IN THE HIGH COURT AT CALCUTTA

CONSTITUTIONAL WRIT JURISDICTION

APPELLATE SIDE

Present:

The Hon'ble Justice Moushumi Bhattacharya

WPA 3211 of 2022

Tania Mukherjee & Ors.

Vs.

The State of West Bengal & Ors.

For the Petitioner	: Mr. Pratik Dhar, Adv. Mr. Kartik Kumar Roy, Adv.
For the State	: Mr. Swapan Kumar Dutta, Adv. Mr. Rajat Dutta, Adv.
For the N.M.C.	: Mr. Indranil Roy, Adv. Mr. Sunit Kumar Roy, Adv.
For the Respondent No. 6	: Mr. D.N. Maiti, Adv.
Last Heard on	: 03.03.2022.
Judgment on	: 08.03.2022.

Moushumi Bhattacharya, J.

1. The challenge in the present writ petition is to an order dated 17th February, 2022 passed by the Secretary, Department of Health and Family Welfare, Government of West Bengal. The said order was passed pursuant to a direction of a Division Bench of this Court in an appeal filed by the petitioners which arose from an order passed by this Court on 8th February,

2022 in W.P.A. No. 1582 of 2022. By the impugned order, the Secretary, Department of Health and Family Welfare, Government of West Bengal, rejected the case of the petitioners, namely, that doctors working in specialised units can be equated with those who have rendered Covid-19 related duties and are eligible for the in-service quota for post-graduate seats in Government colleges.

2. All 50 petitioners before the court have qualified the NEET–PG Examination, 2021 and are graduate doctors who are serving as Medical Officers in Hospitals across the State. The petitioners seek a declaration that the petitioners are eligible for the in-service quota by dint of serving in Specialised Units in terms of a statutory amendment notified on 21st January, 2016 by the Department of Health & Family Welfare, Government of West Bengal. The Specialised Units mentioned in the 2016 Notification are Sick Newborn Care Unit (SNCU), High Dependency Unit (HDU), Critical Care Unit (CCU), Intensive Cardiac Care Unit (ICCU) and Intensive Therapy Unit (ITU). The petitioners claim to have completed more than three years in service in such Specialised Units with an additional one year and nine months of Covid duty.

3. The writ petitioners and three others were before the court in an earlier writ petition being W.P.A. No. 1582 of 2022 (*Tania Mukherjee and Ors. Vs. The State of West Bengal & Ors.*) and had sought for a similar declaration with regard to the petitioners' eligibility for the in-service quota by reason of serving in Specialised Units together with Covid related duty. The Writ Petition was dismissed by an order dated 8th February, 2022

holding that the petitioners cannot be brought within the fold of those Medical Officers who had served in *remote or difficult areas* as defined in a Notification of the Department of Health and Family Welfare, Government of West Bengal dated 26th February, 2020. The petitioners challenged the said order before a Division Bench of this Court and the appeal was disposed of by an order directing the Principal Secretary, Department of Health and Family Welfare, Government of West Bengal, to re-consider the case of the petitioners on account of four points which are set out below :-

> *".....*
>
> *(a) To obtain admission each of the candidates have to be placed as trainee reserve,*
>
> *(b) To qualify as a trainee reserve under the 21st January, 2016 amendment, a candidate is entitled to consideration of relaxation of three years' service in rural, remote or difficult areas if he has worked in one of the five specialised units. This amendment is specially applicable to the State of West Bengal.*
>
> *(c) By the notification of 21st January, 2016, the government extended this relaxation to those doctors who did Covid- 19 related duty,*
>
> *(d) Whether on such consideration any of the appellants is entitled to such relaxation for doing Covid-19 related duty in addition to other duties in the said five specialised units?"*

4. Pursuant to the order of the Division Bench, the Principal Secretary heard the 53 graduate doctors who had filed the earlier writ petition and rejected the contention of the petitioners in respect of the eligibility claimed by them for the in-service quota.

5. It should be clarified that in its order dated 10th February, 2022, the Division Bench did not set aside the order passed by this Court dated 8th February, 2022. The appeal filed by the 53 petitioners was disposed of with a direction on the Principal Secretary to hear and consider the case of the petitioners. The respondent authorities were restrained from taking any permanent decision with regard to allocation of seats for the in-service quota, namely, the 40% reservation for Medical Officers for seats in Government/ Private Colleges in West Bengal. The only observation of the Division Bench which may be seen as a possible departure from the views of this Court is the presumption that the expression "*difficult area*" was meant to be flexible and is not restricted only to geographical locations as it included Covid-19 related duty in the Corrigendum dated 25th January, 2022. The Principal Secretary was hence directed to consider the case of the writ petitioners on the touchstone of fairness and equal treatment.

6. I now come to the impugned order.

7. The issue of jurisdiction is not being gone into since learned counsel appearing for the petitioners and the State have agreed that the impugned order of the Secretary can be read as that of the Principal Secretary of the Health and Family Welfare Department of the State.

8. The Secretary has answered the four points in the following manner:-

(a) Service quota is different from the Trainee Reserve facility and depends on the total number of vacancies in which allocations are made on a nationwide basis. All the candidates including the writ

petitioners can avail of the Trainee Reserve facility provided they are able to secure a seat in NEET-PG counselling through the State quota.

(b) The 5-Judge Bench of the Supreme Court in *Tamil Nadu Medical Officers Association vs Union of India; (2021) 6 SCC 568* rendered the Notification dated 21st January, 2016 *non-est* on and from 31st August, 2020 since the Supreme Court made service in rural/remote/difficult areas mandatory for in-service Medical Officers for a specified period before a candidate could seek admission through a separate channel.

(c) The State is empowered to add Covid-19 duties to the definition of "*difficult areas*" and doctors who have rendered Covid-19 duty cannot be equated to those who have rendered service in specialised units.

(d) Only seven Medical Officers who have rendered Covid-19 duty can be given the benefit of the State quota. These seven in-service doctors are not included in the list of the 53 writ petitioners who had approached the Court in WPA 1582 of 2022 (*Tania Mukherjee vs The State of West Bengal*).

9. Upon considering the impugned order passed by the Secretary and the submissions of learned counsel against and in support of the said order, it is evident that the entire issue revolves around the entitlement of the petitioners to claim eligibility to the reservation in the State quota on the

basis of having rendered three years service in specialised units and one year and nine months of Covid related duty. The petitioners' claim, in other words, is two-fold:

(i) the petitioners should be treated on an equal plane with those doctors who have rendered service in rural/remote/difficult areas

(ii) the petitioners' also claim that service in specialised units should be brought within the expanded meaning of "*difficult areas*" as was done for doctors who had rendered Covid-19 duties by the Corrigendum dated 25th January, 2022 to an order of the Department of Health and Family Welfare dated 8th October, 2021.

10. The expressions "*rural areas*" and "*remote and/or difficult areas*" have been defined in a Notification dated 26th February, 2020 of the State Health and Family Welfare Department. While Explanation I to the said Notification defines "*rural areas*" to broadly mean areas other than those under the jurisdiction of a Metropolitan Area, Municipal Corporation or Notified Town Area, Explanation II defines the term "*Remote and/or Difficult areas*" in the following manner:-

> *"Explanation II: The term "Remote and/or Difficult Areas" means and includes (i) the hill areas (demarcated by the region as defined in Section 2(o) of the Gorkhaland Territorial Administration Act, 2011); (ii) the areas of the Sundarbans under the jurisdiction of the Sundarban Unnayan Parshad, (iii) the areas under the jurisdiction of the Paschimanchal Unnayan Parshad and (iv) the areas under the jurisdiction of the Uttarbanga Unnayan Parshad under the Government of West Bengal."*

The above definition indicates that the term "*rural areas*" was to have a specific geographical indication and signify areas removed from Metropolitan Cities/developed areas and require penetration of medical facilities and services. This definition has to be given a contextual relevance when seen against the Notification of the Government dated 8th October, 2021 and the Corrigendum dated 25th January, 2022. The presumption is that these areas would not be the preferred choice of posting of doctors who would opt for areas in or near cities for the convenience of city-life. The 40% quota was hence given as an incentive to those doctors who sacrifice the facilities of city-life and work in far-flung and remote areas. The incentive given to these doctors can also be rationalized in the context of the overall objective of the State to extend the benefits of medical services to areas which are not easily accessible and ensure that people living in remote areas have access to medical facilities. Significantly, a challenge to the definitions given to these terms was repelled by a Single Bench judgment in WPA 5460 of 2020 (*Dr. Goutam Nemo vs State of West Bengal & Ors.*) as well as by the Division Bench in MAT 773 of 2020 (*Dr. Sourav Chattopadhyay & Ors. vs State of West Bengal & Ors.*).

11. The requirement of service in *rural/remote/difficult areas* was subsequently asserted by the Supreme Court in *Tamil Nadu Medical Officers Association vs Union of India; (2021) 6 SCC 568* which would be demonstrated from paragraph 97 from the Report and is set out below:-

> *"97. We also expect that the statutory instruments of the respective State Governments providing for such separate channel of entry should make a*

> *minimum service in rural or remote or difficult areas for a specified period mandatory before a candidate could seek admission through such separate channel and also subsequent to obtaining the degree. On completion of the course, to ensure the successful candidates serve in such areas, the State shall formulate a policy of making the in-service doctors who obtain entry in postgraduate medical degree courses through independent in-service channel execute bonds for such sum the respective States may consider fit and proper."*

12. Although, the Supreme Court upheld the legislative competence of the State Government for providing reservation to in-service doctors for admission in post-graduate medical degree courses, there is little doubt that the articulation of the Supreme Court in paragraph 97 is a command and an unequivocal direction on the State Government to formulate a policy in terms of the direction. The formulation of policy found shape in the Notification of the State Government dated 8th October, 2021 which required in-service candidates of the Department of Health and Family Welfare to serve in *rural/remote/difficult areas* for a minimum of three years for availing the in-service quota.

13. Hence, the view of the Secretary that the Notification dated 21st January, 2016, equating service in rural areas with service in specialised units, became *non-est* on and from the date of the Judgment of the Supreme Court is borne out from the aforesaid facts and this Court finds no infirmity in such view.

14. Further, the words used by the Supreme Court "*rural/remote/difficult areas*" have to be read in tandem with the definition given to those words in

the Notification dated 26th February, 2020 which has been extracted above. The Corrigendum dated 25th January, 2022 expanded the definition of *difficult areas* to include in-service doctors who have rendered Covid-19 duty. The petitioners claim that service in specialised units should also be brought within the fold of such expansion. The fact that the State was empowered to include Covid-19 related duty within the meaning of *difficult areas* would appear from the fifth paragraph of the 8th October, 2021 Notification itself where the definition given to *rural/remote/difficult areas* was made subject to modification from time to time, as per the demanding situation.

15. That apart, Covid-19 related duty and service in specialised units are factually and conceptually distinct and different. While both require round-the clock vigilance, doctors who have been in the forefront of the battle against the pandemic cannot be treated in the same class as those who have served in specialised units. Hence, even if the petitioners have done Covid-19 duty for one year and nine months, such service cannot be used or seen as a substitute for service in *rural/remote/difficult areas* for 3 years. This is by reason of the fact that the specificity of the definition given to "*remote/difficult areas*" in the Notification of 26th February, 2020 cannot be diluted to mean service in specialised units which may not at all be located in or near the specific areas mentioned in the said Notification. In other words, the specific requirement for eligibility for in-service quota under the Notification dated 8th October, 2021, is service in "*rural/remote/difficult areas*" for three years, taken together, for the relevant academic year. None

of the petitioners have rendered service in such areas and hence do not fulfil the criteria for eligibility to the in-service quota. The expressions "*rural/remote/difficult areas*" are not open-ended terms and must be restricted to the meaning given in the Notification unless relaxed by a subsequent notification.

16. Moreover, stretching the definition of "*difficult area*" to Covid-19 related duty is a policy decision of the State Government which is buttressed by the direction of the Supreme Court in *Tamil Nadu Medical Officers Association* and supported by the objective of the State to reach medical aid and facilities to the remotest corners of the State. The policy is to ensure development- *"Unnayan*"- in areas which are far-removed and lack the infrastructural ease of urban life. A policy decision of this nature is usually within the exclusive domain of the Government and the Supreme Court, in several cases, has advised against embarking upon the uncharted ocean of public policy unless it is marked by an absence of legislative competence. Policies framed by the Executive may also be challenged on the ground of infraction of the fundamental rights guaranteed by the Constitution or where the policy suffers from an excessive delegation of essential legislative functions. A policy framed by the Government can also be hauled up if it is arbitrary, capricious or not informed by reasons. The policy framed by the Government requiring three years service in *rural/remote/difficult areas* and extending difficult areas to include Covid-19 related duty does not suffer from any of the aforesaid vulnerabilities. Expanding the contours of "*difficult areas*" to include Covid-19 duty also does not result in violation of Article 14

of the Constitution or the principle of equality and fair play. The service rendered in specialised units as opposed to the frontline "Covid Warriors" who put their own lives at risk in unimaginably challenging conditions may be seen as a classification based on clearly distinguishable factors and on intelligible differentia with a reasonable and rational connection to the object of the State Government which is to reach medical services to remote areas and provide such services in emergent situations like the Covid-19 pandemic (refer: *Kallakkurichi Taluk Retired Officials Association, Tamil Nadu vs State of Tamil Nadu; (2013) 2 SCC 772*). It is common knowledge that most of the other medical services including specialised care took a backseat during the three successive peaks of the pandemic.

17. This Court is accordingly of the view that including Covid-19 duty to "*difficult areas*" does not result in violation of Article 14 of the Constitution or discriminate against the petitioners who have served in specialised units. The view of the Secretary, on this score, is found to be reasonable.

18. Lastly, the starting point of the 40% reservation for in-service doctors for post-doctoral and postgraduate Medical and Dental degree seats is to be found in a Memo dated 18th April, 2013. The concept of "Specialised Units" like Sick Newborn Care Unit (SNCU), High Dependency Unit (HDU), Critical Care Unit (CCU), Intensive Cardiac Care Unit (ICCU) and Intensive Therapy Unit (ITU) finds place only in the Amendment to the West Bengal Medical Education Service, West Bengal Health Service and West Bengal Health-cum-Administrative Service (Placement on Trainee Reserve) Rules, 2015

notified on 21st January, 2016. This Notification is limited to bringing in two additional provisos to Rule 3 of the 2015 Rules which were notified on 3rd June, 2015. The 2015 Rules deals with placement on Trainee Reserve which protects pay and seniority of those doctors who are placed in this category. Therefore, the 2015 Rules have no connection with the 40% reservation for in-service Medical Officers which would also be evident from Rule 5 of the 2015 Rules which indicates that the application for placement as Trainee Reserve can only be made after the candidate has been selected for counselling before admission. The contention that service in specialised units under the Notification of 21st January, 2016 has its origin in the 2015 Rules is without basis since the entire scope of the two Notifications are different. The difference is also accentuated by a Memorandum dated 8th June, 2018 dealing with pay and allowances of Trainee Reserve candidates. Notably, all candidates can avail of the Trainee Reserve category subject to fulfilment of the conditions therein while the 40% reservation/in-service quota is only available to doctors who come within the purview of the Notifications framed in that sphere including the Notification of 8th October, 2021 and the Corrigendum thereto.

19. In view of the above, the finding of the Secretary on the distinction between the in-service quota and the Trainee Reserve category is found to be correct and cannot be revisited. This Court accordingly finds no reason to set aside the impugned order of the Secretary dated 17th February, 2022 or declare the petitioners to be eligible for in-service reservation by reason of serving in specialised units.

20. As found in the earlier round of litigation, denial of in-service quota to the writ petitioners would not result in irreversible prejudice. All the 50 petitioners would have the opportunity of participating in the ongoing counselling process as open category candidates, namely, outside the 40% reservation. The submission made on behalf of the National Medical Commission, namely that the petitioners would not be excluded from participating in the counselling process and would be free to compete for postgraduate medical seats in colleges across the State of West Bengal is taken note of.

21. WPA 3211 of 2022 is accordingly dismissed in terms of this judgment.

22. Learned counsel appearing for the petitioners prays for stay of the operation of this Judgment. Considering that this is the 3rd round of litigation concerning the same issue, namely, the eligibility of the petitioners for in-service quota by reason of having served in specialised units, the prayer for stay is considered and refused.

Urgent photostat certified copy of this Judgment, if applied for, be given to the parties on usual undertakings.

(**Moushumi Bhattacharya, J**)