

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

**BEFORE
HON'BLE SHRI JUSTICE SUBODH ABHYANKAR
WRIT PETITION No. 25631 of 2021**

BETWEEN:-

**DR. JAGRAM VERMA S/O SHRI BHAROSE LAL,
AGED ABOUT 49 YEARS, OCCUPATION:
WORKING AS ASSOCIATE PROFESSOR H.NO
958, SCHEME NO. 114 PAHSE I VIJAY NAGAR
(MADHYA PRADESH)**

.....PETITIONER

(BY SHRI SAURABH SUNDER – ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH
PRINCIPAL SECRETARY VALLABH
BHAWAN BHOPAL (MADHYA PRADESH)**
- 2. DIVISIONAL COMMISSIONER 518,
MAHATMA GANDHI ROAD, SIYAGANG,
INDORE (MADHYA PRADESH)**
- 3. DEAN MAHATMA GANDHI MEMORIAL
GOVERNMENT MEDICAL COLLEGE
INDORE A.B. ROAD, CRP LINE, INDORE
(MADHYA PRADESH)**
- 4. DR. (MRS) SHENAL KOTHARI W/O DR.
JAYESH KOTHARI, AGED ABOUT 54 YEARS,
OCCUPATION: SERVICE, ASSOCIATE
PROFESSOR (DEPARTMENT OF ENT),
GOVERNMENT AUTONOMOUS MGM
MEDICAL COLLEGE, INDORE R/O- 25/6, YN
ROAD, INDORE (MADHYA PRADESH)**

.....RESPONDENTS

***(BY SHRI VAIBHAV BHAGWAT- G.A. FOR THE RESPONDENT NOS.1 TO
3/STATE AND SHRI L. C. PATNE – ADVOCATE FOR RESPONDENT
NO.4)***

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Reserved on : 21.02.2024
Pronounced on : 22.03.2024
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This petition having been heard and reserved for orders, coming on for pronouncement this day, the court passed the following:

ORDER

Heard finally, with the consent of the parties.

2] This writ petition has been filed by the petitioner Dr. Jagram Verma on 22.11.2021 under Article 226 of the Constitution of India against the advertisement dated 29.10.2021, issued by the respondent No.3 the Dean, Mahatma Gandhi Memorial, Government Medical College, Indore in which amongst other, a vacancy for the post of Professor in the ENT Department for unreserved category has been advertised.

3] The petitioner has challenged the aforesaid advertisement on the ground that the advertisement has been issued *dehors* the Rules as the aforesaid post is a promotional post, whereas the respondents are bent upon to recruit the candidate through direct recruitment. It is submitted that it is an in-house advertisement, which is also not permissible, as it was incumbent upon the respondents to recruit on the said post through departmental recruitment process. In support of his submissions, Shri Saurabh Sunder, learned counsel for the petitioner has relied upon the Circular dated 17.11.2020, and para 3 of which provides that as per Schedule-II, if eligible candidate is not available to be appointed through promotion, in that case, the post can be filled up through direct recruitment.

4] Shri Saurabh Sunder, learned counsel for the petitioner has also drawn the attention of this Court to his joining letter dated 01.10.2018, to submit that the petitioner was otherwise eligible to be promoted for the post of Professor in ENT Department and has also relied upon the Guidelines issued in the year 2017 for appointment of Teachers, Professors Associate and Assistant, in which, for the post of Professor, the requisite qualification is Associate Professor in Otorhinolaryngology for three years from the recognized medical college and minimum of four research publications in Indexed Medical/national journals. It is further submitted that the petitioner is posted as an Associate Professor in ENT and Otorhinolaryngology Department. Thus, it is submitted that the impugned advertisement is liable to be quashed on the ground that it has been issued contrary to the Rules.

5] On the other hand, the prayer is opposed by the counsel for the State by filing a reply. In their reply, the State has submitted that the advertisement has been issued as per the Madhya Pradesh Autonomous Medical College Medical Service Model Rules, 2018 and it is submitted that since the petitioner has already participated in the aforesaid recruitment process, he cannot be allowed to challenge the recruitment process itself at this stage.

6] A detailed reply has also been filed by the private respondent No.4. Dr. Shenal Kothari, who is posted as Associate Professor in the Department of ENT in the respondent No.3 College. The petition is opposed on the ground that the petitioner has no *locus* to file the petition for the reason that the petitioner's appointment itself on the

post of Associate Professor was *dehors* the Rules. Attention of this Court has been drawn to the various documents to demonstrate that the petitioner has been appointed in a direct recruitment whereas, the post was to be filled up through promotion only.

7] Shri L.C. Patne, learned counsel has also submitted that the post was already filled up by one Dr. Yamini Gupta, at the time when the petitioner got the appointment, and that the appointment of the petitioner has also been challenged by the respondent No.4 in a separate Writ Petition No.7501 of 2023, which is pending before this Court only.

8] In support of his submissions, Shri Patne has also relied upon the Schedule - I of the Recruitment Rules of 2018, in which for the post of Professor as well as the Associate Professor only one post each was reserved for Otorhinolaryngology and ENT Cochlear Implant Unit and thus, it is submitted that the petitioner's initial appointment itself was erroneous as he has not been appointed against any vacant post.

9] Shri Patne has also drawn the attention of this Court to the appointment order dated 18.02.2019 in which Dr. Yamini Gupta's earlier appointment has been shown as Assistant Associate Professor ENT (unreserved). Thus, it is submitted that at the time when the petitioner was appointed on the said post on 29.09.2018, Dr. Yamini Gupta was already appointed on the said post.

10] Shri Patne has also relied upon the decision rendered by the Supreme Court in the case of *Mohd. Mustafa Vs. Union of India and others* reported as (2022) 1 SCC 294 wherein, in paras 35 and 36, the

Supreme Court has held that once the petitioner has already participated in a selection process, he cannot be allowed to challenge the same. Counsel has also relied upon Rule 12 of the Madhya Pradesh Civil Services (General Conditions of Services), Rules 1961, which provides that the seniority of persons directly *appointed to a post according to the rules* shall be determined on the basis of the order of merits in which they are recommended for appointment, irrespective of the date of joining. Thus, it is submitted that since the *appointment of the petitioner was not in accordance with the rules*, the petition deserves dismissal.

11] The aforesaid submissions have been advanced to counter the petitioner's contention that the post of the Professor can be filled through direct recruitment only when the eligible candidate is not available whereas, the petitioner himself could not have been selected by way of direct recruitment on his post of Associate Professor.

12] In rebuttal Shri Saurabh Sunder, learned counsel for the petitioner has submitted that the issue of the petitioner's appointment on the post of Associate Professor is not before this Court as in the present petition, the petitioner has challenged the issuance of advertisement for the post of Professor ENT. It is submitted by Shri Sunder that whether the petitioner's appointment was made in accordance with the rules or not, is required to be decided by the Departmental Promotional Committee (DPC) only and if this petition is allowed, the DPC would look into the eligibility of the petitioner to be selected for his present post of Associate Professor.

13] Heard counsel for the parties and perused the record.

14] On perusal of the documents filed on record, it is found that the petitioner's appointment as an Associate Professor itself is under dispute in W.P. No.7501 of 2023, which has been challenged by the respondent No.4, and in such circumstances, this Court cannot reflect upon the merits of the aforesaid case. Thus, suffice it to say that when the petitioner's own appointment is under dispute, i.e., whether his direct recruitment on the said post was valid or not, and whether he was posted on a vacant post, are the issues which are to be decided in the aforesaid writ petition by this court, in such circumstances, it cannot be said that any order passed by the DPC regarding the validity of the petitioner's initial appointment would have any significance at all

15] Thus, when the appointment of the petitioner himself can be said to be shrouded with uncertainty, in such circumstances, this Court is of the considered opinion that the petitioner has no locus to challenge the appointment procedure as per the advertisement dated 29.10.2021.

16] On the other hand, since the petitioner has already participated in the selection process, he is precluded from challenging the advertisement, as has been held by the Supreme Court in the case of *Mohd. Mustafa (Supra)*, paras 35 to 41 of which read as under:-

“35. It is in this context, we have to examine whether the appellants are estopped from challenging the recommendations made by the Empanelment Committee, given the fact that they had taken a calculated chance, and not protested till the selection panel was made public. In our opinion, the ratio in *Madan Lal v. State of J&K* [*Madan Lal v. State of J&K*, (1995) 3 SCC 486 : 1995 SCC (L&S) 712] , would apply in the present case as when a person takes a chance and participates, thereafter he cannot, because the result is unpalatable, turn around to contend that the process was

unfair or the selection committee was not properly constituted. This decision, no doubt, pertains to a case where the petitioner had appeared at an open interview, however, the ratio would apply to the present case as the appellant too had taken a calculated chance in spite of the stakes, that too without protest, and then has belatedly raised the plea of bias and prejudice only when he was not recommended. The judgment in *Madan Lal* [*Madan Lal v. State of J&K*, (1995) 3 SCC 486 : 1995 SCC (L&S) 712] refers to an earlier decision of this Court in *Om Prakash Shukla v. Akhilesh Kumar Shukla* [*Om Prakash Shukla v. Akhilesh Kumar Shukla*, 1986 Supp SCC 285 : 1986 SCC (L&S) 644] , wherein the petitioner who had appeared at an examination without protest was not granted any relief, as he had filed the petition when he could not succeed afterwards in the examination. This principle has been reiterated in *Manish Kumar Shahi v. State of Bihar* [*Manish Kumar Shahi v. State of Bihar*, (2010) 12 SCC 576 : (2011) 1 SCC (L&S) 256] , and *Ramesh Chandra Shah v. Anil Joshi* [*Ramesh Chandra Shah v. Anil Joshi*, (2013) 11 SCC 309 : (2013) 3 SCC (L&S) 129] .

36. More appropriate for our case would be an earlier decision in *G. Sarana v. University of Lucknow* [*G. Sarana v. University of Lucknow*, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] , wherein a similar question had come up for consideration before a three-Judge Bench of this Court as the petitioner, after having appeared before the selection committee and on his failure to get appointed, had challenged the selection result pleading bias against him by three out of five members of the selection committee. He also challenged constitution of the committee. Rejecting the challenge, this Court had held : (SCC p. 591, para 15)

“15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in *Manak Lal case* [*Manak Lal v. Prem Chand Singhvi*, AIR 1957 SC 425] where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of

waiver against him. The following observations made therein are worth quoting : (AIR p. 432, para 9)

‘9. ... It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.’ ”

37. The aforesaid judgment in *G. Sarana* [*G. Sarana v. University of Lucknow*, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] was referred in *Madras Institute of Development Studies v. K. Sivasubramaniyan* [*Madras Institute of Development Studies v. K. Sivasubramaniyan*, (2016) 1 SCC 454 : (2016) 1 SCC (L&S) 164], in which selection to the post of Assistant Professor was challenged on the ground that shortlisting of candidates was contrary to the Faculty Recruitment Rules. The challenge was declined on the ground of estoppel as the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, had submitted his application and participated in the selection process by appearing before the committee of experts.

38. Equally appropriate would be a reference to the decision of this Court in *P.D. Dinakaran (1) v. Judges Inquiry Committee* [*P.D. Dinakaran (1) v. Judges Inquiry Committee*, (2011) 8 SCC 380], in which the allegation was that one of the members of the committee constituted by the Chairman of the Council of States (Rajya Sabha) under Section 3(2) of the Judges (Inquiry) Act, 1968 was biased. This judgment extensively recites and assimilates from both domestic and foreign judgments on the question of bias and prejudice and quotes the following observations in *G. Sarana* [*G. Sarana v. University of Lucknow*, (1976) 3 SCC 585 : 1976 SCC (L&S) 474] case : (*G. Sarana case* [*G. Sarana v. University of Lucknow*, (1976) 3 SCC 585 : 1976 SCC (L&S) 474], SCC p. 590, para 11)

“11. ... the real question is not whether a member of an administrative board while exercising quasi-judicial powers or discharging quasi-judicial functions was biased, for it is difficult to probe the mind of a person. What has to be seen is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias, human probabilities and ordinary course of human conduct have to be taken into consideration.”

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41. In *P.D. Dinakaran (1)* [*P.D. Dinakaran (1) v. Judges Inquiry Committee*, (2011) 8 SCC 380], this Court held that the member in question had during a seminar spoken against the proposed elevation of the petitioner as a Judge of the Supreme Court and, therefore, the apprehension of likelihood of bias is reasonable and not fanciful, though in fact, the member may not be biased. Nevertheless, the writ petition was dismissed on the ground that the petitioner was not a lay person and being well-versed in law should have objected to the constitution of committee when notified in the Official Gazette, which factum was highly publicised in almost all newspapers. Notwithstanding the awareness and knowledge, the petitioner did not object, which indicates that he was satisfied that the member had nothing against him. Therefore, belated plea taken by the petitioner did not merit acceptance and mitigates against bona fides of the objection to the appointment of the person as a member of the committee.

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(Emphasis Supplied)

17] A perusal of the aforesaid decision clearly reveals that it is not the ratio of this case that when a person has participated in a proceeding/selection process etc., he is precluded from challenging the same, but the rider is that his or her objections must be voiced before participating in the said process. In other words, if a person is taking exception to any selection process or the like, he cannot do so after he has participated and failed in the same, however, if he has challenged such process at the earliest opportunity, before participating in the same, then, even if he or she participates in the said process afterwards, it would not be considered as his or her deemed waiver of the objection.

18] Thus, tested on the said anvil, it is found that the petitioner had raised his objections on 10.03.2021 and 29.10.2021, whereas, the impugned advertisement was also issued on 29.10.2021. In such circumstances, it is held that despite the petitioner's participation in the selection process, he can still challenge the said process by virtue

of his earlier objections.

19] Be that as it may, the petition is still misconceived because the eligibility of the petitioner to be appointed as Associate Professor is already under challenge, and to be decided by this court in W.P.No.7501 of 2023, and thus the petitioner cannot assert that his own appointment on his present post of Associate Professor is in accordance with the Rules/law.

20] Thus, the petition is liable to be and is hereby, *dismissed*. However, with a further direction that in case if the order is passed in favour of the petitioner in W.P. No.7501 of 2023, in that case he can renew his prayer before this Court and thus, it is directed that any appointment made on the post so advertised vide advertisement dated 29.10.2021, shall be subject to the challenge by the petitioner, if the occasion so arises.

21] With the aforesaid directions, the petition stands *disposed of*.

(SUBODH ABHYANKAR)
JUDGE

Bahar