

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 11.4.2018

CORAM

THE HON'BLE MR.JUSTICE HULUVADI G.RAMESH
AND
THE HON'BLE MR.JUSTICE M.DHANDAPANI

Writ Petition Nos.6475, 6480, 6815, 6977,
7037, 7170 to 7172 & 7412 of 2018

P.Sowmyaa .. Petitioner in
WP No.6475/18

K.Malini .. Petitioner in
WP No.6480/18

V.Veena Shri .. Petitioner in
WP No.6815/18

J.Divya .. Petitioner in
WP No.6977/18

Dr.Aruna
Dr.Nithyalakshmi
Dr.Anantha Narayanan
Dr.Hema Nandhini
Dr.K.Nisha
Dr.Sri Hari Prashanth .. Petitioners in
Dr.L.Dinesh Babu .. WP No.7037/18

Dr.Praveen Kumar S .. 8th Petitioner in
WP No.7037/18

[Impleaded vide order dated 11.4.2018
made in WMP. No.10432/18 in WP. 7037/18

Dr.Jagadeeswari .. Petitioner in
WP No.7170/18

Dr.S.Sathyavani .. Petitioner in
WP No.7171/18

Dr.K.Karthika .. Petitioner in
WP No.7172/18

Dr.Yazhini Mystica
Dr.Sharmila

Dr.Ahamed Beevi
Dr.Savitha
Dr.Gomathi
Dr.Anandhi R
Dr.Harshvardhan N
Dr.Rajesh
Dr.Sheeba Sharon Gnanaiah
Dr.Bala Vignesh

Petitioners in
.. WP No.7412/18

Vs.

The Secretary(Prl Secretary)
Tamil Nadu Health and Family Welfare Department
Fort St. George
Chennai 9.

The Director of Medical Examination
Directorate of Medical Examination
No.162, Periyar EVR Salai
Kilpauk
Chennai 10.01.2018

The Secretary/Additional Director of Medical Education
Selection Committee R1 to R3 in WP Nos.
No.162, Periyar EVR Salai 6475, 6480, 7037
Kilpauk & 7412/18 &
Chennai 10. .. R2 to R4 in WP
Nos.6815, 6977,
7170/18 to 7172/18

Medical Council of India R4 in WP
Nos.6475, 6480/18 & R1 in WP
Pocket-14, Sector-8 Nos.6815, 6977,
Dwarka Phase I .. 7170 to 7172/18
54New Delhi 110 077.

Prayer in Wps. 6475, 6480, 6815, 6977 & 7170 to 7172/18

Petitions under Article 226 of Constitution of India praying for a writ of Declaration declaring clause 9(a)(i) of the Prospectus issued by the respondents 2 & 3, 2 & 3, 3&4, 4, 4 to 4 respectively (in Wps. 6475, 6480, 6815, 6977 & 7170 to 7172/18 for selection of candidates for Post Graduate Degree and Diploma Courses 2018-19 session in Government Medical Colleges and Government seats in Self Financing Medical Colleges and seats in Rajah Muthiah Medical College (Annamalai University) is unconstitutional and violation of fundamental right enshrined under Articles 14, 19 & 21 of Constitution of India and consequently, direct the respondents 2 and 3, 2 & 3 3 & 4, 3 &

4, respectively (in Wps. 6475, 6480, 6815 & 6977/18) to accept the petitioner's application and scrutinise along with other applications.

Prayer in WP. 7037/18 & 7412 of 2018 Prayer : to issue a writ of Certiorari mandamus, calling for the records of the 1st Respondents pertaining to Clause 9 (a) (I) of the prospectus for admission to Post Graduate Degree / Diploma Courses in Tamil Nadu Government Medical Colleges and government Seats in Self Financing Medical Colleges Affiliated to the Tamil Nadu Dr. MGR Medical University & Rajah Muthiah Medical College Affiliated to Annamalai University for the 2018-19 session issued vide G.O. (D) No.411 dated 15.03.2018 by the 1st Respondent in so far as it excludes the period of maternity leave and earned leave from the period of continuous service and the records pertaining to Row No.9 of the SERVICE PROFORMA (Page I) in the Application form uploaded by the 3rd respondent on 16/03/2018 in The Section Officer, VR Section, High Court, Madras. (2 Copies) far as it excludes maternity and earned leave period of calculating the total period of regular service and quash the same and consequently direct the respondents to consider the period of maternity and earned leave period for calculating the total period of regular service and quash the same and consequently direct the respondents to consider the period of maternity and earned leave as part of the period of ; regular service' for the purpose of granting incentive marks and otherwise for the purpose of admissions under the prospectus issued vide G.O.(D) No. 411 dated 15/03/2018 .

Prayer amended as per order dated 03.04.2018 made in WMP.8917/ in WP. 7034/18

For Petitioners in WP
Nos.6475, 6480, 6815 & Mr.V.Subramanian
6977, 7170 to 7172/18 : For M/s. Dass and Viswa Asso.

For Petitioners in WP
Nos.7037 & 7412/18 : Mr.P.Wilson, S.C.
: For Mr.Richardson Wilson

For Government
in all WPs. : Mr.STS Murthy, Addl.A.G.
RR1 to 3 in : Assisted by
7412/18 & 7037 : Mr.C.Munusamy, Spl.G.P.
For RR2 to 4 (in Wps 6475,
6480, 6815, 6977, 7170 to 7172/18)

For Medical Council of
India in all WPs. : Mr.V.P.Raman (in WP.
6977, 6815, 7170 to 7172/18)

O R D E R
(Made by Huluvadi G.Ramesh,J)

The above writ petitions have been filed challenging Clause 9(a)(i) of the Prospectus for admission to the Post Graduate Degree/Diploma Courses. After hearing both the parties, the learned single Judge framed the following issues for consideration:

(i) Whether the eligible leave including the maternity leave, has got to be taken into account for the purpose of continuity of service for eligible criteria for pursuing the Post Graduate Course / Post Graduate Diploma Course ?

(ii) Whether the incentive marks have got to be extended to those who are on maternity leave/eligible leave, when they were posted in rural/hilly/difficult areas where they could not serve on account of the availing of the said maternity leave/eligible leave ? and

(iii) Whether the order of the learned Judge in W.P.No.12660 of 2017, dated 22.12.2017, which is the subject matter of Writ Appeal in W.A.No.374 of 2018, has given a finality to continuity of service for the purpose of incentive marks ?

2. With regard to the first issue, namely, whether the maternity leave can be counted for the purpose of continuity of service for becoming eligible to pursue PG or PG Diploma Course, the learned single Judge held that women are entitled to maternity leave, which cannot be curtailed, the Government will have to take into account the said leave period for the purpose of counting the service for becoming eligible to take up PG Course. The learned single Judge concurred with the view taken by another learned single Judge in W.P.No.12660 of 2017, that the candidates are entitled to maternity leave which shall be counted for the purpose of continuity of service.

3. However, with regard to the other issue, namely whether the incentive marks have to be extended for those who were on maternity leave, while they were posted in rural/hilly/difficult areas, as they did not actually serve on account of maternity leave, the learned single Judge referred the said issue to be

decided by a Division Bench. Accordingly, these writ petitions are referred to this Bench.

4. Now, this Court is required to decide the following issues:

(i) Whether the incentive marks have got to be extended to those who are on maternity leave/eligible leave, when they were posted in rural/hilly/difficult areas where they could not serve on account of the availing of the said maternity leave/eligible leave ? and

(ii) Whether the order of the learned Judge in W.P.No.12660 of 2017, dated 22.12.2017, which is the subject matter of Writ Appeal in W.A.No.374 of 2018, has given a finality to continuity of service for the purpose of incentive marks ?

5. As regards issue (i), it is pertinent to note that the in-service candidates who aspire for admission to Post Graduate Course are entitled to incentive marks, if they have rendered service in the remote area/hill area/difficult area for a maximum period of three years. In the instant case, the petitioners are in-service candidates and have put in two years of service, including maternity leave.

6. Admittedly, with regard to maternity leave availed within two years by the in-service candidates, it has been held by the learned single Judge, concurring with the view taken by another learned single Judge in W.P.No.12660 of 2017, that the candidates are entitled to maternity leave and the same will be counted for the purpose of continuity of service.

7. According to the petitioners, when they are eligible to avail maternity leave and entitled to all the maternity benefits and that the period during the maternity leave will be counted as service for the purpose of pursuing post graduate courses, the same yardstick should be applied for the granting incentive marks, taking into consideration the place where they are working, namely remote area/hilly area/difficult area.

8. On the contrary, the learned Additional Advocate General contended that though maternity leave is a fundamental right guaranteed to women and therefore, they are entitled to avail maternity leave, the fact that their absence during the maternity leave would deprive the poor patients in the remote area/hilly area/difficult area their right to access to health care guaranteed under Article 21 cannot be ignored and therefore, incentive marks, which is not a fundamental right, should not be granted.

9. Before proceeding further, it would be apt to refer Article 15(3) of the Constitution, which reads as follows:

Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

10. A reading of the above Article would make it clear that Clause (3) empowers the Government to make special provision for women and children. Thus, Clause (3) is an exception to the rule against discrimination provided by Clauses (1) as well as (2). Therefore, there is no impediment for the Government to make special provision for women and children.

11. Article 42 of the Constitution empowers the State to make provision for just and humane conditions of work and also maternity relief.

12. Furthermore, Rule 101(a) of the Tamil Nadu Fundamental Rules confers rights to women Government servants to have the maternity benefits, including distinct period of maternity leave. The maternity leave is to safeguard the interest of the women and foetus. Therefore, the State Government granted 90 days leave as maternity leave and thereafter, it was enhanced to 180 days and subsequently, enhanced to 270 months.

13. Even the Apex Court in *Air India Etc. Etc. v. Nergesh Meerza* [1981 AIR 1829], wherein the Air Hostess who had put in four years of service was terminated on her becoming pregnant, observing that there was a discrimination by the Corporation in the matter of retirement of the Air Hostess and that it was not only a callous and cruel act, but an open insult to Indian womanhood and that the provision for termination is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked depotism and is clearly violative of Article 14, struck down the clauses regarding retirement and pregnancy.

14. Thus, from the ratio laid down by the Apex Court, it is clear that there cannot be any provision preventing the legitimate expectation of a women from becoming a mother, as it would be violative of Article 14 of the Constitution.

15. Keeping the above in mind, let us come to the case on hand. The State Government, vide G.O.Ms.No.29, Health and Family Welfare Department dated 08.02.2017, though identified remote area/hilly area/difficult area for awarding incentive marks as regards in-service candidates, the same was kept in abeyance. Thereafter, in G.O.Ms.No.75, Health and Family Welfare (MCA-1) Department, dated 09.3.2018, the Government ordered that apart from accounting continuous service in remote area/hill area/difficult area for rewarding incentive marks, even partial service can be taken into account, subject to completion of minimum period of one year. It was also ordered that in case a Doctor is deputed for a period of more than 28 days, the same shall be considered for rewarding incentive.

16. The reason for giving incentive marks to the in-service candidates is to attract more graduates to join as Medical Officers in the remote area/hilly area/difficult area. Further, taking note of the sacrifice by the Doctors who render service in remote area/hilly area/difficult area for providing health care facilities, the Government thought that those Doctors deserve incentive marks to be reckoned for determining merit.

17. However, in G.O.Ms.No.75, Health and Family Welfare (MCA-1) Department, dated 09.03.2018, it is further ordered that the certification for the entitlement of incentive has to be provided by the relevant DDHS/JDHS with the prospectus for admission prescribing the formats and the procedure in details. It is further ordered in the said G.O. that with reference to the reservation of 50% of the Post Graduate Diploma seats to the Government Doctors, the Committee recommends to continue the same, provided such reservation based on incentive only to such Doctors who have put in three years of service in such posts categorised under Category A.

18. Subsequently, the above G.O.Ms.No.75 was modified by G.O.Ms.No.96, Health and Family Welfare (MCA-1) Department, dated 23.03.2018. In the said G.O.Ms.No.96, the Government revised the places that are mentioned in the Annexures II, III and IV of the earlier G.O.Ms.No.75 to enable the Medical Officers to get the incentive marks who are working in the remote and difficult areas alone.

19. At this juncture, it is pertinent to refer to the Regulations of Medical Council of India with regard to Regulation 9 of PG Medical Examination Regulations, 2000, more particularly, the amended Paragraphs IV and VII, which read as under:

"(IV). The reservation of seats in medical colleges/institutions for respective categories shall be as per applicable laws prevailing in State/Union Territories. An All-India merit list as well as State-wise Merit list of the eligible candidates shall be prepared on the basis of the marks obtained in National Eligibility-cum-Entrance Test and candidates shall be admitted to Post Graduate courses from the said merit lists only:

Provided that in determining the merit of candidates who are in service of Government/public authority, weightage in the marks may be given by the Government/competent authority as an incentive at the rate of 10% of the marks obtained for each year of service in remote and/or difficult areas up to the maximum of 30% of the marks obtained in National Eligibility-cum-Entrance Test, the remote and difficult areas shall be as defined by the State Government/competent authority from time to time."

"(VII) 50% of the seats in Post Graduate Diploma Courses shall be reserved for Medical Officers in the Government service, who have served for at least three years in remote and/or difficult areas. After acquiring the PG diploma, the Medical Officers shall serve for two more years in remote and/or difficult areas as defined by State Government/competent authority from time to time."

20. Based on the above Regulation, a writ petition was filed by one Dr.Rajesh Wilson in W.P.No.6031 of 2017 to provide

incentive marks in accordance with Paragraph IV of Regulation 9. The said writ petition was allowed directing to follow Regulation 9(IV), by adding 30% marks secured in NEET examination. Assailing the said order, a writ appeal was filed. However, the verdict given by the Division Bench was a split one, namely, one learned Judge held that weightage marks for the in-service candidates is not in conflict with the method evolved by MCI and another learned Judge held that the awarding of incentive marks is not in accordance with Regulation 9. Therefore, the matter was referred to a third Judge, who held that the identification of the rural/remote/difficult areas by the Government, for the year 2017-2018 did not warrant interference and except that, directed to implement the order forthwith.

21. The Government, thereafter, issued G.O.(D)No.1054, Health and Family Welfare Department, dated 06.5.2017, which was challenged in a writ petition. In the said writ petition, a portion of G.O. with regard to amendments made in prospectus relating to weightage was struck down. Subsequently, the Government filed SLP before the Supreme Court and the Supreme Court stayed the order made in the writ petition, consequent to which, admissions to Post Graduate Courses for the year 2017-2018 were made.

22. A committee was constituted by the Government, in G.O.Ms.No.466, Health and Family Welfare (MCA.1) Department, dated 11.12.2017, for identifying the remote/hilly/difficult areas for the purpose of awarding incentive marks to the in-service candidates.

23. In the meanwhile, the Supreme Court, by order dated 31.01.2018, directed the State Government to complete the process of identifying the remote/hilly/difficult areas by 10.3.2018 and notify the same.

24. Admittedly, the intention of the Government to give incentive marks to the in-service candidates for their services rendered in remote area/hilly area/difficult areas, taking note of the difficulty they would undergo in such areas, is a noble one. The above intention of the Government is supported with the Regulations of the Medical Council of India. Therefore, such intention of the Government should not get defeated.

25. In the above scenario, if we look at the case on hand, it will be evident that the petitioners before us are in-service candidates and they have put in two years of service in the remote area/hilly area/difficult area. As per Clause 16 of the Prospectus, the service candidates will be awarded upto 10% of the marks secured in NEET PG 2018 per year of completion of

service in the remote area/hilly area/difficult area. As such, the petitioners herein are also entitled to the incentive marks as they have completed two years of service including the maternity leave availed by them, for the purpose of becoming eligible to pursue Post Graduate Course.

27. Though it is contended that the maternity leave is a fundamental right and incentive mark is not a right, the intention of the Government to grant maternity leave and other benefits in order to protect the interest of the women and the foetus should not be lightly ignored. When the intention is to give benefits to the women, the same intention should not take away the consequential benefits given to the in-service women candidates by way of incentive marks. Moreover, the object of giving incentive marks is to encourage the Doctors who render service in the remote area/hilly area/difficult areas.

28. Any service rule or clause should satisfy not only the public policy, but also the fundamental right guaranteed under Articles 14, 15 and 21 of the Constitution of India, as held by the Constitution Bench of the Apex Court in Central Inland Water Transport v. Brojo Nath Ganguly [AIR 1986 SC 1571].

29. We are, therefore, of the view that the petitioners are entitled to incentive marks and the respondents are directed to take into consideration the period of maternity leave as the service period for the purpose of awarding incentive marks. However, the incentive marks shall be calculated for the period of maternity leave, on the basis of the performance of the in-service candidates during their service in the rest of the period.

30. The issues that were referred to us are answered accordingly.

31. One more issue was raised by the learned counsel for the petitioners with regard to Earned Leave. According to them, the Doctors are entitled to ten days of Earned Leave per year and they can either avail the said leave or they can encash it. Availing of Earned Leave is an ordinary right and it cannot be equated with the Fundamental Right. Thus, except Casual Leave, other leave, namely Earned Leave cannot be taken as a matter of right. Permission for availing Earned Leave is with the Head of the Department. Such leave can be granted by the Head of the Department depending upon the reason assigned, namely any contingency or bereavement, etc. Therefore, we hold that the grant of permission for availing Earned Leave has to be exercised only by the Head of the Department.

32. The writ petitions are disposed of accordingly. However,

there shall be no order as to costs. Consequently, WMP Nos.7990, 7991, 7996, 7997, 8438, 8439, 8630, 8631, 10432, 8918, 8919, 8702 to 8705, 8894 to 8896, 9207 to 9210 of 2018 are closed.

Sd/-
Assistant Registrar(CS IX)

//True copy//

Sub Assistant Registrar

kpl

To

1. The Secretary
Tamil Nadu Health and Family Welfare Department
Fort St. George
Chennai 9.
2. The Director of Medical Examination
Directorate of Medical Examination
No.162, Periyar EVR Salai
Kilpauk
Chennai
3. The Secretary/Additional Director of Medical Education
Selection Committee
No.162, Periyar EVR Salai
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4. Medical Council of India
Pocket-14, Sector-8
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+1cc to Mr.V.P.Raman, Advocate SR.No. 26973
+8cc to Mr. Dass & Viswa, Advocate SR.No.27387
+2cc to Mr.Richardson wilson, Advocate SR.No. (26887 & 26888)

W.P.Nos.6475, 6480, 6815, 6977,
7037, 7170 to 7172 & 7412 of 2018

RI (CO)
GN(23/04/2018)