

(2009) 07 DEL CK 0241

In the Delhi High Court

Case No : Writ Petition (C) No. 6828 of 2009

LT. Col. (Dr.) S.C. Dash, YSM, VSM

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 24-07-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 6 ILR Delhi 769

Hon'ble Judges : S.L. Bhayana, J;B.N. Chaturvedi, J

Bench : Division Bench

Advocate : Kamal Mehta, Mr. Brijesh Oberoi and Ms. Lakhshana Oberoi, for the Appellant; Jyoti Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.L. Bhayana, J.—The present writ petition has been filed by the Petitioner under Article 226 of the Constitution of India, for appropriate writ, order or direction for quashing the order dated 15th December 2008 as illegal, arbitrary and malafide, and for directing the Respondents to grant the Petitioner permission to join the fellowship programme which is the subject matter of this writ petition. The prefatory facts building up the factual edifice would be essential. The Petitioner is Lieutenant Colonel in the Armed Medical Corps. The Petitioner completed his M.B.B.S. and joined the Armed Medical Corps (AMC) in the year 1986. The Petitioner claims that he has been serving AMC for 22 years with utmost dedication, devotion and missionary zeal and has received various commendations and awards from time to time for his excellence.

2. The Petitioner completed post graduation being masters of Surgery (General Surgery) from Armed Forces Medical College, Pune. Thereafter, in 2001, the Petitioner cleared the super-speciality entrance examination of All India institute of Medical Sciences (AIIMS) and on that basis he was selected to do the MCh Urology Course. While doing this MCh Course at AIIMS, which is of three and a half years duration course, the Petitioner remained attached with a local Army

hospital on active duty for one and a half years. Two years study leave granted to him was extended to three and a half years. The Petitioner during his training at AIIMS was also trained in laparoscopic surgery and various branches of urologic surgery and he also learnt about many latest developments in this field during his training. Hence he thought of applying for advanced laparoscopic and robotic surgery training with a view to keep abreast with the latest developments in the field of urology, and for starting the same in the Army. For this purpose, in January 2004, the Petitioner prepared a research project and submitted it along with an application addressed to the commandant, Army Hospital (Research & Referral). However, this proposal was not agreed to by the Army Headquarters.

3. However, in January 2004 itself, the Petitioner came across an advertisement from the Department of Biotechnology, under the Ministry of Science and Technology, Government of India for "Biotechnology Overseas Associateship Award 2003-2004" for conducting advance research or undergoing specialized research training in overseas research institutions/laboratories in the priority area of biotechnology. The Petitioner applied for the said associateship along with a certificate given by Dr. Narmada P. Gupta, a well-known authority in the specialized field of urology and by a statement from the Army through the Dean Academics, Army Hospital, Delhi Cantonment stating that if the Petitioner is selected he shall be granted deputation leave for availing the associateship.

4. The Department of Biotechnology informed the Petitioner vide letter dated 24.5.2004 that he has been selected for the "Long Term Associateship Award" for a period of one year. The Petitioner was required to join the Cleveland Clinic and Vattikutti Urology Institute and Tulane University, Los Angeles, USA and was accordingly asked to send his acceptance with the following documents:

- (i) The service bond to be executed by the candidate as per the prescribed Performa
- (ii) No Objection from the cadre controlling authority/parent organization
- (iii) The deputation order from the parent organization/institution for availing the Associateship by the candidate.

Pursuant to this the Petitioner applied for No Objection Certificate (NOC) from the Army Hospital (R&R), Delhi Cant. His application was, however, not accepted by the Commandant of the Army hospital. As the Petitioner had to submit the documents within a month, he sought personal audience/request to reconsider the case by letter dated 31.5.2004, which was also rejected vide letter dated 23.6.2004. In September 2004, the Petitioner again requested his department for giving NOC and leave, which was summarily rejected. Since the time period in which the Petitioner was required to submit the documents had expired, he applied the Department of Biotechnology to carry forward the approval of associateship to the year 2005-06. The same was granted to him by vide letter dated 28.12.2004.

5. In August 2005, the Petitioner again made an application to Respondents for grant of NOC and the same was again rejected by an army signal/telegram in October 2005. In December 2005 the Petitioner made another representation before Respondent No. 3, Director- General, Armed Forces Medical Services (hereinafter referred to as DGAFMS) for considering his application for leave. Simultaneously, the Petitioner's associateship was once again extended and carried forward for the year 2006-07 vide letter dated 8.2.2006.

6. Thereafter, the Petitioner approached this Court by filing WP (C) No. 12814/2006) in August 2006 for directing the Respondent, to grant leave to the Petitioner, wherein the Division Bench of this Court passed a judgment dated 25.9.2008, setting aside the Respondent's order vide which the Petitioner's application was rejected and directed the Respondent to reconsider the case of the Petitioner within a month on merits, taking into consideration all the factors including the ones which were pointed out by the court in the judgment.

7. In view of the above directions issued in WP (C) No. 12814/2006, the Respondents sought three months' extension for reconsideration of the Petitioner's application by moving an application before this Court in October 2008. The Respondents were given one month's time by this Court to comply with the judgment dated 25.9.2008. However, even after the extended time had elapsed, there was no communication from the Respondents side, the Petitioner filed a contempt petition alleging that despite specific directions of the Division Bench dated 25.9.2008, the Respondents have failed to reconsider the case of the Petitioner. However in the meanwhile, the Respondents reconsidered the Petitioner's case on merits and rejected it by a speaking order dated 15th December 2008. Consequently, the contempt petition was disposed of but the Petitioner was given the liberty to challenge the Respondent's order dated 15th December 2008 or to initiate fresh proceedings. Hence the Petitioner has filed the present writ petition.

8. On the strength of above-mentioned facts, learned counsel for the Petitioner has argued that the refusal of grant of leave by the Respondents is illegal, wrongful, malafide, unreasonable and arbitrary, being ex facie influenced by totally irrelevant and extraneous considerations, despite the specific directions of the Division bench of this court. The learned counsel for the Petitioner has alleged that the impugned decision dated 15-12-2008 is just a cut and paste exercise done arbitrarily with total non-application of mind, upon considerations which have already been rejected by the Division Bench of this Court.

9. Learned counsel has submitted that the Petitioner being a medical professional has a fundamental right as well as duty to upgrade his skills and the organization cannot come in the way of Petitioner's strive for excellence and advancement in his field, particularly when it is in the larger national interest.

10. Learned counsel has contended that the Petitioner is the most deserving and hard working candidate and he has been selected out of 500 candidates for the

said associateship and the Respondents have no jurisdiction to comment upon the qualification of the Petitioner to undergo the training and have only to perform a ministerial act of granting the leave to the Petitioner.

11. Learned counsel has further submitted that the advanced laparoscopy and robot assisted surgery would be of immense benefit to the Army not only to the troops but also their families at far flung areas. On the issue of utility in the Armed Forces, learned counsel informed the Court that the armed forces have a dedicated satellite links by which all the apex and zonal army hospitals can be easily linked and expertise can be well utilized.

12. The Petitioner has contended that he has availed 5 1/2 years of training opportunities (2 years of MS course and 3 1/2 years of the MCh course) about which there is nothing exceptional as all super specialists of the AFMS undergoing DM/MCh are given this much period of study leave and attachment period as per the Training and Grading and Classification Rules (TGC rules) dated 28-3-2005.

13. The Petitioner has further alleged that the Respondent's argument of shortage of surgeons is a red-herring argument, made only to digress the issue. The Petitioner alleged that the Respondents have abused the power conferred upon them and that while he was denied permission on the ground of shortage of surgeons, other surgeons have been sent on United Nations missions, foreign deputations and advanced trainings both in and out of India. Hence the Petitioner has been grossly discriminated against.

14. Learned counsel for the Petitioner further alleges that the Respondents have taken into consideration totally irrelevant circumstances in rejecting the Petitioner's application and thus their decision is hit by the "Wednesbury Principles of Reasonableness".

15. The Petitioner has submitted that Respondent's approach that robotic surgery is not required by the Army and the same is a regressive one. He further submitted that AFMS has already procured a robot for Joint Replacement Centre of AH (R&R) in the year 2003 and that basic laparoscopic urology surgery is being conducted at Army Hospital and in various urology centers of the armed forces. The Petitioner claims to have performed such surgeries at the Command Hospital (WC), Chandimandir and Command hospital (NC).

16. Per contra, the learned counsel for the Respondents has refuted all the above contentions of the Petitioner. The substratum of the Respondents' case is that the decision not to grant NOC, taken by Respondent No. 3, i.e., DGAFMS is a reasoned one based on the holistic requirement of the AFMS and on organizational needs and constraints. Learned counsel has submitted that the AFMS are mandated to provide combat medical support to the Armed forces of the Union. It has been submitted by the learned counsel that an individual while fully competent to strive for excellence, must necessarily be guided by the logic of organizational constraints and goals as invested to the organization by its

mandate. The armed forces members have to suffer hardships including privation of aspirations to meet the national commitments of the army. Unlike the AFMS, the AIIMS is a premier institute for fostering research and training. Thus, the Petitioner who is a medical officer with the army, trained by the army as a surgeon and urologist, cannot compare himself with the senior resident doctors of the AIIMS.

17. Secondly, the learned counsel has refuted the Petitioner's contention that there has been mechanical exercise by mindless application and has averred that the competent authorities have persistently viewed the Petitioner's application with open mind and consideration based on holistic appraisal. In response to the Petitioner's contention that Respondents have only a ministerial act to perform, the learned counsel for the Respondent has averred that the DGAFMS has the jurisdiction to decide any training in respect of the Petitioner. On this issue the Petitioner has applied four times and all four times his matter has been considered on file by the competent authority and rejected.

18. In reply to the petitioner's submissions learned counsel for the Respondents submitted that by forwarding his application without explicit approval of the Respondents the Petitioner has committed a violation of the existing procedure and as such he is amenable to administrative proceedings against him. It is Respondent no. 3, i.e. DGAFMS and not the OIC University Cell and Dean Academics Army Hospital (R&R) who is the approving authority for further procedures involved in obtaining government sanction for the deputation of the Petitioner. The Petitioner was never permitted by Respondent no. 3 to apply for the associateship.

Respondent no. 3 has rejected the Petitioner's claims in public interest and in the interest of the army manpower and their families. It is rejected by them submitting that neither there is any equipment available nor there is any plan to procure them in the near future even in the Army Hospital (R&R), let alone the far flung areas. The learned counsel has refuted the contention of the Petitioner that the army has dedicated satellite links which could be used to link apex and zonal hospitals of the armed forces by explaining that the ISRO tele-link is only a planned tele-link for limited tele-medicine and cannot meet the technical standards required for robotic tele-surgery.

19. Learned counsel for the respondents has further submitted that the army has to plan their health care delivery to the clientele population that is the troops and their families and to provide basic specialties and to redress deficiencies in specialized fields and if the Petitioner is deputed for the training in robotic surgery, it will accentuate the already existing critical deficiency in field of surgery.

20. Learned counsel has further explained that the requirements of the AFMS are being undertaken by teams of technical personnel from time to time. The clientele population suffers a low incidence of less than 4% from diseases that

would benefit from these implements. Thus, this telerobotic technology would not exercise the requirements of the AFMS. The Prostectomy endorsed by the manufacturer of the Da Vinci Robot in field of robotic urology is applicable for localized prostate cancer which has an incidence of less than 4% per annum out of total of approximately 200 cases of prostate cancer as reported in the various centers of the Armed Forces. Thus the number of cases that would benefit from robot would be too meager to invest huge sums of money that would be involved.

21. Learned counsel has further explained that prostate cancer is an ailment that affects the male population in the 6th decade of life and beyond. Thus, only the retired servicemen would fit in this group and this category is being looked after by the Ex-servicemen contributory health scheme (ECHS) and not the AFMS thus robotic urology is not a priority of AFMS.

22. Learned counsel further submitted that the training desired by the Petitioner will be of no use to the organization unless proper infrastructure is planned for the same, since the techniques of advanced laparoscopy and robotic surgery are nascent ones and have been recently introduced in the Armed Forces and the Armed Forces have no plan to acquire it at this stage. These are very costly technologies. Moreover, neither robotic surgery not advanced laparoscopy are in the roadmap of AFMS.

23. Refuting the petitioner's allegation regarding amendment of TGC rules as colorable exercise, the learned counsel for the Respondents has submitted that the TGC Rules were amended to bring it in conformity with the requirement of the environment, after a study was undertaken headed by the then DGMS (Navy) in view of the change in age for undergoing training in sub-specialties in medical institutions across the world.

24. Learned counsel for the Respondent has submitted that the department of urology at Army hospital (R&R) runs a programme for urologists from the services to acquaint themselves with advances in laparoscopy from time to time, and the same has been offered to the Petitioner as well. Awards and medals received by the Petitioner have been given to him in recognition of his service to the organization and have got no bearing with the training he has been asking for. These do not entitle the Petitioner to ask for leave/deputation.

25. Learned counsel has explained due to the peculiar needs of the clientele population that a joint replacement centre has been set up in Army hospital (R&R) as the nature of military operation and rigorous training the joints of military personnel are more prone to injuries. To say that the implements procured for the joint replacement centre can also be used in urology would amount to misleading the court. Government authorizes only 2 years of study leave to the AFMS officers. However, to facilitate the Petitioner to complete his super specialty course he was granted additional one and a half years attachment at the Army Hospital (R&R) Delhi Cantt to work at AIIMS, New Delhi. The Petitioner has already been away from the organization for three and a half

years. Thus, now, the Petitioner should serve the organization in the field in which he was trained.

26. Learned counsel has vehemently refuted the Petitioner's allegations of nepotism and favoritism and has submitted that it has been held by this court in case WP(C) 12814/2006 filed by the Petitioner, that the Petitioner could not prove any case of nepotism or favouritism or malafide on part of the authorities. The Respondents have explained that the officers named by the Petitioner have been sent on training/programme only when approved by the competent authority, when there was no deficiency in their respective fields.

27. We have considered the submissions made by learned counsel for the parties and pursued the record. The question that has come up before this court is that whether the Respondents have acted arbitrarily and illegally in rejecting the Petitioner's application and whether the Respondents should be directed to grant the Petitioner permission to join the fellowship programme.

28. We have gone through the impugned order dated 15-12-2008, whereby Respondent No. 3 has given the following reasons for rejecting the grant of NOC to the Petitioner:

1. Functional deficiency of 40.89% as regards availability of surgeons in the AFMS.

2. The Petitioner has already undergone training for a period of 3. 1/2 years in allied discipline of urology and the organization cannot spare him for further time especially for any training which does not meet organizational requirements. This is coupled with the fact that the Petitioner took an undertaking at the time of applying for grant of study leave "to be available at all times to undertake the duties of a General Surgeon notwithstanding any training undertaken subsequently.

3. The AFMS clientele suffer in very small percentage of less than 0.4% as per the AFMS records from diseases which would benefit from robotic urology.

4. Though advanced laparoscopy in the field of robotic urology is performed at army hospital (R&R) the report by a collegiums of urologists of the AFMS has opined that "at present AFMS does not have any requirement for robotic surgery in urology as the number of cases meriting such surgery is very limited, "and that "long term training in this field is not recommended".

29. We do not find any arbitrariness, illegality or unreasonableness in this order. The Respondents have reached the above decision after examining all the relevant aspects and the requirements and mandate of the AFMS. Also, the Respondents have duly complied with the directions of the judgment of division bench of this court.

30. The action of the Respondents is completely in conformity with law and is not required to be interfered by the court. The records do not reflect any

arbitrariness or breach of the Wednesbury principles of reasonableness. The Wednesbury principles of reasonableness say that discretion must be exercised reasonably. As per the Wednesbury principle, the exceptional circumstances for judicial review in administrative matters are illegality, irrationality and procedural impropriety. Irrelevant matters must be excluded from consideration and relevant material ought to be considered. As per Lord Diplock in CCHQ case in 1985, irrationality means a decision which is so outrageous in its defiance or of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Modern trend points towards judicial restraint in administrative actions because authorities are specialist in matters relating to administration and therefore ordinarily such matters should be decided by administrative authorities for a decision not to be hit by Wednesbury principle, it is essential that there should be no infirmity in decision making process. Petitioner cannot insist his right in public interest decision. It is specifically pleaded in the case of respondent that there is a shortage of such specialized medical officers and therefore the request of the petitioner cannot be accepted at this stage, in view of exigencies of service and in public interest.

31. It is relevant to take note of Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another, , wherein it was held "it is a well-known principle of administrative law that when relevant considerations have been taken note of and irrelevant aspects have been eschewed from consideration and that no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, the same cannot be attacked on merits. Judicial review is permissible only to the extent of finding whether the process in reaching decision has been observed correctly and not the decision as such."

In exercise of judicial review we are concerned with the decision making process and not the merit of the decision unless it is shown that the decision of the Respondent is irrational or is perverse or contrary to some law, the court cannot interfere with such a decision.

32. While exercising powers under Article 226 of the Constitution of India, we would interfere with any administrative decision only if it appears to us to be unconscionable or perverse or irrational in the Wednesbury mould. In the light of the contentions put forward by the respective sides and after a careful perusal of the entire material placed before us, we do not find any infirmity in the Respondents action in this case. Resultantly, we are not inclined to accept this petition.

33. In the net result, the petition is without any merit and the same is therefore dismissed. No costs.