IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 25-04-2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

WRIT PETITION Nos.2336, 2337 and 10226 OF 2011

And M.P.Nos.1, 1 and 2 of 2011

Dr.N.Jayanthi M.S.,D.O. ..Petitioner in all WPs

Vs

1.State of Tamil Nadu rep.by
by Secretary to Government,
Health and Family Welfare
Department, Fort St. George,
Chennai-9.

2.The Director of Medical Education,
Kilpauk, Chennai-10.

3.The Dean, Madras Medical College,
Chennai-3. …Respondents in all WPs

WP.No.2336/2011:

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari, calling for the records of the first respondent made in G.O.Ms.No.408, Public Health and Family Welfare Department, dated 15.12.2009 and quash the said Government Order dated 15.12.2009.

WP.No.2337/2011:

PETITION under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus, calling for the orders of the second respondent bearing Ref.No.L.Dis.No.27372/E3/3/10 dated 15.5.2010 and the consequential proceedings of the third respondent in Ref.No. 08121/E1/510 dated 2.6.2010 and quash the said proceedings of the second and third respondents dated 15.5.2010 and 2.6.2010 respectively and consequently direct the respondents to treat the petitioner as voluntarily retired with effect from 24.5.2010.

WP.No.10226/2011:

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari, calling

for the records of the second respondent bearing Ref.No.14692/SC1/1/2011 dated 11.3.2011 and quash the said Government Order dated 11.3.2011.

For Petitioner : Mr.R.Muthukumaraswamy, SC
for Mr.A.Jenasenan

For Respondents : Mrs.A.Srijayanthi,
Special Addl. Government Pleader

COMMON ORDER

The petitioner was selected through Tamil Nadu Public Service Commission and appointed as Assistant Surgeon in the Directorate of Medical Services in the Government Primary Health Centre, Kandramanickam on 5.6.1989. In 1991, after she completed her probation, she was selected as a service candidate to undergo Post Graduate Diploma Course in Ophthalmology. She completed the course in October 1993. Subsequently, she also pursued her Post Graduate Degree in Ophthalmology, after which she switched over to the teaching line. In November 2009, the petitioner went on medical leave, due her own ill-health and the ill-health of her mother-in-law. While continuing on medical leave, the petitioner submitted an application on 24.2.2010, seeking to go on voluntary retirement. In normal circumstances, the petitioner was entitled to seek voluntary retirement, as she had completed 20 years of service in June 2009. It is relevant to note that the application for voluntary retirement dated 24.2.2010 was forwarded to the appointing authority viz., the Government, both through proper channel as well as in person, when the petitioner handed over an advance copy. The period of 3 months prescribed by the FR 56(f), was to expire on 24.5.2010. But no order was communicated to the petitioner till 24.5.2010. However, by a communication dated 2.6.2010, the Dean of the Madras Medical College informed the petitioner that her request was rejected by the Director of Medical Education, by an order dated 15.5.2010. The order of the Director of Medical Education dated 15.5.2010 was also enclosed to the communication of the Dean dated 2.6.2010. The rejection of the request of the petitioner was on the ground that the post held by her had been declared to be a scarce category of post under G.O.Ms. No.408 Health and Family Welfare Department, dated 15.12.2009. Therefore, aggrieved by the rejection of her request for voluntary retirement, the petitioner has come up with two writ petitions viz., W.P.Nos.2336 and 2337 of 2011. In the first writ petition, the petitioner challenges G.O.Ms.No.408, Health and Family Welfare Department, dated 15.12.2009, by which the post held by the petitioner was declared as a scarce category of post. In the second writ petition, the petitioner challenges the

order dated 15.5.2010 and 2.6.2010 passed respectively by the Director of Medical Education and the Dean of the Madras Medical College, rejecting her request for voluntary retirement.

2. After the above writ petitions were admitted and notice ordered, the Director of Medical Education issued a charge memo dated 11.3.2011, for the failure of the petitioner to report for duty, after expiry of the leave sanctioned to her. Therefore, challenging the charge memo, the petitioner has come up with the third writ petition in W.P.No.10226 of 2011. Since the third writ petition arises out of proceedings, which were consequential to the rejection of the request of the petitioner for voluntary retirement, the fate of the said writ petition would follow the fate of the other two writ petitions. Therefore, let me first deal with the first two writ petitions.

W.P.No.2336 of 2011:

3. As stated earlier, the challenge in this writ petition is to the Government Order by which all categories of posts were declared as scarce categories by the Government. The said Government Order was issued in pursuance of FR 56(3)(f), which reads as follows:-

> "(f) The appointing authority shall issue orders before the date of expiry of notice either accepting the voluntary retirement or not. Otherwise, the Government servant shall be deemed to have been retired voluntary from service at the end of the period of notice:
>
> Provided that where a Government servant under suspension or against whom disciplinary or criminal action is pending, seeks to retire voluntarily, specific orders of the appointing authority for such voluntary retirement is necessary. The appointing authority may with-hold the permission sought for by the Government servant, if any of the conditions specified in clause (e) are not satisfied.
>
> Provided further that the appointing authority may also withhold the permission for voluntary retirement sought for by a Government Servant, if the post held by him has been declared as "Scarce Category" by the Administrative Department concerned in Secretariat and whose continuation in Government service is absolutely essential in public interest".

4. The impugned Government Order reads as follows:-

"In the Government Order first read above, Medical Officers working in certain categories like Nephrology, Neurosurgery etc., and Non-clinical categories such as Anatomy, Physiology etc., have been declared as scarce categories in Tamil Nadu Medical Service in view of public interest and they have not been permitted to go on Voluntary Retirement.

2. In the Government Order second read above, orders have been issued empowering the appointing authority to withhold permission of Voluntary Retirement sought for by the Government Servant who hold the post declared as scarce category and whose continuation in Government Service is absolutely essential in public interest. Accordingly, in the Government Order third read above suitable amendment to FR 56(3)(f) has been issued.

3. The Tamil Nadu Government Doctors' Association had placed certain demands including acceptance of Voluntary Retirement from Government Doctors. A Committee was constituted in the Government Order fourth read above and the Committee had given the following recommendations on Voluntary Retirement Scheme:-

(i) Voluntary Retirement may be allowed as per Government rules to all Doctors except those on non-clinical side and in case of rare specialities.

(ii) To prescribe a cooling off period to allow the Government Doctors who are in Pay Band 4 to go on Voluntary Retirement.

4. Accordingly, in the Government Order fifth read above, the Government among other things, have issued orders, as follows on Voluntary Retirement:-

i. to accept Voluntary Retirement from all Doctors except those in non-clinical side and in case of rare specialities in principle and to identify the rare/specific specialities separately.

ii. Prescription of cooling off period of five years to allow those Medical Officers who are in Pay Band IV to go on Voluntary Retirement.

5. Consequent to issue of above orders, in consultation with the Director of Medical Education and Director of Medical and Rural Health Services, the following specialities have been identified as rare/specific specialities to be excluded from Voluntary Retirement Scheme of Government Doctors:-

RARE SPECIALITIES IN CLINICAL SIDE

1. Radio Diagnosis
2. Radio Therapy
3. Thoracic Medicine
4. Physical Medicine
5. Psychiatry
6. Transfusion Medicine
7. Cardiology
8. Cardio Thoracic Surgery
9. Neurology
10. Neuro Surgery
11. Nephrology
12. Urology
13. Medical Gastro Enterology
14. Surgical Gastro Enterology
15. Hepatology
16. Medical Oncology
17. Surgical Oncology
18. Plastic Surgery
19. Vascular Surgery
20. Haematology
21. Rheumatology
22. Surgical Endocrinology
23. Medical Endocrinology
24. Geriatric Syrgert
25. Uro Gynaecology
26. Haematology and Oncology
27. Neo Natology
28. Paediatric Surgery
29. Paediatric Gastro Enterology
30. Paediatric Neurology
31. Paediatric Nephrology
32. Paediatric Cardiology
33. Geriatric Medicine
34. Paediatric Haematology
35. Anaesthesia
36. Obstetrics and Gynaecology
37. Paediatrics
38. Radiology
39. Ophthalmology
40. General Medicine
41. Clinical Pathology

SPECIALITIES IN MDS (Dental)

42.OralMaxillofacial Surgery

43.Prosthodontics

44.Conservative Dentistry and Endodontics

45.Periodontics

46.Orthodontics

47.Oral Medicine and Radiology

48.Oral Pathology

49.Preventive and Community Dentistry.

6. The Government direct that all the specialities mentioned in para 5 above be declared as rare/specific specialities and the request go on voluntary retirement of the Government Doctors belonging to the above specialities will not be accepted by the Government in public interest. The subsiding contractual obligations/ bond executed for Post Graduate periods will also apply.

7. The Director of Medical Education, Director of Medical and Rural Health Services, Director of Medical and Rural Health Services (ESI) and the Director of Public Health and Preventive Medicine are instructed not to forward the proposals to Government for acceptance of voluntary retirement from the Medical Offices belonging to the above categories."

5. The above Government Order is challenged by the petitioner on the following grounds:-

(i) FR 56(3)(f) as it originally stood, contemplated the rejection of the request for voluntary retirement, only in cases of Government Servants against whom disciplinary proceedings or criminal action was pending. Subsequently, an amendment was made to FR 56(3)(f) enabling the Government to reject a claim for voluntary retirement, if the post held by the concerned Government servant is a scarce category and the continuation of the person in service was considered to be essential in public interest. The exclusion contemplated by the amendment to the FR was only in respect of rare specialities. But by the impugned order, the Government had included all specialities in medicine as rare specialities, which is arbitrary and unreasonable.

(ii) The expressions "scarce category" and "rare speciality" have not been defined. Consequently, these expressions have to be assigned the normal dictionary meaning and if so assumed, all Departments included in the impugned order would not come within the meaning of the expressions "scarce category" or "rare speciality".

6. In order to test the veracity of the above contentions, we have to see the rationale behind the prescription. In order to attract the best of talent among the medical professionals, the Government introduced a quota of 50% of seats in Post Graduate Degree/Diploma Courses in super specialities, to in-service candidates. The said reservation of 50% for service candidates came to be challenged before this Court. But the reservation was upheld on the ground that that was the only way to attract people to serve in rural areas and primary health centres. Most of the service candidates who gained admissions to Post Graduate Degrees/Diplomas had to be compelled to stay in Government Service only through the Indemnity Bonds and Service Agreements. After gaining Post Graduate Degrees/Diplomas, these professionals became eligible to switch over to the non-clinical side viz., teaching side. While on the one hand, it served public purposes, as the Government medical educational institutions got well qualified teachers, it also served on the other hand, the private interest of a few to get postings in areas where the educational institutions were located.

7. After the advent of the self-financing institutions, there was a dearth of medical professionals who could teach in newly started Medical Colleges. Till the advent of the self-financing educational institutions, most of the well qualified professionals were only in Government Service. But in order to get recognition of the Medical Council of India and affiliation to the Medical Universities, the self-financing institutions necessarily had to have persons possessing Post Graduate Degrees/Diplomas. Consequently they poached in Government educational institutions and there was an exodus. The Government woke up to this reality much later and found that persons who acquired Post Graduate Degrees/Diplomas only as a result of being in Government Service, were switching over to self-financing institutions, leaving the Government educational institutions in the lurch. Therefore, in order to prevent this exodus, the Government brought an amendment to FR 56(3)(f).

8. Interestingly, the scheme for voluntary retirement, wherever it is, was originally introduced for chopping of dead wood. But experience showed that the dead wood always stayed back and the meritorious alone went out.

9. Therefore, considering the fact that persons, who acquired Post Graduate Degrees/Diplomas in super specialities, only by virtue of being in Government Service, were not giving back to the Government and the Society, the fruits of the investment made on them by the Government, the Government had introduced the Second Proviso to FR 56(3)(f). Hence the same cannot be found fault with. As a matter of fact, the petitioner

does not challenge the Second Proviso to FR 56(3)(f), inserted by way of amendment under G.O.Ms.No.179, P&AR Department, dated 29.9.2008. The petitioner merely challenges the Government Order by which they have identified the scarce categories in pursuance of the Second Proviso under FR 56(3)(f).

10. Keeping the above in mind, if we look at the grounds of challenge to the Government Order, it will be clear that the same has been passed by the Administrative Department in the Secretariat, which is authorised by the proviso. For this identification, the Government had split the posts into clinical and non-clinical posts. It is only the posts on the clinical side listed in paragraph-5 of the Government Order, that have been identified as scarce categories. The contention that all specialities in medicine cannot be included within the meaning of the term 'scarce categories', does not hold water. As I have pointed out earlier, there is an exodus of persons from Government Service to private medical colleges. Such exodus is of persons, who got trained at the expense of the Government and at the cost of poor patients in General Hospitals and Primary Health Centres. Therefore, what is scare and what is rare is for the Government to decide. Once the Fundamental Rule has conferred such a power upon the Government, the same cannot be found fault with.

11. The second contention is that scarce categories and rare specialities have not been defined and that when they are assigned normal dictionary meaning, all Departments cannot be included within these definitions. But, this contention also, in my considered view, does not merit acceptance. We are concerned here with an executive order, issued in exercise of the power conferred by the Rules framed under the Proviso to Article 309. In a Subordinate Legislation, there is no scope for such arguments. Therefore, this contention is also rejected.

12. Consequently, the challenge to G.O.Ms.No.408, Public Health and Family Welfare Department, dated 15.12.2009 has to fail. Therefore, W.P.No.2336 of 2011 is dismissed.

W.P.Nos.2337 and 10266 of 2011 :

13. These writ petitions challenge the order rejecting the request of the petitioner for voluntary retirement and a charge memo issued as a consequence of the petitioner not joining duty after expiry of the leave sanctioned to her.

14. The rejection of the request of the petitioner for voluntary retirement is primarily on the ground that the post held by her is a scarce category post. But, from the records, it appears that the petitioner is suffering from serious ailments.

While we appreciate the rule that Government Servants should not be allowed to go on voluntary retirement for the purpose of seeking greener pastures, the rule cannot be without exception. Whenever a person suffers from serious ailments, it is not possible for them to come and work. Since the records show that the petitioner is suffering from serious ailments, I am of the considered view that the Government should have considered her request sympathetically.

15. Therefore, W.P.No.2337 of 2011 is allowed and the order refusing permission to the petitioner to go on voluntary retirement is set aside. As a consequence, W.P.No.10266 of 2011 challenging the charge memo is allowed and the charge memo is quashed. No costs. Consequently, all connected pending MPs are closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

To
1.The Secretary to Government of Tamil Nadu, Health and Family Welfare
Department, Fort St. George, Chennai-9.
2.The Director of Medical Education, Kilpauk, Chennai-10.
3.The Dean, Madras Medical College, Chennai-3.

1 cc to Mr.A.Jenasenan, Advocate, sr.25467

Svn/RS

WP.Nos.2336, 2337 & 10226 of 2011

ev co
kra 19.05.2016