constituted under the law of a State to regulate the registration of nurses, midwives or health visitors in the State, and "State Register⁷" means a register of nurses, midwives, or health visitors maintained under the law of a State.

Act 1934, duly adopted and modified by the Adaptation of Law Order 1950, provides for registration of nurses, midwives, assistant midwives, (auxiliary nurse-midwives or health visitors). It extends to whole of Uttar Pradesh. Section 3 of Act 1934 provides for establishment and incorporation of a council viz. United Provinces Nurses and Midwives Council, which in view of Section 17 is required to "make orders for regulating the formation, maintenance and publication of registers of nurses, midwives, assistant midwives, auxiliary nurse-midwives, and health visitor, according to their respective qualifications".

In terms of Section 23 of Act 1934 persons holding qualifications recognized under Act 1947 are "entitled to be registered" in the State register. Section 23, for our purpose, is extracted:

"23. Persons entitled to be registered.- The following persons shall, subject to the rules and regulations made under this Act and to the payment of such fees as may be prescribed, be entitled to have their names entered in the registers of nurses, midwives, assistant midwives, [auxiliary nurse-midwives or health visitors], namely-

(a) persons who hold qualifications in nursing or midwives or health, visiting recognized under the India Nursing Council Act, 1947;

(b).....

(c)....."

State Government in exercise of powers conferred by proviso to Article 309 of the Constitution of India and in supersession of all existing rules and orders on the subject enacted Rules 1997 regulating recruitment and conditions of service of persons appointed to the Medical Health Services. Rule 3(j) defines "Health Worker (Female)" to mean and be deemed always to have meant a person appointed as such on or after July 23, 1981 and includes person working as (i) Auxiliary Nurse, Midwife and (ii) Family Welfare Worker on the said date.

"Member of the Service" means a person substantively appointed under these rules or the rules or orders in force prior to the commencement of these rules to a post in the cadre of the Service.

Part III of Rules 1997 relates to "Recruitment". Sub-rule (2) of Rule 5 provides for recruitment of Health Worker (Female), which is one of the source for recruitment to various categories of posts. Sub-rule (2) is extracted:

"(2) Health Worker (Female).-By direct recruitment through the Commission from amongst such female candidates who have successfully completed one and a half year basic mahila health worker training course (including six months training related to deliveries) conducted by Uttar Pradesh Nurses and Midwives Council, Lucknow and who are duly registered in the Uttar Pradesh Nurses and Midwives Council,

Lucknow."

Part IV provides for "Qualifications"

Academic qualification for direct recruitment to the post of Health Worker (Female) is provided under Sub-rule (2) of Rule 8 which reads thus:

"(2) A candidate for direct recruitment to the post of Health Worker (Female) must have successfully completed prescribed training course for Basic Health Worker (Female) conducted by the Uttar Pradesh Nurses and Midwives Council, Lucknow and is also duly registered in the Uttar Pradesh Nurses and Midwives Council Lucknow."

On conjoint reading of Rule 5 and Rule 8 of Rules 1997 it is clear that only those persons are eligible for recruitment to the post of Health Worker (Female) who have successfully completed prescribed training course conducted by Uttar Pradesh Nurses and Midwives Council, meaning thereby, candidates who have successfully completed training course conducted by any other institution(s) from outside the State duly recognized under Act 1947 and entered in the State register maintained by the Uttar Pradesh Nurses and Midwives Council, are not eligible to be considered for recruitment/appointment to the post of Health Worker (Female), but are otherwise eligible for all other purposes for which they have obtained the training certificate, including appointment on contract basis.

In the backdrop of the statutory provisions and rival contentions of the parties, the issue that falls for our consideration is whether persons who have acquired qualification/training certificate of Health Worker from Institution/Councils duly recognized by the Indian Nursing Council under Act 1947, can be ousted from being considered for appointment to Medical Health Service of the State.

On examining the statutory provisions it emerges that in order to establish and regulate a uniform standard of training for nurses, midwives, health workers etc. Act 1947 envisages constitution of a Council under section 3 for the purposes of the Act and for recognition of qualification included in Part I. In other words, any authority within the State constituted for the purpose of granting any qualification, grants a qualification in general nursing, midwifery, health worker etc. not included in the Schedule may apply to the Council to have such qualification recognized and the Council may declare such qualification shall be a recognized qualification for the purposes of Act 1947.

Section 11 of Act 1947 provides for the "Effect of Recognition", which begins with a non-obstante clause: Notwithstanding anything contained in any other law:

(a) any recognized qualification shall be a sufficient qualification or enrollment in any State register-

(b) no person shall, after the date of the commencement of this Act, be entitled to be enrolled in any State register as a nurse, midwife, (auxiliary nurse-midwife,) health

visitor, or public health nurse unless he or she holds a recognized qualification:

Provided xxxxxxxxxxxxxxxxxxxxxxx;

(c) xxxxxxxxxxxxxxxxxxxxxxx Part I of Act 1947 enlists the Examination Boards, State Councils, State Medical Faculty of the States etc. imparting courses/training and recognized qualification in nursing, midwifery, health worker etc. The Uttar Pradesh State Medical Faculty and the Uttar Pradesh Nurses and Midwives Council finds entry at Sl. No. 5 and 6. It is thus clear from the provisions of Act 1947 that recognized councils throughout the country included in Part I are eligible to impart training/courses which entitle the persons to seek enrollment in State register in terms of Section 11 of Act 1947 read with Section 23 of Act 1934.

At this juncture, we may also notice Section 16 of Act 1947 which confers upon the Council to make regulations, which may, inter alia, provide for:

(a) prescribing the standard curricula for training of nurses, midwives and health visitors;

(b) prescribing standards of examination and other requirements to be satisfied to secure for qualifications recognition under the Act.

Act 1934, a State enactment, provides for registration of nurses etc. in the registers maintained by the State Council under Section 17 and in terms of Section 23 all persons having qualifications in nursing, midwifery etc. recognized under Act 1947 are entitled to have their names entered in the respective State registers. It follows, on plain reading, that the recognized qualification enlisted in Schedule to Act 1947 entitles such person to seek registration in the registers maintained by State Councils where the person desires to work as a nurse, health worker etc. It is not in dispute, inter se parties, that the petitioners hold recognized qualification for the post advertised and are duly registered in the register maintained by the State Council, otherwise, they could not have been engaged on contract and as a matter of fact are functioning as health workers at various CHS.

However, Rule 5 and Rule 8 of Rules 1997, framed by the State Government in exercise of powers under Article 309 of the Constitution, mandates that only those female candidates who have successfully completed training course conducted by U.P. Nurses and Midwives Council are alone eligible to participate in the recruitment for the post of Health Worker (Female). The academic qualification provided under Rule 8, principally, prohibits or debars all such persons having obtained recognized qualification prescribed under Act 1947 from being eligible for the post of Health Worker (Female).

In our considered opinion, the State Government has overstepped its jurisdiction while prescribing the academic qualification under the subordinate legislation which is not only in conflict and in contradiction to the Central Act i.e. Act 1947, Section 23 of Act 1934, but, is also violative of Article 14 and 16 of the Constitution.

There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:

- (a) Lack of legislative competence to make the subordinate legislation.
- (b) Violation of fundamental rights guaranteed under the Constitution of India.
- (c) Violation of any provision of the Constitution of India.
- (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
- (e) Repugnancy to the laws of the land, that is, any enactment.
- (f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

(Refer: State of T.N. Versus P. Krishnamurthy⁹ and Cellular Operators Association of India and others Versus Telecom Regulatory Authority of India and others¹⁰) In the present case, the petitioners have succeeded in assailing the impugned rules under paras (b), (d) (e) and (f).

In Ashok Kumar Verma and others Versus State of U.P. and another¹¹ the question posed before the Division Bench of this Court was whether the State Government could impose a condition that only those persons who obtained degree of B.A.M.S. from any University established in Uttar Pradesh alone could apply for the appointment to the post of Medical Officers.

The Court answered the question against the State, paragraph 47 of the report is extracted:

"47. After giving our careful consideration to the matter we are of the opinion that Rule 10 of the Subordinate (Gazetted) Medical Service (Ayurveda and Unani Rules 1964 and Section 40 of the U.P. Indian Medicine Act, 1939 excluding graduates from other State from being considered for the appointment of medical officers in Uttar Pradesh suffer from the vice of discrimination, arbitrariness and unreasonableness. They are hit by Article 16 of the constitution."

In Jitendra Kumar Soni and others Versus State of U.P. and others¹², inter alia, the following questions fell for consideration:

- "(a) Whether the degree obtained by a student from an institution/university established by law, situate at a place out side the State of Uttar Pradesh but duly recognized by the N.C.T.E. can be refused acceptance as valid qualification for being admitted to Special B.T.C. Course-2008 by the State?

(b) Whether the classification under the Government Order between the degree of B.Ed. obtained from other State being valid for admission to B.T.C. Course-2008, while the degree of C.P.Ed., B.P.Ed. and D.P.Ed. similarly obtained from the institutions situate outside the State of Uttar Pradesh being invalid for considered for admission to B.T.C. Course -2008 is arbitrary and without any reasonable rational and therefore hit by Article 14 of the Constitution of India?" (Page 51) Full Bench of this Court answered the reference in the following terms:

"(1) In answer to Question No. (a), it is not open to the State or the State authorities to exclude the students, who have obtained degree/diploma/certificate in LT/B.P.Ed./D.P.Ed./C.P.Ed. from Institutions/Universities established by law situate at place outside the State of Uttar Pradesh and duly recognized by NCTE, from applying either for the Special B.T.C. Course or B.T.C. Course. Any such exclusion is illegal. Question No. (a) is answered, accordingly."

In *B.L. Asawa Versus State of Rajasthan*¹³, the issue for consideration before the Supreme Court was whether the Rajasthan Public Service Commission was right in law in excluding the appellant, therein, holding degree of M.D. in Forensic Medicine from University of Bihar, duly included in the Schedule to the Indian Medical Council Act 1956, from consideration on the ground that he did not possess the academic qualification prescribed under the Ordinance of Rajasthan University for the post of Lecturer in Forensic Medicine. The Court held that the appellant was fully qualified for appointment to the post of Lecturer in Forensic Medicine and could not be excluded for merely holding the degree from an institution outside the State.

Learned Additional Advocate General during the course of arguments submitted, on instructions, that the State Government is contemplating to amend Rules 1997 and scrap the entire selection for the post of Health Worker (Female) initiated pursuant to the impugned advertisement. In other words, the State Government does not desire to proceed any further with the selections. The submission has been opposed by learned counsel for the petitioner and the learned Senior Counsels appearing on behalf of the intervenors. It is urged on behalf of the petitioner that the State has not categorically assured the Court that Rule 5 and 8 impugned would be amended suitably, and petitioners would be permitted to participate in the selection for the post in future. On behalf of the intervenors it is urged that they fulfill the qualifications in terms of Rule 5 and 8, therefore, have a limited legal right to be considered pursuant to the impugned advertisement. It is, therefore, urged that the State Government cannot back track mid way after inviting applications. The selections have to be brought to its logical end on the basis of the Rules applicable on the date of advertisement. In support of their submission, reliance has been placed on decisions rendered in *Sonia Versus Oriental Insurance Co. Ltd.* and another¹⁴, and *Bishnu Biswas and others Versus Union of India and others*¹⁵.

We are not inclined to enter into this controversy nor take judicial notice of the submission of learned Additional Advocate General for the reason that Rules are yet to be amended and what would be the nature of the amendment is not yet known. We have already declared the Rules under challenge as void and invalid, therefore, the impugned advertisement issued pursuant thereof

inviting applications and all proceedings taken thereunder for recruitment to the post of Health Worker (Female) has rendered void. The applicants (intervenors) who have made applications pursuant to the impugned advertisement have, therefore, not acquired any right as their applications have been made under the Rule which has been declared invalid. (Refer: State of Andhra Pradesh Versus T. Ramakrishna Rao and others¹⁶) As a result, the writ petition is allowed. Declaring Rule 5 and Rule 8 of U.P. Medical Health and Family Welfare Department Health Workers and Health Supervisors (Male & Female) Service Rules 1997, insofar it relates to Health Worker (Female) ultra vires of India Nursing Council Act, 1947, and violative of petitioners fundamental right under Articles 14 and 16 of the Constitution, consequently, the impugned Advertisement is set aside and quashed.

No cost.

Order Date :- 2.2.2018

K.K. Maurya

(Suneet Kumar,J.)

(Dilip B. Bhosale,CJ)