



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON:	10.02.2021
DELIVERED ON:	11.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

W.P.(MD)No.20172 of 2019

and W.M.P.(MD) Nos.16722, 16723 & 16726 of 2019

(Through Video Conference)

WEB COPY

Dr.G.Natarajan,
Professor and Head,
Department of Forensic Medicine,
Sivagangai Medical College,
Sivagangai District.

... Petitioner

Vs

1) The State of Tamil Nadu,
Rep., by its Principal Secretary,
Department of Health & Family Welfare,
Fort St.George,
Chennai 600 009

2) The Director of Medical Education,
Kilpauk, Chennai 600 010

3) The Dean,
Sivagangai Medical College,
Sivagangai District.

4) The Dean,
Madurai Government Medical College,
Madurai, Madurai District.

... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records relating to the impugned order passed by the 2nd respondent / Director of Medical Education in Ref.No.53558/E1/4/2019 dated 23.07.2019, quash the same and further direct the 2nd respondent to effect the transfer of the petitioner from Government Sivagangai Medical College, Sivagangai to the fourth respondent Madurai Government Medical College, Madurai in terms of the choice made in the transfer counselling conducted by the 2nd respondent Director of Medical Education on 05.03.2019.

For Petitioner : Mr.Isaac Mohanlal, Senior Counsel
For M/s.Isaac Chambers

For Respondents : Mr.S.Dhayalan, Government Advocate.



ORDER

The brief facts of the case are as follows:-

(1.1.) The petitioner herein, who is a Professor and Head of the Department of Forensic Medicine in Sivagangai Government Medical College, Sivagangai District, is the senior-most Professor in the Department of Forensic Medicine in the State of Tamil Nadu.

(1.2.) In accordance with the Government Order in G.O.(4D) No.2 Health and Family Welfare (A1) Department, dated 15.02.2019, the second respondent issued a Circular, dated 22.02.2019 for conducting Transfer *cum* Promotion Counselling for the post of Professor, followed by Promotion Counselling for Associate Professors. The circular carries vacancy position of the Professors in various Departments, including the Department of Forensic Medicine. Owing to the intervening examination for MBBS students, another circular dated 02.03.2019 for Transfer and Promotion Counselling was released.

(1.3.) Though the petitioner was the senior-most Professor, he was not invited for the Transfer Counselling, which prompted him to file a writ petition, seeking for permission to participate in the Counselling and by an order dated 04.03.2019, this Court had permitted the petitioner for participating in the Counselling. Accordingly, the petitioner had participated and opted for the vacant post of Professor in Madurai Medical College, Madurai. Though the opted post was earmarked for the petitioner, no transfer order was issued. Consequently, a contempt petition was filed by the petitioner, pursuant to which, the impugned order dated 23.07.2019 came to be passed by the second respondent, refusing the petitioner's request for transfer to the Madurai Medical College, on the ground that, no regular Transfer Counselling for the post of Professors have been conducted in the Directorate and that, the present Counselling was conducted only for the excess posts. Challenging the same, the present writ petition has been filed.

2. Mr.Isaac Mohanlal, learned Senior Counsel appearing for the petitioner submitted that the post of Professor in Madurai Medical College has been lying vacant since 2015 and inspite of the orders of this Court passed in W.P.(MD) No.5171 of 2019, the respondents had wantonly refrained from accommodating the petitioner therein. According to the learned Senior Counsel, though the petitioner is admittedly the senior-most Professor in the State of Tamil Nadu and the post of Professor at the Madurai Medical College has also been earmarked for him, the deliberate conduct of the respondent in denying the promotion to Madurai, is a colourable exercise of power. Since G.O.(4D) No.2 Health and Family Welfare (A1) Department, dated 15.02.2019 does not provide for Transfer and Promotion Counselling only to the excess posts, the impugned order cannot be sustained.



3. Per contra, the learned Government Advocate placed reliance on the averments in the counter affidavit, dated 05.12.2019 and submitted that as per G.O.(4D) No.2 Health and Family Welfare (A1) Department, dated 15.02.2019, the second respondent had conducted compulsory Transfer Counselling, for the excess sanctioned posts alone and therefore, the petitioner's request for transfer to Madurai Medical College was not feasible. He also placed reliance on the additional counter affidavit dated 04.02.2021 and submitted that there were various complaints against the petitioner from the public, police officials and staff, when the petitioner was working as a Head of the Department at Madurai Medical College, Madurai and therefore, the petitioner's request for transfer once again to Government Medical College is not feasible on administrative reasons and also to ensure smooth functioning of the Department of Forensic Medicine, Madurai Medical College. Apart from such submissions, the learned Government Advocate also stated that the petitioner has been subjected to various departmental enquiries, in connection with his earlier tenure at Madurai, which could be prejudicial to the smooth functioning of the Department of Forensic Medicine, if the petitioner is transferred to Madurai.

4. I am not in agreement with the reasons adduced by the respondents. Incidentally, the petitioner's request for transfer to Madurai Medical College was not rejected on the ground of complaints against the petitioner or the departmental action against him during his earlier tenure at Madurai Medical College. The only reason assigned is that, the petitioner's candidature was not considered since the Counselling was conducted only to the excess posts and not for General Transfer. The second respondent cannot improve their action of non-consideration by raising new grounds in the counter affidavit or through oral submissions. Even otherwise, the charges levelled against the petitioner in the year 2013, came to be quashed by this Court, which was reported in **(2015) 8 MLJ 25**. Likewise, two other charges which were recently framed in the year 2020 had also ended in imposition of punishments of censure and deferment of increment for six months. Earlier, when this Court had quashed the charges against the petitioner, the action taken at that point of time in transferring the petitioner from Madurai Medical College to Thanjavur Medical College was held to be an action 'motivated by malice'.

5. It is brought to the notice of this Court that the position of Professor in the Forensic Department of Madurai Medical College has been lying vacant from the year 2015 onwards, and all along, an Associate Professor has been made in-charge for the said post at Madurai Medical College. The intervention by this Court to have the position filled by permitting the petitioner to participate in the Transfer Counselling, was rendered futile by the second respondent in citing reasons, which would effectively prevent the petitioner



from being transferred to Madurai Medical College. At the same time, the position of a Professor has also been vacant without any justification or basis.

6. The Government Order relied upon by the learned Government Advocate in G.O.(4D) No.2 Health and Family Welfare (A1) Department, dated 15.02.2019, does not place a restriction on Compulsory Transfer Counselling alone, but rather enables Transfer Counselling for the post of Professors, who are already refitted and designated as Professors. As such, the option exercised by the respondents in restricting the transfer to the excess sanctioned posts, indicates an arbitrary exercise of the discretion vested in them, while exercising their administrative decision. This Court is conscious of the fact that, in normal circumstances, the powers under Article 226 of the Constitution of India, would not be invoked for the purpose of issuing positive directions for transfer, since such administrative decision would be usually vested with the Authorities.

7. While earlier, when this Court had weighed a *prima facie* case in favour of the petitioner and thought it fit to enable the petitioner to participate in the Transfer Counselling process, through passing of an interim order, such an order was not an empty exercise but, to enable the petitioner to opt the place of his choice, while the imminent transfer was likely to happen. In this background, the subsequent conduct of the respondents, in rendering this exercise of the Court futile, by citing unfounded reasons of restrictions in the Transfer Counselling, could be termed as a colourable exercise of power.

8. An administrative decision is generally a discretionary exercise. But such discretions are always harnessed with restrictions. Such restrictions can broadly be stated to be within the acts of fairness and reasonableness and in conformity with the purpose of law. The restrictions on such discretionary powers have been consistently stressed upon by the Hon'ble Supreme Court time and again. In **National Insurance Company Limited vs. Keshav Bahadur** reported in **AIR 2004 SCC 1581**, the restrictions of discretionary powers have been laid down in the following manner:-

"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 colorable 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 "

9. The respondents herein, while exercising their discretionary powers under the guise of an administrative decision, have restricted the scope of Transfer Counselling, which has denied the petitioner's right of being transferred to the Government Medical College, Madurai. When there was no impediment for the petitioner to be posted at Government Medical College, Madurai, since he was admittedly the senior-most Professor in the State of Tamil Nadu and entitled to opt for transfer to Government Medical College, Madurai and for the further reason that, the place has also been earmarked for him, the restrictions alleged in the Transfer Counselling could be termed as an 'arbitrary exercise of powers'.

10. Even viewed from the angle of public policy, it is rather unfortunate that the Forensic Department in such a large Hospital, viz. the Madurai Medical College, which is one among the largest Hospitals in the State of Tamil Nadu, with an approximate of 3000 postmortems being done every year, wherein the reports of these postmortems are crucial in various medico-legal cases, compensation claims, etc., has been encouraged to function under the superintendence of an Associate Professor in-charge, when they always had an option of filling up the post with a Professor.

11. The learned Government Advocate attempted to stress on the departmental action initiated against the petitioner as a disqualification for the petitioner to be transferred. A faint attempt was also made by the respondents in imputing allegations of complaints against the petitioner when he had served the Forensic Medicine Department of Madurai Medical College earlier and therefore, submitted that, accommodating the petitioner at Madurai Medical College, would not be conducive.

12. This reasoning is unacceptable for two reasons. Firstly, such a reason was not assigned in the impugned order while rejecting the petitioner's request for transfer and the respondents are dis-entitled to improve their case through fresh allegations in the counter affidavit. Secondly, such alleged complaints also culminated into a departmental action, one of which was quashed by this Court and the others had ended in minor punishments. It is nobody's case that these punishments are a disqualification for the petitioner to be transferred to Madurai. Thus, when it is clearly established that the action of the respondents in refusing to



transfer the petitioner is an arbitrary and colourable exercise of power, which discretion is impermissible as laid down in **National Insurance Co. Limited's** case (cited supra), this Court would be justified in interfering with such an administrative decision.

13. Furthermore, such an action would also amount to a "malice in law" since it is established to have been done wrongfully and willfully without reasonable or probable cause. Above all, the action of rejecting the petitioner's request can be termed to be mulcted with malafides since the reason adduced in the counter affidavit, as well as the oral submissions, is contrary to the reasons adduced in the impugned rejection order, thereby indicating a strong suspicion that the respondents would rather prefer to keep the post of Professor at the Department of Forensic Medicine, Madurai Medical College vacant and continue with the Associate Professor therein to be in-charge, than accommodating the senior-most Professor in the State of Tamil Nadu, to the said post.

14. When the inaction on the part of the respondents has resulted in non-filling up of the post of Professors for so many years, and handing over such a huge responsibility to an Associate Professor and further imputing excuses for expeditious filling up of the vacancy through transfer, the action in question, would attract the principle of malice in law and thereby enable this Court to exercise its powers under Article 226 of the Constitution of India, in giving a positive direction to transfer the petitioner.

15. In identical circumstances, a learned Single Judge of this Court in the case of **M.Pallanichamy vs. the Secretary and Agricultural Production Commissioner and others**, had passed an order in W.P.(MD)No.10927 of 2009, dated 23.03.2010 ordering for transfer of an Government Employee to a place of his choice. The relevant portion of the order reads thus:-

"9. On a perusal of the entire records it is not in dispute that the petitioner stands as a senior most person in the Register of Requests. Even assuming that respondents 1 to 4 have got certain inherent rights on administrative reasons to effect transfer, which will not be interfered with by this Court in normal circumstances, such discretion is to be certainly exercised in a proper manner. It is not as if the fifth respondent stands senior to that of the petitioner in the Register of Requests, which cannot also be possible for the reason that the fifth respondent himself was holding the lower post of Assistant Agricultural Officer and he was promoted only two days prior to the impugned order came to be passed, and therefore, there is no possibility either for the second respondent or the fourth respondent to consider the representation of the fifth respondent in its proper perspective, especially,

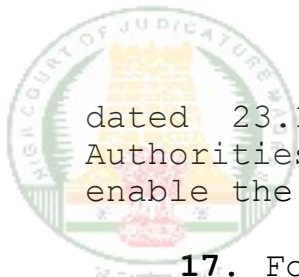


when it is the case of the petitioner, as submitted by the learned counsel for the petitioner, that the intervening days happened to be holidays, i.e., Saturday and Sunday.

10. So, there is absolutely no difficulty to conclude that the discretion has not been exercised in a proper manner in effecting transfer by respondents 2 and 4. Normally, the effecting of transfer is an administrative convenience of the authorities concerned, which will not be normally interfered with by this Court, since it is for the authorities concerned to decide about the suitability of the candidates to be posted in the transferred place. But, in the case on hand, when the order of the authorities confers certain rights, that right has to be exercised as per the provisions of the above said Government Order and it is not at all open to the any of the Governmental Authorities to effect transfer without following the above said Government Order. There is absolutely no explanation whatsoever offered for retaining the fifth respondent, who is junior to the petitioner in the post of Assistant Seed Officer in the seniority list of Register of Requests, which detrimentally affects the rights of the petitioner to be considered for posting him in his native District. Therefore, in the absence of any proper explanation for such transfer or retaining the fifth respondent in the same place, I am of the considered view that the impugned order of the fourth respondent dated 12.10.2009 is liable to be set aside, as it is bereft of particulars.

11. In view of the above, the impugned order dated 12.10.2009 is set aside with a direction against respondents 2 and 4 to act as per the above said Government Order issued in G.O.Ms.No.10, Personnel and Administrative Reforms (Personnel-S) Department, dated 07.01.1994, by posting the petitioner in Ottanchatram at Dindigul in his native District within a period of two weeks from the date of receipt of a copy of this Order, if there is no other legal impediment."

16. Earlier when the petitioner herein was transferred from Madurai Medical College to Thanjavur Medical College, this Court in the case reported in **(2015) 8 MLJ 25** (cited supra), had held such an 'act' to be 'motivated by malice'. Likewise, in similar circumstances, when the orders for Transfers were violated by the Authorities, this Court in the case of **P.Vijayakumari vs. the Director of Elementary Education**, in W.P.(MD) No.31018 of 2018,



dated 23.11.2018 had commented on the scant regard of the Authorities to the orders passed by the Government, which would enable the Writ Court to pass positive orders of Transfer.

17. For all the foregoing reasons, the impugned order passed by the 2nd respondent / Director of Medical Education in Ref.No.53558/E1/4/2019 dated 23.07.2019 is quashed and consequently, there shall be a direction to the second respondent herein, to pass appropriate orders, transferring the petitioner from the Government Medical College, Sivagangai District to the fourth respondent/ Government Medical College, Madurai, atleast within a period of one week from the date of receipt of a copy of this order.

18. Accordingly, the writ petition stands allowed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(AS)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate / litigant concerned.

To:

- 1) The Principal Secretary,
Department of Health & Family Welfare,
Fort St.George,
Chennai 600 009
- 2) The Director of Medical Education,
Kilpauk, Chennai 600 010
- 3) The Dean,
Sivagangai Medical College,
Sivagangai District.



4) The Dean,
Madurai Government Medical College,
Madurai, Madurai District.

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+1 CC to M/s.ISAAC CHAMBERS, Advocate (SR-10658[F] dated 12/03/2021)

+1 CC to M/s.SPL GP (SR-10916[F] dated 12/03/2021)

Order made in
W.P. (MD) No.20172 of 2019
Dated:11.03.2021

MJ(CO)
TR(12.03.2021) 9P 7C