IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.04.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Appeal No.1409 of 2019 & C.M.P.No.9725 of 2019

Dr.P.Parthiban, S/o.E.Palani,
No.11, Kannikoil Street,
Rajesh Apartments, L3,
Zameen Royapet,
Chromepet, Chennai-600 044. ..Appellant/1st Petitioner

-Vs-

1.The Government of Tamil Nadu,
Rep. by the Principal Secretary to Government,
Health and Family Welfare Department,
Fort St. George, Chennai-600 009.

2.The Director of Medical Education,
The Directorate of Medical Education,
No.162, Periyar EVR High Road,
Kilpauk, Chennai-600 010.

3.The Selection Committee, Rep., by its Secretary,
Post Graduate Medical Admission,
No.162, Periyar EVR High Road,
Kilpauk, Chennai-600 010.

4.The Medical Council of India,
Rep. by its Secretary, Pocket 14, Sector 8,
Dwarka Phase – 1, New Delhi-110 077.

5.The Chairman,
The Committee appointed for identification of areas/
Categories for marks in Tamil Nadu
Medical PG Entrance Exams,
TNMSC Building, Pantheon Road, Egmore, Chennai.
6.The Managing Director,
Tamil Nadu Medical Services Corporation,
Chennai-600 008. ..Respondents/Respondents

7.Dr.S.Karthiga

8.Dr.M.Niruba

9.Dr.S.Ravi ..Respondents/Given up Respondents

APPEAL under Clause 15 of the Letters Patent to set aside the order dated 27.03.2019 made in W.P.No.8705 of 2019 on the file of this Court, which was filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records pertaining to the first respondent in G.O.Ms.No.86, Health and Family Welfare (MCA-1) Department, dated 06.03.2019 and quash the same insofar as it relates to classify the institution to which the petitioner belongs in the category of not eligible for incentive marks and consequently, direct the respondents to award incentive marks to the petitioner.

For Appellant : Mr.G.Sankaran

For RR1 and 2 : Mrs.Narmadha Sampath,
Additional Advocate General
assisted by Mr.T.M.Pappiah,
Special Government Pleader

JUDGMENT
(Delivered by T.S.Sivagnanam, J.)

This appeal is directed against the order dated 27.03.2019 passed in a batch of cases in W.P.Nos.8681 of 2019 and etc., batch. Though there were several cases which were disposed of in the batch, there is a only one appeal before us by the first writ petitioner in W.P.No.8705 of 2019.

2.The said writ petition was filed for issuance of a Writ of Certiorarified Mandamus to quash the Government Order in G.O. (Ms.) No.86, Health and Family Welfare (MCA-1) Department, dated 06.03.2019 and to classify the institution to which the writ petitioner belongs in the category of not eligible for incentive marks and consequently direct the respondents to award incentive marks to the writ petitioner.

3.In W.P.No.8705 of 2019, there were four writ petitioners who joined together and filed a single writ petition. However, there is only one who has filed this writ appeal, viz., the first writ petitioner, Dr.P.Parthiban. The appellant on completion of his M.B.B.S. Degree, attended the Medical Recruitment Board Examination and joined Government service. At present, he is working as a Senior Assistant Surgeon in Madurandhagam Government Hospital. The appellant appeared for the NEET examination for Post Graduate Degree/Diploma Courses

for the year 2019-2020 and secured a score of 637.

4.It is the case of the appellant that in terms of the directions issued by a Hon'ble Division Bench of this Court in W.A.Nos.1051 of 2018 and etc., batch, dated 17.05.2018, a committee was constituted by the Government under the Chairmanship of Hon'ble Mr.Justice A.Selvam, a former Judge of this Court to identify remote/difficult/rural areas for awarding incentive marks to in-service Medical Officers for the admission to Post Graduate Degree/Diploma Courses from the academic year 2019-2020 in consonance with the Medical Council of India's Post Graduate Regulations. The Committee submitted two reports dated 13.02.2019 and 04.03.2019 pursuant to which, G.O.(Ms.) No.86, dated 06.03.2019 was issued (impugned order in the writ petition).

5.The appellant's case is that the appellant and the other writ petitioners were working in various Government Hospitals and have been given name of some institutions, viz., Namakkal Government Head Quarters Hospital, Tambaram Government Hospital, Kanchipuram Government Head Quarters Hospital and persons working in these institutions are not eligible for incentive marks. It is the case of the appellant that the same facilities and same qualifications of Doctors in the District Head Quarters Hospitals like Ooty, Nagapattinam and Penagaram are being granted the benefit of incentive marks. This according to the appellant was discriminatory and violative of his rights guaranteed under Article 14 of the Constitution of India. The appellant by relying on Regulation 9(4) of the Medical Council of India Regulations submitted that in terms of the said Regulations, the State Government has right to define/notify remote and difficult area, but the committee instead of classifying two categories, viz., remote and difficult area, had classified five categories, that is, difficult areas in hills, difficult areas in plains, remote areas, rural areas and urban areas (Municipal/Corporation areas). This according to the appellant is not a valid classification and on account of this classification, the persons like the appellant who are working in urban areas (Municipal/Corporation areas) are not eligible for incentive marks, but similarly qualified Doctors working in institutions at Sriperumubudur, Mangadu, Kundrathur, Rameswaram, Parthipanur, Mandapam, Velure in Namakkal District and Musiri in Trichy District with similar facilities located on the highways have been awarded incentive marks and Medical Officers working in Medavakkam and Perumbakkam Primary Health Centres, both of which are urbanized within Chennai District and Corporation have been included in the District of Chengulput and awarded incentive marks. Thus, according to the appellant this classification is arbitrary and unreasonable. Thus, the basis for filing the writ petition by the appellant was on the ground

that he has been treated discriminately. The classification which was recommended by the committee was erroneous and consequently, the Government Order in G.O.(Ms.) No.86 needs to be struck down.

6.The learned Single Judge considered the matter and took note of the fact that in terms of the directions issued by the Hon'ble Division Bench of this Court in the case of The State of Tamil Nadu vs. Dr.P.Pravin reported in (2018) 2 WLR 161, a Committee was constituted under the Chairmanship of a former Judge of this Court, who had made a thorough study and had made recommendations which have fructified into a Government Order and the appellant has not made out any case to interfere with the said Government Order and accordingly, the writ petition was dismissed.

7.To be noted that earlier, a batch of appeals were posted before us in which the classification of areas was put to challenge. Precisely in the said case, the appellant contended that the hospital where he was working should be construed as a difficult area because, he is in a hilly area with no proper connectivity. The classification made in the Government Order was put to challenge contending, the hospital was situated in a hilly area and should have been classified as a difficult area. We considered the submissions and we dismissed the writ appeals confirming the order passed by the learned Single Bench and in which we have also held that enough thought processes had gone into the decision making, more particularly, the recommendations of the Expert Committee constituted by the State Government. The said decision will squarely apply to the facts of the present case, since the appellant approached the Writ Court on more or less identical lines. We say so because, the appellant now seeks for classifying the hospital where he is working to that of a category where he will get incentive marks. We have held earlier that such exercise cannot be done by the High Court. Therefore, this would be sufficient to dismiss the writ appeal. However, before us Mr.G.Sankaran, learned counsel appearing for the appellant raised a contention stating that in the Government Order in G.O.(Ms.) No.86, dated 06.03.2019, the persons who are working in urban areas (Municipal/Corporation areas) are not entitled for any incentive marks. However, the prospectus makes a small distinction in respect of such of those candidates who secured a Post Graduate seat in M.D.(Community Medicine). This according to Mr.G.Sankaran is wholly arbitrary, unreasonable, violative of Article 14 of the Constitution of India and against the decision of the Hon'ble Division Bench in the case of Dr.P.Pravin (supra) and against the spirit of the decision of the Hon'ble Supreme Court in the case of State of Utta Pradesh And Others vs. Dinesh Singh Chauhan reported in (2016) 9 SCC 749; the decision of the Hon'ble Supreme Court in

Dr.Brijesh Yadav And Others vs. State of M.P. And Others reported in 2017 SCC OnLine MP 743; and the decision of the Hon'ble Supreme Court in State of Haryana And Another vs. Narendra Soni And Others reported in (2017) 14 SCC 642.

8.The learned counsel laid emphasis on the findings rendered by the Hon'ble Division Bench in Dr.P.Pravin (supra) more particularly, paragraphs 29 and 30 of the judgment. Thus, it is the submission that the object of the award of incentive marks has been thoroughly misunderstood. Hence, it is submitted that the order passed in the writ petition needs to be set aside.

9.Mrs.Narmadha Sampath, learned Additional Advocate General assisted by Mr.T.M.Pappiah, learned Special Government Pleader, raised a preliminary objection by contending that the ground which is canvassed by the learned counsel for the appellant before this Court was never raised in the writ petition, therefore, the appellant should not be permitted to raise such a contention before this Court for the first time.

10.The learned Additional Advocate General is right in her submission that when a point was never canvassed before a lower court, on appeal, the appellant would be precluded from raising such a contention except in cases where the contention is a pure question of law. We would have been well justified in dismissing this appeal on the ground that the appellant did not raise the contention now advanced before us before the learned Writ Court, nor such a contention was pleaded in the affidavit filed in support of the writ petition. However, considering the sensitivity of the issue, as it relates to admission to Post Graduate medical courses and the appellant challenges the correctness of the decision of the Government, we thought it fit to hear the parties on the contentions advanced.

11.We have elaborately heard the learned counsels on three occasions and we directed the learned Additional Advocate General to place a position note explaining as to what was the basis for awarding 10% marks to Health Officers who are working in Tamil Nadu Health Services for getting Post Graduate seats in M.D. (Community Medicine) alone. Accordingly, the learned Additional Advocate General has filed a position note duly supported by the relevant documents.

12.Heard the learned counsels for the parties and carefully perused the materials placed on record.

13.As pointed out by us earlier, we had considered the challenge to the decision of the Government in G.O.(Ms.) No.86 wherein Doctors working in certain category of hospitals were considered eligible for 10% incentive marks and we have held

that this Court cannot tamper or tinker with the findings rendered by the Expert Committee specifically constituted for such purpose pursuant to the direction issued by the Hon'ble Division Bench in the case of Dr.P.Pravin (supra). Admittedly, there is no challenge to the decision making process of the Committee or that of the Government. In such circumstances, we cannot substitute our views to the decision taken by the Expert Committee which are policy matters. The underlying purpose for giving incentive marks flows from the decision in the case of Dinesh Singh Chauhan (supra). We need not venture much into it because, this decision is not disputed on either side.

14.All that we are required to consider is whether there has been a thought process before the Expert Committee made a recommendation for 10% incentive marks to Health Officers who are working in Tamil Nadu Public Service for getting a Post Graduate seat in M.D. (Community Medicine) alone. The corollary would be that if a Health Officer who is working in Tamil Nadu Public Health Service Centres would opt for some other Post Graduate seat or in other words secured some other Post Graduate seat other than M.D. (Community Medicine), he is not entitled to 10% of the marks secured in NEET per year of service as incentive marks.

15.The moot question would be as to why the Government adopted this policy? Is there any reasonable nexus to the object sought to be achieved? or Is it an arbitrary exercise of power. A Committee which was constituted by the Government under the Chairmanship of a former Judge of this Court had considered this aspect and has made its recommendation. At this juncture, it would be beneficial to take note of the relevant portion of the recommendation, which reads as follows:-

> "10.Tamil Nadu Public Health Service Cadre Officers are posted in National Filaria Control Units, Sanitation Projects, Municipalities and Corporations as Health Officers, Deputy Directors of Health Services covering the whole district, Programme Officers whose duty covers the entire state or district. They are responsible for implementing all the National and State Health programmes, prevention of communicable and non-communicable diseases, infectious diseases outbreak control, disaster relief activities and implementation of various acts related to Public Health.
>
> 11.They should acquire PG Diploma or PG degree in Public Health or Community Medicine within four years of service. Candidates will not be deemed to have satisfactorily completed their

probation and will not be entitled to appointment as full members of the service until they acquire the Public Health Qualification. If they fail to acquire the said qualification within the said period of four years, their probation will be terminated and they will be discharged from service.

12.Considering the special nature of work and the fact that the Government of Tamil Nadu has decided to convert all PG Diploma into PG Degree courses in line with the decision of MCI to do away with Diploma Courses, Tamil Nadu Public Health Service Officers are eligible for incentive marks @ 10 percent of the marks secured in NET per year of service, for MD Community Medicine. They are not entitled for such incentive marks for PG courses other than what is required as per their service conditions."

16.From the above, it is clear that the candidates who are working as Health Officers in the Tamil Nadu Public Services have to acquire their Post Graduate qualification within four years. If they failed to do so, their services are liable to be discharged. Considering the special nature of work and the fact that the Government of Tamil Nadu had decided to convert all Post Graduate Diploma into Post Graduate Degree courses to be in line with the Medical Council of India's Regulations, the Committee recommended incentive marks for M.D. (Community Medicine) alone. Further, the Committee made it clear that the candidates are not eligible for such incentive marks for Post Graduate Course other than what is required as per their service condition. Thus, what weighed in the minds of the Expert Committee was the necessity to acquire the qualification to continue to be in employment.

17.The learned Additional Advocate General also placed certain other facts which appealed to us, since they had nexus to the object of granting 10% incentive marks. The first aspect is the vacancy position. The National Health Systems Resources Centre, Ministry of Health and Family Welfare, Government of India had issued a concept and process document in which one of the aspects pointed out in the annexure is regarding securing of vacancies. Thus, essentially, the vacancy position is one of the factors which can be taken note of.

18.It is the submission of Mr.G.Sankaran, that vacancy position is not the correct basis for deciding as to whether incentive marks have to be granted or not. It may be true that the vacancy position solely cannot be the criteria, but definitely to our mind, it is one of the criteria which would be

of relevance. The vacancy position in the Tamil Nadu Public Services for the four years is as hereunder:-

Vacancies in Tamil Nadu Public Health Services
Total Sanctioned Posts = 168

Year	Vacancies
2006-2007	41
2009-2010	38
2013-2014	52
2019-2020	48

The above figures show that roughly about 1/3rd of the sanctioned posts are lying vacant.

19.In terms of the Special Rules, no member of the Tamil Nadu Public Services is entitled to engage himself in private practice. This is the one more factor which needs to be borne in mind. The prospectus issued by the Government of Tamil Nadu for the year 2016-17 has provided for sponsorship of candidate by the Public Health Department and corporations in Tamil Nadu and they are exempted from writing Entrance Examination vide Government Order in G.O.(D).No.147 dated 03.02.2003. The prospectus for the year 2017-18 also specifies that to be considered under service quota for M.D. (Community Medicine), the candidates must have completed two years of service as per other Post Graduate Courses. The prospectus for the year 2018-19 states that out of the five seats in DPH Course under the State Quota in Madras Medical College, three seats are reserved for Health Officers in Tamil Nadu Public Service and one seat for Medical Officers of Corporations in Tamil Nadu. The prospectus further states that all the sponsored candidates must send their applications forwarded through proper channel with remarks of the forwarding authority. The Medical Council of India vide public notice dated 28.02.2019 has permitted conversion of Post Graduate Diploma Course seats into corresponding degree seats prospectively from the academic session 2019-2020. Thus, these are all the basis for which the Government Order in G.O.(Ms.) No.86 dated 06.03.2019 was issued.

20.Further, the vacant position note filed by the Additional Director of Medical Education, Secretary, Selection Committee has furnished certain data which we will presently consider. There are three streams, viz., (i) Directorate of Public Health and Preventive Medicine (DPH & PM); (ii) Directorate of Medical Services (DMS); and (iii) Directorate of Medical Education (DME). Under DPH & PM, there are two types of services; one is Tamil Nadu Public Health Services (TNPHS) and

the other is Tamil Nadu Medical Service (TNMS). Under DMS and DME, there is one type of service, viz., Tamil Nadu Medical Service. The cadre strength in DMS side is 7618 and in DME side it is 4374. So far as DPH & PM side is concerned, the cadre strength in TNMS is 6531 and cadre strength in TNPHS is 156. We are presently concerned with candidates who fall within this 156 cadre strength. The incentive marks as per the location of the hospital in which they are working is granted to the 6531 and 4374 Doctors. Insofar as 7618 is concerned, those were all Doctors who were working in the post of CmONC/Trauma/Accident/Emergency Care/NICU/SNCU Units, irrespective of the location of such units in any type of institution, district and geography. This was struck down by the Division Bench in Dr.P.Pravin (supra) holding that such category completely falls outside the quota of what is envisaged in proviso to sub-Clause IV of Regulation 9 of the Post Graduate Medical Education Regulations, 2000 and since a separate classification has been made solely on the basis of areas of specialisation, it does not meet the object which is sought to be provided for under the Regulations, 2000.

21.It is the argument of Mr.G.Sankaran that what is now done by the Government by granting 10% incentive marks to Health Officers who are working in Tamil Nadu Health Services for getting P.G. seats in M.D. (Community Medicine) alone is illegal because, it also amounts to allocation of incentive marks based on specialisation. In our considered view, the said argument is liable to be rejected for several reasons. Firstly, the cadre strength in TNPHS is 156. We have earlier pointed out that 1/3rd of the sanctioned strength is lying vacant. Thus, it appears that there are not many Doctors who opt for the post in TNPHS and that is the reason these posts are lying vacant. One more impediment is that the persons in TNPHS, i.e., those 156 Doctors to be eligible to continue in employment are required to acquire P.G. seats in M.D. (Community Medicine) alone within four years failing which they are liable to be discharged from service. That apart, they are not allowed private practice from the beginning of their service and for transfers throughout the service no choice for place of preference will be entertained. So these are all factors which weighed with the Expert Committee while making such recommendation. Therefore, the contention of the appellant that the incentive mark is awarded based on specialisation is incorrect. The incentive mark is awarded for a Health Officer, who is working in Tamil Nadu Public Health Service and it is given only if he gets a Post Graduate seat in M.D. (Community Medicine) alone and not any other branch and while working as a Health Officer, he cannot have private practice. Apart from that if the Health Officers does not acquire the P.G. Degree qualification within the time permitted by the Government, viz., four years, he will not be granted any

increment and promotion and his services are liable to be discharged. Thus, these are all factors which have weighed in the mind of the Committee to take a decision and this decision was accepted by the Government while issuing G.O.(Ms.) No.86. We have also pointed out that even earlier, that is, from the year 2016-17 onwards, this category of Doctors has always been separately dealt with and the prospectuses issued from year to year clearly discloses the same. Therefore, there is proper nexus to the object sought to be achieved in granting 10% incentive marks and there is no error either in the decision making process of the Committee or the decision taken by the Government.

22.For all the above reasons, the appellant has not made out any case for interference. Accordingly, the writ appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

abr

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Principal Secretary to Government,
   The Government of Tamil Nadu,
   Health and Family Welfare Department,
   Fort St. George, Chennai-600 009.

2. The Director of Medical Education,
   The Directorate of Medical Education,
   No.162, Periyar EVR High Road,
   Kilpauk, Chennai-600 010.

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   The Selection Committee,
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6.The Managing Director,
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Chennai-600 008.

+1cc to Mr.G.Sankaran, Advocate, SR.No.42422

W.A.No.1409 of 2019

Kak(30/07/2019)