IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.03.2019

CORAM

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.8097 of 2019
& W.M.P.No.8688 of 2019

1. Dr.M.Sathya
2. Dr.P.Karthikeyan
3. Dr.Shalini
4. Dr.P.Balaji
5. Dr.D.M.Stalin
6. Dr.G.Banupriya
7. Dr.P.Magesh
8. Dr.S.Dhanapriya
9. Dr.Keerthana
10. Dr.Usha Samraj .. Petitioners

Vs.

1. The Government of India
   rep. by its Secretary to Government,
   Ministry of Health and Family Welfare,
   Room No.348, 'A' Wing, Nirman Bhavan,
   New Delhi-110 011.

2. The State of Tamil Nadu
   rep. by its Principal Secretary to Government,
   Health and Family Welfare Department,
   Secretariat, Fort St. George,
   Chennai-600 009.

3. The Director of Medical Education,
   Kilpauk, Chennai-600 010.

4. The Secretary,
   Selection Committee,
   The Directorate of Medical Education,
   Kilpauk, Chennai-600 010.

5. The Secretary,
   Medical Council of India,
   Pocket 14, Sector 8,
   Dwaraka,
   New Delhi-110 077. .. Respondents

Prayer : Writ petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records relating to the impugned Government Order issued by the second respondent in G.O.Ms.No.86,

Health and Family Welfare (MCA-1) Department, dated 06.03.2019 and to quash the same in so far as non-inclusion of ESI Dispensaries coming under ESI Scheme in Tamil Nadu for the purpose of categoriation of Remote/ Difficult/Rural areas for awarding incentive marks to the in-service candidates for admission to Post Graduation Medical Courses as per Regulation 9 (iv) of Post Graduate Medical Education Regulation, 2000, is concerned and consequently directing the respondents to award weightage/incentive marks for the petitioners/Doctors working in ESI Dispensaries depending upon its location in Remote/Difficult/Rural areas in compliance of Regulation 9(iv) of Post Graduate Medical Education Regulation, 2000 for admission to PG Medical Courses for the academic year 2019-2020.

* * *

For Petitioners: Mr.G.Sankaran

For Respondents: Mrs.Narmadha Sampath,
Additional Advocate General
assisted by Mr.V.Kadhirvelu,
Special Govt. Pleader (Hr. Edn.)
for RR 2 and 3

Mr.Abdul Saleem for R4

Mr.V.P.Raman for R5

O R D E R

Preface :

In India, labour movement dates back to pre-independence. National leaders fought for the welfare of the common man and also the labour force. One of the finest labour law legislations in the country is the Employment State Insurance Act, 1948.

2. The object of the ESI Act is to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. The Act mandates establishment of hospitals and dispensaries exclusively for the workforce of the country. Though India has developed and modified the health care for the working force also, while doing much for the rural health care, some of the hospitals for the labours may not get good Doctors, who are expected to have expertise not only in medicine, but also to some extent in labour laws and its nuances.

3. Treating the patients, who suffered injuries in industries and workplaces while in duty is not as treating a patient in a PHCs or Hospitals. At times, it requires immediate medical attention and further steps with respect to the legal

issues. A Doctor should be able to handle the situation.

4. The Doctors in city based multi-specialty hospitals/ Government Hospital are provided with multifarious equipments and are depending on laboratory reports. While there is no harm using such facilities, the Doctors in their classified areas, such as difficult / remote / rural areas feel helpless, as those Doctors get little experience to clinical skills, while treating patients with industrial injuries, than their counter parts in the urban areas.

5. The State Governments have posted the Doctors to serve in the hospitals/dispensaries earmarked for ESI to cater the need of the workforce in the country. Some of those hospitals are located in the classified areas, where the Doctors are forced to go for service. They will have no social interaction, no schools of reputation for their children and no health care facilities for themselves are available, while serving in the classified areas. Therefore, it is not surprising that they are not willing to work in such environment. The physical isolation is also the reason for this discrimination. Other than the incentive marks offered, what are the other motivational factors that may interest a person to serve in the rural and remote areas ? May be the national interest one has besides the respect and recognition, comfortable working conditions, competent and considerate mentor and also promotional avenues.

6. In spite of the moderate Doctor - patient ratio prevailing in the country/State, it is the bounden duty of the State to oblige its own labour legislation towards which the Doctors are posted in ESI Dispensaries. Surprisingly, it is the claim of the State that the Doctors are exercising their preferential option to work in the ESI Dispensaries, given the nature of workload.

Prayer :

7. With the above preface, let us touch upon the prayer of the petitioners herein :

7.1. All the petitioners herein are Doctors and they lay challenge to the G.O.Ms.No.86, Health and Family Welfare (MCA-1) Department, dated 06.03.2019 (in short, "G.O.86, dated 06.03.2019") in so far as its non-inclusion of the Doctors serving in ESI Dispensaries located in Remote/Difficult/Rural areas thereby depriving them from getting the incentive marks for admission to Post Graduate Medical Courses and seek a direction to the respondents to extend the benefit of the said G.O. to the Doctors working in ESI Dispensaries located in Remote /Difficult/Rural areas in compliance with Regulation 9 (iv) of the Post Graduate Medical Education Regulation, 2000 (in short, "2000 PG Regulation").

8. The petitioners are working as Assistant Surgeons/Medical Officers in the Employees' State Insurance Dispensaries (in short "ESI Dispensaries") coming under the Employees State Insurance Corporation Scheme in the State of Tamil Nadu. The Doctors working in ESI Dispensaries located in the difficult / remote / rural areas are also entitled to get incentive marks on par with their counterparts working in Primary Health Centres (PHCs) and other Hospitals, which benefit was conferred on them even in the earlier Government Order in G.O.Ms.No.75, dated 09.03.2018. However, the impugned G.O.86, dated 06.03.2019 totally excluded the ESI Dispensaries from the purview of the incentive marks prejudicially affecting their rights, while extending the benefit of incentive marks to the counterparts in the PHCs and other hospitals. It is their claim that since they have been selected by the Medical Services Recruitment Board (MRB) and posted at the ESI Dispensaries, there should not be any disparity between them and they should also be given the same benefits, that were extended to the similarly placed Doctors serving the PHCs and other hospitals located in the difficult/remote/rural areas. To this extent, they pray that the impugned G.O. needs interference.

9. Resisting the claim of the petitioners, the fourth respondent filed a counter-affidavit on behalf of second and third respondents as well, wherein, the reason for exclusion of the petitioners and other similarly placed Doctors is spelt out in paragraph 20, which reads as follows :

> "20. It is also submitted that the prayer of the petitioners to include the ESI Hospitals in the categories for giving incentive marks, it is humbly submitted that the committee considered doctors working in the Directorate of Public Health and Preventive Medicine and Directorate of Medical and Rural Health Services. It is humbly submitted that the doctors who expressed their willingness are alone posted in the dispensaries / hospital run by the other departments like Police, Electricity Board, Prison, Employees State Insurance Corporation. Hence, the Doctors working in these hospitals and dispensaries were not considered for awarding incentive marks for admission to Post Graduate Degree/Diploma courses. As far as the doctors in ESI it was considered that they cater only to the beneficiaries of the ESI scheme and the nature of duty, expected from them demands experience with various provisions of labour laws. Therefore only senior doctors, with experience are preferred and hence this category was not considered for provision of incentive marks. The committee was of the opinion that non-incentivisation will act as a deterrent for junior doctors taking up ESI

institutions."

10. The learned Additional Advocate General, upon instructions, submitted that pursuant to the directions issued by a Division Bench of this Court in the judgment in The State of Tamil Nadu V. Dr.P.Pravin, (2018) 2 WLR 161, the Government passed G.O.Ms.No.536, Health and Family Welfare (MCA-1) Department, dated 15.11.2018, appointing a seven-member committee headed by a Hon'ble retired Judge of this Court to identify remote / difficult / rural areas for awarding incentive marks to the in-service Medical Officers for the admission to the Post Graduate Degree / Diploma Courses from the academic year 2019-2010 in consonance with the Medical Council of India's Post Graduate Regulations. It is submitted that based on the report and the recommendations of the Committee, that were submitted through the letters of its Member Secretary dated 13.02.2019 and 04.03.2019, the impugned G.O.86, dated 06.03.2019 was passed. It is her submission that the Committee had delved into every aspect of the difficulties of the Doctors serving in all the areas in the width and breadth of the State and arrived at the classification and even in the classified areas, the Committee consciously taken a decision to omit certain hospitals, like ESI Dispensaries, Prisons Hospitals, etc., given the nature of duties that were being performed by them, duration of working hours, the option exercised by them to join those institutions, etc., and hence, the petitioners cannot seek parity with the Doctors working in PHCs and other hospitals situate in those locations so as to enable them to get incentive marks.

11. At the outset, it is to be stated that the order of the Division Bench was passed on 17.05.2018 giving suggestion to the State Government that the Committee of experts may be headed by a retired Judge of this Court. However, the G.O.Ms.No.536 was passed only on 15.11.2018 constituting the seven-member committee. Such delay in constitution of the Committee itself could have been avoided by the State, given the time schedule stipulated by the Hon'ble Supreme Court in respect of the admission to professional courses.

12. Be that as it may, the Government passed the impugned G.O., accepting the recommendations of the Committee for awarding incentive marks to the Medical Officers who are working in Government Medical Institutions by classifying the institutions into five categories as hereunder :

Sl. No.	Area		% of marks to be awarded
1.	Difficult Areas in Hills	-	10% of marks per year

Sl. No.	Area		% of marks to be awarded
2.	Difficult Areas in Plains	-	9% of marks per year
3.	Remote Area	-	8% of marks per year
4.	Rural Areas	-	5% of marks per year
5.	Urban Aras (Municipal / Corporation Areas)	-	No incentive marks

13. The claim of the petitioners is that they are also serving in one of the hospitals located in the above classified areas and they should also be extended similar treatment, as that of the benefits conferred upon the Doctors serving in PHCs and other Hospitals which come within the purview of the beneficial classification. The said claim is negatived on the sole ground that the working hours of the Doctors in ESI Dispensaries, Prison Hospitals, etc. are minuscule and they have time to prepare for the NEET Examination. Even the said reason was not spelt out in the impugned Government order.

14. At this juncture, it is relevant to note that the Division Bench of this Court in Dr.P.Pravin's case (cited supra) has categorically held that "the categorization of bringing in Doctors on the basis of areas of specialization amounts to indirect legislation and also tantamount to amending proviso to Sub-clause IV of Regulation 9 of the Regulations 2000".

15. Pursuant to the said order of the Division Bench, the impugned G.O.86, dated 06.03.2019 was passed and paragraph 7 of the same is usefully extracted as follows :

> "7. The Government have examined the above orders of the Hon'ble Division Bench of the High Court of Madras and in the light of the time limit prescribed by the Hon'ble Supreme Court of India for completing the counseling process and have decided to comply with the orders of the Hon'ble Division Bench of the High Court of Madras and to delete the Category A3 in the Government Order first and second read above (i.e. Posts in all CemONC / Trauma / Accident / Emergency care / NICU / SNCU Units, irrespective of the location of such units in any type of institution, district and geography). Accordingly, orders have been issued by deleting the above category in Government Order sixth read above and completed the admission process for Post Graduate Degree and Diploma courses for the academic year 2018-2019."

16. Though it is stated by the respondents that their action of issuing the G.O. is based on the directions of this Court, the classification issued by the respondents cannot be stated to be in conformity with the above directions, as the same kind of classification, which was made by the respondents based on the nature of duties, was struck down by the Division Bench in the aforesaid judgment.

17. Further, a reading of the aforesaid paragraph 7 of the impugned G.O. makes it clear that the nature of duties being performed by the Doctors cannot be a criteria to award incentive marks. It is to be stated that it is not the intention of the legislature also to give weightage of incentive marks based on the nature of duties, which is very clear from the reading of Regulation 9(IV) of the 2000 PG Regulation. The said provision reads as follows :

> Regulation 9. Procedure for selection of candidate for post-graduate courses shall be as follows :-
>
> (IV). The reservation of seats in medical colleges/institutions for respective categories shall be as per applicable laws prevailing in States/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 marks obtained in National-cum-Entrance Test and candidates shall be admitted to postgraduate 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 upto the maximum of 30% of the marks obtained in National Eligibility-cum-Entrance Test, the remove and difficult areas shall be as defined by the State Government/competent authority from time to time."

18. It is stated in categorical terms in the proviso to Regulation 9(IV) that the incentive marks shall be given to the in-service Doctors working in remote and / or difficult areas, and neither there is mention about the Doctors serving in urban areas nor Doctors serving on shift basis in any particular place and places based on their nature of duty.

19. Admittedly, Regulation 9(IV) was upheld by the Hon'ble Apex Court in State of U.P. V. Dinesh Singh Chauhan, (2016) 9 SCC 749. While doing so, it was held by the Apex Court thus :

"33. ..... Firstly, the fresh qualified doctors will be attracted to opt for rural service, as later they would stand a good chance to get admission to postgraduate "degree" courses of their choice. Secondly, the rural healthcare units run by the public authority would be benefited by doctors willing to work in notified rural or difficult areas in the State. In our view, a Regulation such as this subserves larger public interest. .....

34. The crucial question to be examined in this case is : whether the norm specified in Regulation 9 regarding incentive marks can be termed as excessive and unreasonable ? Regulation 9, as applicable, does not permit preparation of two merit lists, as predicated in State of M.P. V. Gopal V. Tirthani, (2003) 7 SCC 83. Regulation 9 is a complete code. It prescribes the basis for determining the eligibilities of the candidates including the method t be adopted for determining the inter se merit, on the basis of one merit list of candidates appearing in the same NEET including by giving commensurate weightage of marks to the in-service candidates.

35. As aforesaid, the Regulations have been framed by an expert body based on past experience and including the necessity to reckon the services and experience gained by the in-service candidates in notified remote and difficult areas in the State. The proviso prescribes the measure for giving incentive marks to in-service candidates who have worked in notified remote and difficult areas in the State. That can be termed as a qualitative factor for determining their merit. Even the quantitative factor to reckon merit of the eligible in-service candidates is spelt out in the proviso. It envisages giving of incentive marks @ 10% of the marks obtained for each year of service in remote and/or difficult areas up to 30% of the marks obtained in NEET. It is an objective method of linking the incentive marks to the marks obtained in NEET by the candidate. To illustrate, if an in-service candidate who has worked in a notified remote and/or difficult area in the State for at least one year and has obtained 150 marks out of 200 marks in NEET, he or she would get 15 additional marks; and if the candidate has worked for two years, the candidate would get another 15 marks. Similarly, if the candidate has worked for three years and more, the candidate would get a further 15 marks in addition to the marks secured in NEET. 15 marks out of 200 marks in that sense would work out to a weightage of 7.5% only, for having

served in notified remote and/or difficult areas in the State for one year. Had it been a case of giving 10% marks en bloc of the total marks irrespective of the marks obtained by the eligible in-service candidates in NEET, it would have been a different matter. Accordingly, some weightage marks given to eligible in-service candidate linked to performance in NEET and also the length of service in remote and/or difficult areas in the State by no standard can be said to be excessive, unreasonable or irrational. This provision has been brought into force in larger public interest and not merely to provide institutional preference or for that matter to create separate channel for the in-service candidate, much less reservation. It is unfathomable as to how such a provision can be said to be unreasonable or irrational."

20. In view of the same, the categorization of Doctors on the basis of the place of service in geographically difficult / remote areas alone is permitted and categorization based on the nature of their duties is deprecated. Even in the counter-affidavit filed by the respondents in this writ petition, a bald attempt was made to deny the incentive benefits to the petitioners stating that the incentive system needs to be viewed with reference to the factors like, the heavy workload, large number of patients visiting and taking treatment, improper housing facilities, poor recreational facilities, professional isolation and difficulty in taking time off to prepare for examinations, few opportunities for continuing education, challenges in maintaining professional boundaries, security issues in rural areas, limited job opportunities for spouses, lack of educational institutions for children and travelling distances for further education, etc. There is no denial that the petitioners/Doctors working in the ESI Dispensaries located in the classified areas, such as, hilly / remote / rural areas, are not facing such hurdles. In the absence of the said denial, the respondents cannot deny to extend the said benefits to the similarly placed Doctors.

21. As stated above, for categorizing the Doctors, the nature of the duties being performed by them cannot be the criteria and only classification permitted by the Regulation is the geographical difficulty and / or remoteness of the areas. Hence, there is much force in the claim of the Doctors serving in the ESI Dispensaries / Hospitals, which are located in the areas classified in the present G.O.86, dated 06.03.2019.

22. Admittedly, the petitioners have been serving in the classified areas with a legitimate expectation that they will get the incentive marks for serving in the difficult / remote /

rural areas, as the said locations were earlier included in the previous Government Order for incentive marks. Though the petitioners cannot claim their legitimate expectation as a matter of right, it cannot be taken away by the respondents, as has been done in this case shattering the hopes of the petitioners and other similarly placed Doctors. Had they been put to notice about such intention earlier, they would have preferred to work in PHCs and other hospitals in the classified location, instead of ESI Dispensaries.

23. If the respondents are of the opinion that there is a disparity between the Doctors in ESI Dispensaries and the PHCs in terms of workload, it is a separate issue to be addressed by the Government. When the categorization of areas is based on geographical classification, the ESI Dispensaries cannot be left out in extending the benefits of incentive marks.

24. In fact, it is to be stated, at this juncture, that when a batch of writ petitions connected with the instant writ petition was taken up for hearing on 22.03.2019, this Court passed the following order :

> Dr.K.Kulandaswamy, Director of Public Health and Preventive Medicine, Chennai, and Mr.A.Sugavanam, Joint Secretary to the Government, Health and Family Welfare Department, Government of Tamil Nadu, Secretariat, Chennai-600 009, are present.
>
> 2. After hearing all the parties in all these writ petitions and the learned Additional Advocate General, Ms.Narmadha Sampath, learned Additional Advocate General represented that there is a possibility of the Government including even the ESI Hospitals situate in the classified areas, namely, rural/remote/difficult areas, to be included for consideration. It was stated that they would get back with instructions on 25.03.2019 and also file an additional counter-affidavits in the other matters, including the writ petitions moved as lunch motion.
>
> 3. Post on 25.03.2019 immediately after admission."

25. From the above, it is clear that at request of the learned Additional Advocate General that she would attempt with the Government for the inclusion of the Doctors working in ESI Dispensaries/hospital in the respective classification of the areas and sought time till 25.03.2019, the matter was directed to be posted on 25.03.2019. However, when the matter was taken up on 25.03.2019, it is submitted by the learned Additional Advocate General that the Government would abide by the directions of this Court.

26. In view of the foregoing discussion, this Court is of the view that the impugned G.O.No.86, dated 06.03.2019 requires interference from this Court to the limited extent indicated above.

27. Accordingly, the second respondent is directed to include the ESI Dispensaries located in the classified areas, namely, hilly / remote / rural areas also, as has been done in the previous Academic Year 2018-2019, in the impugned G.O.No.86, dated 06.03.2019 forthwith and the third and fourth respondents are directed to draw the merit list, as scheduled, thereafter and extend the benefit of incentive marks to the Doctors working in ESI Dispensaries, including the petitioners, if the same are located in the classified areas.

28. This writ petition is allowed in the above terms. There will be no orders as to costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

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To

1. The Principal Secretary,
   Ministry of Health and Family Welfare,
   Government of India,
   Room No.348, 'A' Wing, Nirman Bhavan,
   New Delhi-110 011.

2. The Principal Secretary,
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+1 CC to Abdul Saleem, Advocate sr 29996.
+1 CC to Mr.V.P.Raman, advocate sr 28966
+1 CC to Mr.G.Sankaran, advocate sr 29541.
+1 CC to Govt. Pleader sr 29810

W.P.No.8097 of 2019

SP(29/03/2019)