

Unreportable
+IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WP(C) No.12814/2006

Date of Hearing: 14.08.2008

Date of Decision: 25.09.2008

#Lt. Col. (Dr.) S.C. Dash, YSM, VSM
!

.....Petitioner
Through: Mr.Kamal Mehta with
Mr.Brijesh Oberoi and Ms.Lakhshana Oberoi

Versus

\$Union of India and Others

.....Respondents
Through Mr. Rakesh Tikku

CORAM :-

***THE HON'BLE MR.JUSTICE A.K.SIKRI**

THE HON'BLE MR. JUSTICE MANMOHAN SINGH

- 1.Whether Reporters of Local papers may be allowed to see the Judgment?
- 2.To be referred to the Reporter or not?
- 3.Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

:

1. The petitioner got admission into the MBBS course at SCB Medical College, Cuttak in the year 1980. While he was still pursuing his studies, he applied under the Medical Cadet Scheme of the Army. After interview he got selected and was conferred scholarship from the Army to complete the final year of his medical education/course. In the year 1985, he completed MBBS course whereafter he joined the Army Medical Corps (AMC) under the Indian Army in the year 1986 when he was still doing his internship. Since then he is in the service of the Army in its AMC and at present holds the position of Lt. Colonel.

2. He claims that he has been serving AMC with utmost dedication, devotion and sincerity with a missionary zeal. He received General Officer Commanding in Chief (Western Command) Commendation as Regimental Resident Officer 12 Kumaon. In the year 1991 the petitioner also received Chief of Army Staff Commendation as Regimental Medical Officer 12 Kumaon in 'Operation Rakshak'. In 1995 another commendation in counter insurgency operations for management of battle casualties was given to him. In the year 1996, the petitioner completed post graduation course in Masters of Surgery, General Surgery from the Armed Force Medical College, Pune. In the year 1998, he received Vishist Sewa Medal (VSM) from the President of India for management of battle casualties in counter insurgency operation while being with 165 MH, 3 Corps. He also received Yudh Sewa Medal in 'Operation Vijay' (Kargil War) for management of battle casualties which was also awarded by the President of India to him in the year 2000.
3. In his zeal to pursue further studies the petitioner appeared in the Entrance Examination which he qualified on the basis whereof he was selected to do MCh Urology Course, which is a super speciality course in All-India Institute of Medical Sciences (AIIMS). He accordingly joined that course in the year 2001. The petitioner availed five and a half years of training opportunities of which two years for Masters of Surgery Post Graduation Degree and three and a half years for MCh

Super Speciality in AIIMS. While doing the Super Speciality MCh course at AIIMS which is of three and a half years duration, the petitioner for one and a half years of the said course remained attached with a local Army Hospital that is being on active duty. Two years study leave was expended to three and a half years of super speciality MCh course and the remaining one and a half years was spent on duty. The petitioner during his training at AIIMS was also trained in laparoscopic surgery and various branches of urologic surgery.

4. The petitioner learnt about many latest developments in the field during his training. Hence he thought of applying for advanced laparoscopic and robotic surgery training to maintain the continuity with an endeavour to keep abreast with the latest development in the world in the field of urology. The petitioner towards his said craving for excellence in the field of urology thought of applying for advanced laparoscopic and robotic surgery training and for starting the same in the Army where it is not existing. The petitioner prepared a research project and submitted the same along with the application addressed to the commandant Army Hospital (R&R) which has financial implication of 24000 USD required to be sanctioned by the Army Headquarters.

5. This proposal of the petitioner was, however, not agreed to by the Army Headquarters. However, as the luck would have been, the Department of Bio-Technology under the Ministry of Science and

Technology, Government of India issued an advertisement in June 2004 for “Bio-Technology Overseas Associateship Award 2003-04 for conducting advance research or undergoing specialized research training in overseas research institutions/laboratories. The petitioner applied for this Associateship supported by a certificate given by Dr. Narmada P. Gupta, Professor and Head of Department, Urology, AIIMS, New Delhi certifying the capacity and capabilities of the petitioner. This application was also supported by the Dean Academics, Army Hospital, Delhi Cantt. stating that if the petitioner is selected, he shall be granted deputation leave for availing of Associateship.

6. After due consideration the Ministry of Science and Technology, Department of Bio-Technology, Government of India informed the petitioner vide letter dated 24.5.2004 that he had been selected for the “long term Associateship Award for a period of one year.” This Associateship could, however, be availed of by the petitioner after fulfilling the following requirements:-

- (i) The service bond to be executed by the candidate as per the prescribed proforma;
- (ii) No-objection from the cadre controlling authority/patent organization; and

(iii) The deputation order from the parent organization/institution for availing the Associateship by the candidate.

7. The petitioner was accordingly asked to send these documents within one month. It is here where the trouble has started for the petitioner and though more than four years have passed, the petitioner's cadre controlling authority, namely, the Army has not given its assent which led the petitioner to file the instant petition in August 2006.
8. The events which transpired in dealing with the request of the petitioner with the department and rejection thereof may now be summarized. It is the case of the petitioner that after receiving the aforesaid award letter dated 24.5.2004 he applied for no-objection certificate (NOC) from the Army Hospital (Research & Referral), Delhi Cantt. where he was posted. His application was, however, not accepted by the Commandant of the Hospital. Vide letter dated 31.5.2004 he requested for personal audience. However, thereafter vide letter dated 23.6.2004 his request was rejected. In September 2004 he again represented his department for giving NOC. Nothing happened. In the meantime, the Department of Bio-Technology granted the extension as asked for by the petitioner with approval of Associateship in the financial year 2005-06 as well. Armed with this letter he again requested his cadre controlling authority to give the

permission. However, in October 2005 the petitioner received an army signal/telegram whereby his request was again turned down.

9. The petitioner yet again applied for extension and for carry forward of the Associateship for the year 2006-07 which request was once again allowed by the Department of Bio-Technology vide letter dated 8.2.2006. With this extension in hand and having no hopes from the respondents the petitioner knocked the doors of this Court by filing the instant petition in August 2006 with the following prayers:-

“a) To issue an appropriate writ, order or direction in the nature of certiorari quashing the communication dated 23.6.2004 whereby the petitioner’s application has not been agreed to and the communication sent to the Headquarters Western Command whereby the petitioner’s second application was also not been agreed to being illegal, wrongful, mala fide, unreasonable, arbitrary being influenced by totally irrelevant and extraneous considerations;

b) To issue an appropriate writ, order or direction in the nature of mandamus and/or other appropriate writ of similar nature directing the respondents to forthwith grant the permission/leave as promised and/or assured when the petitioner made the application before the Government of India, Ministry of Science & Technology, Department of Biotechnology.”

10. In essence, thus, the petitioner wants that orders of rejection communicated by the respondents to the petitioner be quashed and directions be issued to the respondents to grant him the permission/leave for availing the Associateship Award and to enable him to undergo the training in Advance Laparoscopic and Robo

Assisted Urological Surgery at Cleave Land Clinic, Ohio, USA and Vattikuti Urology Institute Detroit, USA.

11. We may note at this stage that during the pendency of this petition the petitioner has been able to obtain further extensions from the Department of Biotechnology for undertaking the said course and availing the Associateship Award. Therefore, in so far as the Government is concerned, the offer of Associateship Award is still open and valid.

12. The challenge to the decision of the respondents in turning down his request to undergo the aforesaid project and do Advance Laparoscopic and Robo Assisted Urological Surgery is primarily on the ground that the same is arbitrary, unreasonable, irrational, mala fide and is on totally irrelevant considerations whereas the relevant considerations are kept outside the decision-making process.

13. As noted above, first request of the petitioner was rejected by the respondents vide communication dated 23.6.2004 and second request was rejected in October 2005. Communication dated 23.6.2004 reads as under:-

“1. Refer your DO letter No.5385/scd/pers 31 May 2004 addressed to the DGMS (Army).

2. I have been directed to inform you that your application for training abroad has been considered at this Dte Gen and the same has not been agreed to.”

14. Likewise, the second rejection sent to the petitioner via signal contained the following text:-

“FOR MED. REF YOUR HQ LETTER 52015/4/M-1 DATED AUG. 31. PERMISSION TO AVAIL INDIAN OVERSEAS ASSOCIATESHIP AWARD FOR THE YR 2004 (WHICH HAS BEEN EXTENDED TO 2005-2006) IN LAPAROSCOPIC UROLOGY AND ROBOT ASSISTED SURGERY IN R/O MR 05385 M LT COL SC DASH YSM COMMA VSM COMMA CL SPL (SURG AND UROLOGIST) OF CH WC HAS NOT BEEN AGREED TO.”

15. It is clear that both the communications do not contain any reasons.

However, the respondent has filed the counter affidavit to this petition explaining the reasons because of which his request has been rejected, which may be summarized as under:-

- a) The petitioner, out of 20 years of his service, has been granted training opportunities for 6 1/2 years (03 of MS Course in General Surgery and 3 1/2 years for MCh course in Urology) at Government expenses. The study leave to officers is granted only for two years. The petitioner was granted an additional 1 1/2 years attachment at Army Hospital (R&R), New Delhi to work at AIIMS to enable him to complete his super-speciality, i.e., MCh in Urology. Only few officers get this privilege to upgrade professional qualification to such an extent fully financed by the Government.

- b) There is substantial shortage of trained manpower in Armed Forces especially in basic discipline such as Surgery, Anaesthesia, Medicine and Gynaecology. The deficiency of Surgeons will get further accentuated if officers are sent on training course where there is no requirement in the organization. The organization has already given him fair share during his span of service.
- c) The petitioner claims as he has been accorded permission by the Department of Science and Technology he should be detailed to undergo training abroad irrespective of the service requirements. There is no proposal to start Robotic Surgery in Urology at the moment or in the near future in the Armed Forces Hospitals. Robotic Surgery is in an incipient stage in the country. The same has been unequivocally and unanimously commented by various authorities in the Armed Forces Medical Services, including Dy. DGMS (p), Dy. DGAFMS (P&T), Consultant Urology, Senior Consultant Surgery, DGMS(Army) and DGAFMS.
- d) The petitioner did not seek concurrence of the competent authority, i.e., DGAFMS, for applying for the Associateship. To maintain discipline in the uniformed service, any educational venture by an officer needs

prior approval of the competent authority, even for correspondence courses, leave aside for regular training. The officer approached Department of Science and Technology without permission of the competent administrative authority, i.e., DGAFMS/DGMS (Army), which itself is an act of indiscipline.

16.Allegations of bias and prejudice are denied by submitting that the petitioner has been suitably rewarded and given awards for his achievements as he has been recipient of VSM, COAs and commendation cards and Army Commander's commendation card. He has also been granted training opportunities on number of occasions at Government expense. It is mentioned that the authorities felt that after completing his training in MCh in Urology in August 2004 it was the opinion of all authorities, including Consultant (Urology), Senior Consultant (Surgery) GHMS (Army) and the DG AFMS that he should gain 3-5 years experience in Urology and Endoscopic surgery before embarking on training in Robotic Surgery.

17.We were also shown the original record wherein the application and request of the petitioner was processed time and again and we find that the request is rejected on the grounds mentioned in the counter affidavit which we have highlighted above.

18.It is clear from the above that the main reason for rejection of the request of the petitioner are that he should gain more experience in Urology and Endoscopic surgery before embarking on a training in Robotic Surgery; at present there is no proposal to start Robotic Surgery in Urology or even in near future and therefore, the training of the petitioner in this discipline may not be of any use to the respondents; there is an acute shortage of trained manpower in Armed Forces specially in the basic discipline such as surgery etc. and it would be difficult to spare the petitioner at this moment.

19.In so far as the first reason is concerned, namely, the petitioner should gain some more experience in urology and endoscopic surgery, this might have been a valid reason when the petitioner's request was rejected in the year 2004 or 2005. However, as of today the petitioner has already gained further experience of four years after he completed training in MCh in Urology in August 2004. Therefore, this is no more a valid reason. Notwithstanding we would like to make few comments on this reason. The petitioner had applied for and was awarded the Associateship Award for the year 2004-05, initially by the Department of Biotechnology. It was on the basis of the project submitted by him in Advance Laparoscopic and Robo Assisted Urology Surgery. His research paper was considered by the competent authorities in the Department of Biotechnology, Ministry of Science and Technology, Government of India. It can safely be presumed that this consideration

must have been bestowed by the experts in the field who not only cleared the said research paper on merits but found that the petitioner was imminently suited for award of the Fellowship to undergo the said project at Cleave Land Clinic, Ohio, USA. Once he has been successful in getting this Associateship Award rejecting the application on the ground that he needs some more experience in Urology after completing his MCh course therein, to our mind, would be unreasonable and guided by extraneous considerations. We refrain from making any further comments on this in view of the fact that even if such a reason is acceptable, as of today, the petitioner meets this requirement as he has already gained four years experience after completing super speciality in the discipline of urology.

20.Second reason given by the respondent in refusing the request of the petitioner is that there is no proposal to start Robotic Surgery in Urology at present or in near future and therefore, training of the petitioner in this discipline would not be of any use to the respondents. It was argued that Robotic Surgery is seldom used in India and the equipments which are required for this purpose are very costly. Going by the economics thereof vis-à-vis the utility, there is a conscious decision taken not to introduce Robotic Surgery in the AFMS. It was argued that it is purely a managerial decision and this policy decision has to be respected by the petitioner, more so when even the courts would not like to dwell into this area. The proposition, which is

advanced by the learned counsel for the respondent, cannot be disputed. No doubt, it is the prerogative of the management to decide as to whether it is necessary to introduce Robotic Surgery in Urology in AFMS or not. Before taking such a decision so many factors need to be considered which weigh in the mind of the experts in the field. However, what is emphasized by the petitioner is that the fellowship given to the petitioner is not only in Robotic Urology Surgery but in advanced Laparoscopic Surgery as well. It is pointed out that Laparoscopic surgical instruments are already available in the AFMS even upto the zonal level. The petitioner has annexed some of the equipments available along with their store number as Annexure-A to the affidavit dated 13.11.2006. This is not denied by the respondents in reply affidavit except stating that these instruments cannot be used for Robotic Prosectomy. Thus, at least there is no denial that the petitioner is to undergo the training in advance laparoscopic surgery as well. His specific averment that advance laparoscopic surgery can be performed with the instruments already available but to do so what is lacking is the training remains unrefuted. Therefore, at least the relevance of advance laparoscopic surgery course is accepted by the respondents by not specifically denying the averments to this effect made by the petitioner. Therefore, if the petitioner is detailed for this purpose he can be of immense use to the respondents inasmuch as, there would be a significant augment in the skills of the petitioner

whose competence and merit as a doctor in his field stands accepted. If in addition he learns the techniques in the robotic urology surgery as well, he would be able to hone his skills better. Thus, refusing to grant him the promotion by taking into consideration only one aspect of the fellowship, namely, robotic urology surgery would not be justified. The respondents have not looked into the matter by giving holistic approach. The course/fellowship in its entirety, which includes the element of advance laparoscopic surgery as well. To this extent the decision-making process may not be wholly correct inasmuch as, some of the relevant considerations, which should have been taken into consideration while deciding the request of the petitioner, having not been taken into consideration.

21. Last ground given, as pointed out above, is that there is acute shortage of surgeons in AFMS and therefore, the petitioner cannot be spared. Again, as noted above, this was the position taken into consideration 3-4 years ago. If the request of the petitioner was rejected on this ground on an earlier occasion and if such a reason is accepted even now, that would give an impression that come what may the respondents do not want the petitioner to undergo this course. One has to keep in mind that the selection of the petitioner is on merits for the said fellowship, that too by none other than another wing of the Government of India, i.e., the Department of Biotechnology in the Ministry of Science and Technology. One arm of the Government has

found the petitioner fit for award of this fellowship. It is clear that the consideration which weighed with the Department of Biotechnology would include:-

- a) Merit, justification and relevancy of the project submitted by the petitioner;
- b) Competence of the petitioner to undergo such a course by availing the fellowship;
- c) The relevancy of the project and usefulness thereof in India/
- d) While making selection, the Department was conscious of the fact that the petitioner belongs to Armed Forces. There is thus an implicit hope expressed by the other Government Department that the petitioner's employer would spare him for some time to undergo the training in the prestigious institute having worldwide recognition.

22. Above all, the very fact that the Department of Biotechnology has renewed the Associateship award initially meant for the year 2003-04 by extending the same for successive years would clearly show that in so far as the Department of Biotechnology is concerned, it gives due importance to this project and is very much interested that the petitioner avails the fellowship and acquires the necessary training.

23. In the aforesaid backdrop, we are of the view that the matter needs reconsideration at the hands of the authorities, namely, the

respondents. No doubt, it is the discretion of the respondents to give permission to the petitioner to avail the fellowship or not. At the same time this discretion has to be exercised objectively and taking into consideration all the relevant factors. We get an impression that some of the relevant considerations have given a go-by while taking the decision. The Supreme Court in the case of Union of India v. Kuldeep Singh, AIR 2004 SC 827 laid down the following principles on this discretion has to be exercised:-

“19. Discretion is to know through law what is just. Where a Judge has and exercised a judicial discretion his order is unappealable unless he did so under a mistake of law or fact or in disregard of principle, or after taking into account irrelevant matters. It will help to show this if it can be shown that there were no materials on which he could exercise his discretion in the way he did. Not any one of the reasons attempted to be enumerated by the High Court in this case could in law be viewed as either relevant or reasonable reasons carrying even any resemblance of nexus in adjudging the quantum of punishment in respect of an offence punishable under the Act.

20. When any thing is left to any person, Judge or Magistrate to be done according to his discretion, the law intends it must be done with sound discretion, and according to law. (See Tomlin’s Law Dictionary). In its ordinary meaning, the word “discretion” signifies unrestrained exercise of choice or will: freedom to act according to one’s own judgment; unrestrained exercise of will; the liberty of power of acting without other control than one’s judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and, therefore, whoever hath power

to act at discretion, is bound by the rule of reason and law. (See Tomlin's Law Dictionary).

21. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment, soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (Per Lord Halsbury, LC, in *Sharp v. Wakefield* (1891) Appeal Cases 173). Also (See *S.G. Jaisinghani v. Union of India and others* (AIR 1967 SC 1427)).

22. The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, where the legislature concedes discretion it also imposes a heavy responsibility.

"The discretion of a Judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is often times caprice; in the worst it is very vice, folly, and passion to which human nature is liable." Said (Lord Camden, LCJ, in *Hindson and Kersey* (1680) 8 How St Tr 57)."

24. We may also usefully refer to the following observations of the Supreme Court in Sant Raj and another v. O.P. Singla and another, (1985) 2 SCC 349:-

“4. In the present case, the Labour Court having held that the termination of services of the appellants would constitute retrenchment and as the pre-requisite for a valid retrenchment having not been satisfied, the termination of service was bad, yet in the facts of the case in his discretion declined to grant the relief of reinstatement. Whenever, it is said that something has to be done within the discretion of the authority then that something has to be done according to the rules of reason and justice and not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful but legal and regular and it must be exercised within the limit to which an honest man to the discharge of his office ought to find himself. (See *Sharpe v. Wakefield*). Discretion means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful. (See *S.G. Jaisinghani v. Union of India*).”

25. In Indian Railway Construction Co. Ltd. v. Ajay Kumar, **2003(2) SCALE 481**, the Supreme Court reiterated the principles on which judicial review of the administrative decision is to be undertaken by the courts. Referring to the *Wednesbury's* principles followed successfully by the Apex Court, the Court made the following observations:-

“20. Therefore, to arrive at a decision on “reasonableness” the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide

upon the choice and not for the Court to substitute its view.

21. The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in *CCSU* case as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was & principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows:

“.....Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of ‘proportionality’ which is recognized in the administrative law of several of our fellow members of the European Economic Community.”

Lord Diplock explained “irrationality” as follows:-

“By ‘irrationality’ I mean what can now be succinctly referred to as *Wednesbury unreasonableness*. It applies to a decision which is to outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

26. It is not necessary to go into the allegations of *mala fides* etc. as alleged by the petitioner. We may only observe that going by the record, *prima facie*, we are not inclined to accept that there were any

mala fides in rejecting the application of the petitioner, though the discretion is not exercised on sound principles.

27.In view of our foregoing discussion, we set aside the impugned order vide which the application of the petitioner is rejected and direct the respondents to reconsider the case of the petitioner on merits taking into consideration all relevant factors, including those pointed out by us in this judgment. We are hopeful that the matter would be considered objectively and with open mind. It should be done within one month from today and decision communicated to the petitioner. No costs.

(A.K. SIKRI)
JUDGE

September 25, 2008
hp.

(MANMOHAN SINGH)
JUDGE