

(2014) 09 DEL CK 0001

Delhi High Court

Case No: W.P. (C) 4151 and 4167/2014 and C.M. Nos. 8323 and 8362/2014

Sapna Channa

APPELLANT

Vs

Govt. of NCT of Delhi

RESPONDENT

Date of Decision: Sept. 9, 2014

Acts Referred:

- Constitution of India, 1950 - Article 14, 226

Hon'ble Judges: Vipin Sanghi, J; S. Ravindra Bhat, J

Bench: Division Bench

Advocate: Pratima. K. Gupta, Abhishek Goyal, Advocates, Rakesh Tikku, Sr. Advocate and Sandeep Kumar, Advocate for the Appellant; Zubeda Begum, Standing Counsel, Naresh Kaushik, Amita Singh Kalkal and Aditi Gupta, Advocate for the Respondent

Final Decision: Dismissed

Judgement

S. Ravindra Bhat, J.

The petitioners in this case are aggrieved by the common order of the Central Administrative Tribunal (CAT) dated 02.07.2014 in O.A. No.3145/2013, whereby their applications seeking direction for permanent absorption in the cadre of General Duty Medical Officers (GDMOs), denied to them by the GNCTD decision, was rejected.

2. Briefly, the facts are that both the petitioners joined the GNCTD as deputationists and were working as GDMOs, discharging the duties of medical doctors. The petitioner in W.P.(C) 4151/2014 - Dr. Sapna Channa joined the GNCTD on 26.08.2008 in such capacity, having been recommended by the selection committee, with the approval of the Lieutenant Governor. Likewise, the petitioner in W.P.(C) 4167/2014, Dr. Sarla Gupta, was appointed as GDMO some time on 29.11.2004. At these points in time in 2004 and 2008, when the petitioners joined the GNCTD, no rules for governing the terms and conditions of such GDMOs or, for that matter, the Delhi Health Service (DHS) existed. These were subsequently framed on 23.12.2009 by the

Delhi Health Service (Allopathy) Rules, 2009 (hereafter referred to as "the 2009 rules").

3. The 2009 rules provided for inter alia the method of recruitment to the various categories and classes of posts within the Delhi Health Service (DHS). Rule 8, which dealt with filling up of different posts by deputation, including short-term contract, provided as follows:

"8. Filling of Duty Posts by Deputation (including short term contract):

(1) Notwithstanding anything contained in rule 7, where the Government is of the opinion that it is necessary or expedient so to do, it may for reasons to be recorded in writing, fill not more than five percent duty posts, in the grades of Medical Officer in the General Duty Sub-Cadre and Specialist Grade III in the Non-Teaching Specialist Sub- Cadre by transfer on deputation of suitable officers holding analogous posts under the Central Government (including Ministries of Railways and Defense)/State Government/Union Territories or by short term contract of suitable officers holding analogous posts under the statutory bodies, autonomous bodies, semi-government organizations, universities or recognized Research Institutions in consultation with the Commission.

Provided that with regard to the posts filled up on deputation it shall be open for the government, in consultation with the Commission, to consider appointment on absorption basis only in the Non-Teaching Specialists sub-cadre.

(2) The period of deputation or contract shall ordinarily not exceed three years, which may, in special circumstances be extended up to five years, as the Government may think fit.

(3) For appointment to duty posts on deputation or absorption basis, the officer shall, among others, fulfill the minimum educational and other qualifications prescribed for the posts in Schedule ♦ V to these rules."

4. The Rules also contained a power of relaxation, which reads:

"16. Power to relax.

Where the Government is of the opinion that it is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing, and in consultation with the Commission, relax any of the provisions of these rules with respect to any class or category of persons."

5. The petitioners, who were deputationists, sought permanent absorption with the advent of the 2009 Rules, since they wished to serve in the DHS and did not want to go back to their parent employer. This was considered by the GNCTD, which, after taking into account the position in the Rules, was of the opinion that since absorption of GDMOs was not permissible, some other method had to be considered. One route which fell for consideration was amendment of the 2009

rules to accommodate the present petitioners and others like them, for whom absorption was not an option in view of the express terms of Rule 8. The GNCTD also took into account the power of relaxation and referred the matter to the UPSC for its comments. This, apparently, was considered by the UPSC which, by its order dated 07.03.2013, rejected the request of the GNCTD, stating as follows:

"F.No.11/6/2012-ADT.3

UNION PUBLIC SERVICE COMMISSION

DHOLPUR HOUSE, SHAHJAHAN ROAD,

NEW DELHI 110069"

Dated: 7.3.2013

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2. The proposal has been examined in the commission. As per Rule 8 of DHS Rules, there is no provision for absorption of Medical Officer in GNCTD. Relaxation cannot be resorted to bringing a new method of recruitment not originally envisaged in the Rules. In the absence of absorption being provided as the mode of recruitment in the R.Rs, no relaxation of the same can be considered."

6. The GNCTD, acting upon the UPSC's rejection, expressed its inability to absorb the petitioners. Aggrieved, they approached the CAT.

7. Before the CAT, the petitioners urged that Rule 8, in so far as it denied permanent absorption to GDMOs, was violative of Article 14 in as much, as, there was no intelligible basis for differentiating between one class of deputationists and another. Since the Rule sought to extend the benefit of absorption of a class of deputationists - the resultant discrimination, singling out GDMOs from that benefit was hostile and, consequently, also arbitrary. The second limb of argument advanced was that the failure to seek recourse to power of relaxation in the case of petitioners was also arbitrary and that, in any event, the reasons for denial of such relaxation was extraneous. The CAT rejected both the arguments. With regard to the second argument, it was held that:

"22. We are in agreement with the learned counsel for respondent no.1 that a proposal mooted for the absorption of the applicant by respondent no.1 and obtaining NOC from the parent cadre cannot become a ground to claim a legal right for absorption. In this context, we refer to Kunal Nanda (supra) wherein it was held by Supreme Court that A deputationist cannot assert and succeed in his claim for permanent absorption in the department where he works on deputation unless his claim is based upon a statutory rule, regulation or order having the force of law. A deputationist can always and at any time be repatriated to his parent department, at the instance of either borrowing department or parent department. There is no vested right in such a person to continue for long on deputation or get absorbed in

borrowing department. The respondent no.1 had processed the request of the applicant and her husband in terms of the DHS Rules, 2009. The proviso to Rule 8 has unambiguous provision that the absorption of deputationist can be considered only for the Non-Teaching Specialist category of Doctors, and therefore, there is no scope for consideration of the request of the applicant under these rules. The respondent no.1 had, therefore, proposed relaxation of proviso to Rule 8 (1) exercising the power under Rule 16. Learned counsel for the applicants has not been able to identify the source of power of respondent no.1 that would enable it to relax the provision of these rules without consulting the respondent no.3. Rule 16 of the DHS Rules, 2009 specifically provides that where the Government is the opinion that it is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing, and in consultation with the Commission, relax any of the provisions of these rules with respect to any class or category of persons. Such consultation was, therefore, unavoidable for the respondent no.1. Another contention raised by learned counsel for the applicants is that the respondent no.1 was not bound by the advice of the respondent no.3. We agree with this contention but at the same time, it cannot be construed therefrom that respondent no.1 getting persuaded by the advice of respondent no.3 cannot change its earlier stand or view. In this case, precisely this is what has happened, as shown by learned counsel for respondent no.1 by producing the original file wherein the decision making levels in the Government have concurred with the advice given by respondent no.3 despite the fact that it involved reversal of their earlier view. It is logical to conclude that, as envisaged in the rules, the view taken by the decision making authority after consulting respondent no.3 and considering its advice, would be the final view of the Govt. and not the one which had been taken while sending the proposal for advice of respondent no.3.

23. With regard to the contention that UPSC's advice was contrary to the rules and against the public interest, we do not find much force in this argument. The learned counsel for respondent no.3 has shown that the initial appointment of the applicant and continuation of the deputation from second year onwards after the expiry of the initial deputation term without consultation with UPSC was unauthorised. The learned counsel for the applicant has not been able to refute this submission by respondent no.3 except saying that on each occasion of extension of deputation, the approval was given by LG, Delhi. It is trite that when there are express provisions in the rules to do a thing in a particular manner, the same has to be done in that manner. In this case since the rules provided consultation with respondent no.3 and the same was not done, the approval of LG, Delhi alone cannot cure the defect in the procedure that was followed while appointing or giving extensions to the applicant. The learned counsel for the applicant has also referred to the decision of this Tribunal in OA-3827/2013 and OA-2565/2013 wherein it was observed that:

When the Cabinet, Delhi Government has taken a decision to relax the rules, the role of UPSC is only to suggest the method of carrying out such relaxation and its

implementation. Consultant cannot confer upon the authority required to be consulted, the power of accepting or rejecting authority. The function of consultation is entirely different from that of approval and acceptance. Nevertheless the consultation may not be understood as a mechanical concurrence. It is the duty of the consultant to apply its mind on the subject and give its expert opinion fairly."

8. Even though the CAT's order was challenged before this Court on both grounds - discrimination and erroneous findings with regard to the refusal to grant relaxation, during the course of hearing - the challenge on the ground of Article 14 was given-up.

9. Learned counsel urged that the terms "relaxation" and "amendment" convey different meanings. Underlining that Rule 16 requires merely "consultation" with the UPSC, whose opinion cannot be taken as conclusive, learned Senior Counsel urged that the GNCTD proceeded on the erroneous premise that unavailability of the route of absorption in Rule 8 acted as a bar. Learned counsel submitted that the relaxation rule was engrafted to provide for all manner of contingencies, including the present one, where the GDMOs were brought in on deputation through a transparent and publically notified process. Emphasising that the denial of absorption was on account of no fault on their part, learned counsel stressed that they were discharging the duties of doctors to the utmost satisfaction of the GNCTD. That in 2009, statutory rules outlining the terms and conditions for service of doctors in the DHS were framed, which consciously excluded the GDMOs from the denial of absorption as deputationists, was not within their control. Such being the case, the power of relaxation was wide enough and permitted the GNCTD, as an employer, to grant permanent absorption to the petitioners.

10. Learned counsel urged that the UPSC's opinion, that in the absence of absorption as a mode of recruitment, the power of relaxation could not be exercised to permit absorption of the petitioners, flew in the face of the wide amplitude of the power conferred on the administrative body, GNCTD under the Rule 16. Learned counsel also relied upon various file notings, which were produced during the course of hearings after having been obtained through applications under the RTI Act. These notings dated 16.11.2011, 06.01.2012, 25.01.2012, 25.04.2012, 10.07.2012, and 01.10.2012, recognized the need to grant the benefit of absorption to those like the petitioners. Learned counsel submitted that apart from the petitioners, 11 others were sought to be considered for permanent absorption. It was only when the process of amending the rules was found to be too cumbersome that the power of relaxation was sought to be utilized. There being no infirmity in the initial opinion formation with regard to the need to absorb the petitioners, the GNCTD could not thereafter, in a complete volte face, state that since the rules did not permit such a course, the power of relaxation would not be resorted to.

11. The respondents submitted that consistently, the position of the GNCTD was that the exclusion of the deputationist GDMOs from the benefit of permanent

absorption (in a limited quota of 5%) - itself brought in by way of exception - was the result of a conscious decision. Learned counsel relied upon the counter affidavit, for the submission regarding unavailability of local talent at the GDMO level, to man the posts in a newly created cadre under the DHS rules. It was submitted that even otherwise, the deputationists cannot claim absorption in the borrowing organization as a matter of right. Learned counsel submitted that the petitioners had overstayed the deputation period, and even exceeded the maximum tenure provided for that purpose. Such being the circumstance, their insistence to be considered for absorption, could not have been claimed as a matter of right and certainly not one to warrant direction from the Court under Article 226. It was submitted, in addition, that the parent employer or lending organization had repeatedly sought for repatriation of petitioners, and given this fact, their applications for permanent absorption were misconceived. Learned counsel for the UPSC submitted that the power of relaxation has to be considered in the context of the Rules within which it is located. It was submitted that certain essential conditions, such as those relating to channels of recruitment, qualifications etc. are non derogable and relaxation cannot ever be resorted to. It was emphasized that in this case, the view taken by the UPSC was in consonance with the law declared by the Supreme Court. Learned counsel relied upon the decisions reported as State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, and J.C. Yadav and others Vs. State of Haryana and others.

12. The 2009 Rules - by Rule 4, provided for the authorized strength of the service. The GDMOs are provided for by Rule 4(7). Rule 7, in turn, deals with "maintenance of service" and provides that vacancies in various grades in the second Schedule will be filled up in the manner provided by the 2009 Rules themselves. The relevant part of the Schedule dealing with Medical Officers - the posts which the petitioners manned, states that vacancies in the grade (Medical Officers PB-3) would be filled by direct recruitment on the basis of written examination to be conducted by the UPSC. Thus, the 2009 Rules are categorical, in that entry to the cadre under Rule 7 read with the relevant entry in the second Schedule, could be only through direct recruitment. Seen from this perspective, Rule 8 carves out an exception in regard to certain categories of doctors, only in respect of 5% of duty posts. If the GNCTD is of the opinion that it is expedient or necessary to do so, it can "for reasons to be recorded in writing, fill not more than 5% duty posts in certain specific categories such as Medical Officers in General Duty Sub-Cadre and Specialist Grade-III in Non-teaching Specialist sub-cadre by transfer on deputation by suitable officers holding analogous posts" etc. Concededly, the petitioners do not fall within this exception. They are not Medical Officers in the General Duty sub-cadre, but are General Duty Medical Officers. Their challenge to the Rule 8(1) on the ground of discrimination not having succeeded, the argument now pressed into service is that the UPSC's opinion with regard to the scope of the power of relaxation, was based upon a misreading of the rules.

13. The power to relax, found in Rule 16, states that when the Government is of the opinion that it is necessary or expedient, for reasons to be recorded in writing, coupled with the consultation with the UPSC, it may relax any of the provisions of the Rules with respect to any class or category of persons. The judgment in *Sukanti* (supra) interpreted the power of relaxation., as one which does not confer a blanket power; its scope would be limited to relaxing any rule, such as eligibility criteria, but would not expand to forcing the government to disregard the Rules altogether. The Supreme Court observed:

"8.....Rule 14, we are afraid, does not confer such a blanket power; its scope is limited to relaxing any rule, e.g., eligibility criteria, or the like, but it cannot be understood to empower Government to throw the Rules overboard. If the rule is so constructed it may not stand the test of Article 14 of the Constitution. The proviso to Rule 13 can come into play in the matter of fixation of seniority between candidates who have successfully cleared the examination and a candidate who cleared the examination after availing of the benefit of relaxation. We are, therefore, of the opinion that the Tribunal committed no error in understanding the purport of Rule 14."

14. Likewise, in *J.C. Yadav* (supra), the object of framing the power of relaxation was underlined to mean the power to mitigate undue hardship or to meet a particular situation in the following manner:

"6.....The scope of Rule is wide enough to confer power on the State Government to relax the requirement of Rules in respect of an individual or class of individuals to the extent it may consider necessary for dealing with the case in a just and equitable manner. The power of relaxation is generally contained in the Rules with a view to mitigate undue hardship or to meet a particular situation. Many a times strict application of service rules create a situation where a particular individual or a set of individuals may suffer undue hardship and further there may be a situation where requisite qualified persons may not be available for appointment to the service. In such a situation the Government has power to relax requirement of Rules. The State Government may in exercise of its powers issue a general order relaxing any particular Rule with a view to avail the services of requisite officers. The relaxation even if granted in a general manner would enure to the benefit of individual officers."

15. In the present case, the discussion in the extracts of the notes produced along with the petition, no doubt discloses that the GNCTD was of the opinion that the petitioners, i.e. GDMOs stood excluded from the benefit of Rule 8(1), but on account of their service, GNCTD was desirous of absorbing them. Initially, the method suggested was to amend the rules; however, the opinion of the UPSC was sought with regard to the permanent absorption. The UPSC was of the view that since the relaxation would entail introduction of an entirely different channel of entry into the grade, when such channel is non-existent, under Rule 8(1), relaxation would be

impermissible. This Court is of the opinion that the petitioners' submissions with regard to either the UPSC or the GNCTD misinterpreting Rule 16 does not arise.

16. Secondly, as held by the CAT, no public employee has a right to insist that he ought to be permanently absorbed in an organization when his lien is with some other public employer. As a deputationist, he can only seek permanent absorption if the Rules so permit. More pertinently, in this case, Rule 8(1) constitutes an exception - (i) to the extent of 5% of the entirety of each cadre; (ii) in respect of specified posts which do not include the GDMO category.

17. In other words, the route of deputation itself is confined to a specified category with upper cap of 5%. The GDMOs clearly do not fall in that category. Furthermore, Rule 8(1) itself is premised upon the recording of the opinion of the Government that "it is necessary or expedient so to do" to fill duty posts by transfer by deputation. That power is again confined to non-GDMO category officers. Having regard to this position, the UPSC's opinion, accepted by the GNCTD can hardly be said to violate Article 14, as urged by the present petitioners. The public employer, i.e. GNCTD cannot achieve, by virtue of relaxation through the backdoor, what is impermissible in the Rule itself. This position is fortified by the decisions of the Supreme Court mentioned above. For the above reasons, we are of the opinion that there is no infirmity with the impugned order of the CAT. The writ petitions are accordingly dismissed along with the pending applications.