

HIGH COURT OF MADHYA PRADESH : JABALPUR**WRIT PETITION No.13764/2014**

Smt. Pratibha Kushram

Vs.

State of Madhya Pradesh & others

Shri Rashid Suhail Siddiqui, learned Counsel for the petitioner.

Shri Sanjay Dwivedi, learned Govt. Advocate for the respondents.

Present : Hon'ble Shri Justice K.K. Trivedi

O R D E R**(____/01/2015)**

This writ petition under Article 226 of the Constitution of India is directed against the order dated 10.07.2014 as also the order dated 25.08.2014 by which the respondent No.5 is posted in place of the petitioner and by subsequent order the representation made by the petitioner against that order is rejected on the ground that the petitioner was substantially appointed on the post of Assistant Teacher, was promoted on the post of Superintendent of Hostel and was made to work as Hostel Superintendent in Scheduled Caste Pre-Metric Girls Hostel, Nainpur. Since the petitioner was substantively holding the post, which was vacated by one Smt. Sangeeta Kawde, without making any posting order in respect of the petitioner, the respondent No.5 could not have been posted on the said post. A representation was made by the petitioner but the same was not being considered, therefore, she was required to approach this Court by way of filing W.P. No.10558/2014, which writ petition was disposed of vide order dated 22.07.2014 with a

direction to the respondents to consider and decide the representation of the petitioner expeditiously. The interim protection was granted to the petitioner directing that status quo with respect to the posting shall be maintained till the representation is decided. By the subsequent impugned order dated 25.08.2014 since the representation made by the petitioner has been rejected, she is now left with no option but to file this writ petition.

2. While entertaining the writ petition, this Court granted an interim protection on 19.09.2014 directing that status quo with respect to the posting of the petitioner be maintained. Since this order was passed, the petitioner was allowed to continue on the post and even when after service of notice of this writ petition, the respondent No.5 filed her reply and an application for vacating stay, the I.A. filed by the respondent No.5 was rejected and opportunity was granted to the State to file a return and if necessary, to move appropriate application for vacating stay. The respondents No.1 to 4 and 6 have filed their return categorically contending that the petitioner has not come with clean hands before this Court inasmuch as she has made a wrong statement in her writ petition regarding her appointment as Hostel Superintendent. It is contended by the respondents that the petitioner was appointed as an Assistant Teacher and was posted in Govt. Naveen Middle School, Nainpur. The charge of the post of Hostel Superintendent was given in addition to the petitioner and there is no channel of promotion provided from the post of Assistant Teacher to the post of Hostel Superintendent. Therefore, the petitioner is not a regular incumbent holding the post of Hostel Superintendent. It is contended that the respondent No.5 though was appointed on contract basis but her appointment is specifically against the post of Superintendent of the Tribal Hostel and, therefore, the petitioner cannot say that the respondent No.5 is not

eligible to be posted in place of the petitioner. It is contended that these facts the petitioner was knowing fully well but has deliberately concealed to mislead this Court for obtaining an interim stay. Even if no posting order is issued in respect of the petitioner, she is to continue on her substantive post of Assistant Teacher in the school where she has been posted on regular basis. There would not be any problem in drawing the salary of the petitioner as she is not getting the salary from the post of Hostel Superintendent, which post is not substantially held by the petitioner. In view of this, it is contended that the writ petition is liable to be dismissed. An application for vacation of the interim order is also made on these grounds by the aforesaid respondents.

3. The respondent No.5 has filed independent return and has contended that the entire claim made by the petitioner is misconceived. It is the policy of the State Government that in a girls hostel a lady teacher is to be posted as Superintendent. Though the respondent No.5 was appointed on contract as Hostel Superintendent, yet she was posted in a boys hostel. This posting was in violation of the policy of the State, therefore, when the fact was found that the petitioner is holding the current charge/additional charge of the post of Hostel Superintendent in the girls hostel, the respondent No.5 was posted on regular basis and no posting order was required to be issued in respect of the petitioner, who will continue to work on her post of teacher in the school within the same place. In view of this, it is contended that the entire writ petition is misconceived and is liable to be dismissed. In proof of the fact that the petitioner is getting salary as Assistant Teacher, annual pay slip for the month of July, 2014 to September, 2014 is filed by the respondent No.5.

4. Though rejoinders have been filed by the petitioner firstly meeting out the allegations made by the respondent No.5 in her return and secondly meeting out the allegations made by the respondents No.1 to 4 and 6 in their return but except placing on record an order of appointment of the respondent No.5 and order passed by this Court in one of the writ petition, nothing more is stated. In the additional rejoinder a circular of the State Government has been placed on record to show that in the girls hostels only the aged Scheduled Caste/Tribal Teacher is required to be posted. Nothing much is said in the rejoinders.

5. Heard learned Counsel for the parties at length and perused the record.

6. First of all the claim made by the petitioner is to be examined whether she has any statutory right to be posted on the post of Hostel Superintendent or not. The petitioner though has averred in the writ petition that she was subsequently promoted on the post of Hostel Superintendent in the year 2007 but not a single order in that respect has been placed on record. The petitioner has not described as to how she was considered to be promoted on a post of Hostel Superintendent, whether such a post was in the channel of promotion of an Assistant Teacher or not. Nothing has been pointed out from the statutory rules that such a promotion is permissible as per the rules. Secondly the petitioner has contended that she is getting the salary against the post of Hostel Superintendent but not a single document in that respect is placed on record by the petitioner. It cannot be accepted from such averments made in the writ petition in paragraph 5.9 that the salary of the petitioner is being drawn from the post of Hostel Superintendent, specially when a document is placed on record by respondent No.5 indicating that the salary of the petitioner is being drawn from the post of Assistant Teacher

(LDT) and her drawing and disbursing authority is the Principal, Nainpur Higher Secondary School, New Nainpur. This particular document is also not denied by the petitioner. It is the contention of learned Counsel for the petitioner that the respondent No.5 is ineligible to be posted in place of the petitioner as in her order of appointment a condition is imposed that the post on which appointment is made would not be transferable. From these facts, it is clear that the petitioner has not stated the right facts deliberately though she was fully aware of such facts. At the time of arguments learned Counsel for the petitioner has shown an order dated 15.02.2007 issued in respect of one Smt. Sangeeta Kawde by which the said Assistant Teacher was transferred to work as Superintendent of the Girls Hostel in same capacity and similar pay. This order further indicates that since the incumbent holding the post of Superintendent on current charge was transferred, the petitioner was given the current charge of the said post. This order cannot be termed to be an order of promotion in any manner and, therefore, it cannot be said that the petitioner was substantially posted on the post of Hostel Superintendent after promotion on the said post.

7. From the documents available on record, relied by the petitioner herself, it is clear that the respondent No.5 was substantially appointed on contract basis as a Hostel Superintendent. From the order passed by the Commissioner it is clear that in a girls hostel only a lady Superintendent is to be posted to function as Warden of the said hostel. The fact that respondent No.5 was appointed as a Hostel Superintendent, is not disputed. Even if such an appointment was on contract basis, it has to be treated as a substantive appointment. This fact is not disputed that the respondent No.5 though was appointed as a Hostel Superintendent and being a woman, was required to be posted in a girls hostel, was made to work in a boys hostel.

If these facts are taken into consideration together, it would be clear that only in terms of the policy made by the State Government, the error in posting of respondent No.5 was corrected and she was posted in the girls hostel by the order impugned. Since the petitioner was working in the said hostel in her capacity as incharge Hostel Superintendent, until further orders, she was to make room for respondent No.5 to comply with the order issued on 10.07.2014 by handing over charge of the said hostel. There was no occasion for the petitioner to assail the said order as the petitioner was never posted in the hostel in her capacity as Hostel Superintendent in substantive manner. She was only working in incharge capacity and as such was not to be allowed to continue when the regular incumbent appointed on the post of Hostel Superintendent was posted in her place.

8. Yet another aspect is that since the substantive posting of the petitioner is in the school which too is situated within the very same city, there was no need to make any posting of the petitioner elsewhere. The petitioner was to continue on her post on which she was substantively posted in the school. At any rate the petitioner was not required to shift anywhere and except working in the hostel, she was to work in the school. That being so, challenge to the order impugned is not acceptable and cannot be countenance.

9. Learned Govt. Advocate appearing for the respondents-State has contended that there were material suppression of facts by the petitioner which has weighed this Court for grant of interim relief to the petitioner. Placing reliance in the case of ***State of A.P. and another vs. T. Suryachandra Rao, (2005) 6 SCC 149***, it is contended by learned Govt. Advocate that misrepresentation by misleading facts or suppression of material facts amount to

fraud and when such a fact is taken note of by the Court, the party guilty of committing such fraud is not entitled to any relief. It is contended that in such circumstances the petitioner who too is guilty of misrepresentation of facts would not be entitled to any such relief as claimed in the writ petition.

10. In the case of **T. Suryachandra Rao** (supra), the Apex Court while dealing with the interpretation of word 'fraud' has explained that even when such suppression of material facts is done, the same is to be treated as fraud. The interpretation of word 'fraud' has been done by the Apex Court in paragraph 11, which reads thus :

"11. Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In *Webster's Third New International Dictionary* "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In *Black's Legal Dictionary*, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In *Concise Oxford Dictionary*, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to *Halsbury's Laws of England*, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines "fraud" as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact,

which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case i.e. *Derry v. Peek* what constitutes "fraud" was described thus:

"Fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false".

11. In the case of ***Raj Kumar Soni and another vs. State of U.P. and another, (2007) 10 SCC 635***, again suppression of material facts has been held to be abuse of process of law and it has been categorically held that party guilty of not disclosing the right facts is not to be granted any benefit as it has to be held that such a party has not come to the Court with clean hands. In the case of ***K.D. Sharma vs. Steel Authority of India Limited and others, (2008) 12 SCC 481***, even testing the maintainability of a writ petition in view of such suppression of facts the Apex Court has held that the writ courts should not entertain such writ petition, if are based on misleading facts or reliefs are based on suppression of material facts. Again it has been reiterated by the Apex Court that such suppression of facts would amount to abuse of process of law and a party guilty of such suppression of material facts is not entitled to grant of any relief in such writ petition, which is based on suppression of material facts.

12. As has been pointed out herein above, the facts which were well within the knowledge of the petitioner were not rightly stated by her. Though she was knowing it fully well that she is not substantially appointed on the post of Hostel Superintendent nor the order issued in her respect on 28.02.2007 could be treated as an order of promotion, yet boldly such statements were made in the writ petition. The documents in support of such submissions were not placed

on record. Even when such a document of posting is shown to the Court, it became crystal clear that the petitioner was given only the current charge on temporary basis on the post of Hostel Superintendent till further orders. Even in that order the designation of the petitioner was shown to be Assistant Teacher. From this it is clear that facts as stated in the writ petition by the petitioner were not correct to her own knowledge. It is also seen that on first occasion when the order dated 10.07.2014 was assailed by the petitioner, matter was relegated to the competent authority to decide the representation of the petitioner and in that representation also fact was found that the respondent No.5 was posted as substantively appointed Hostel Superintendent in a boys hostel whereas she being a lady, was to be posted in a girls hostel. Even when such an order was called in question, the right of petitioner to continue on the post of Hostel Superintendent was to be shown in the writ petition. Had it been pointed out that the petitioner was given the current charge only on the post of Hostel Superintendent, the writ petition of the petitioner would have been dismissed at the threshold and, therefore, deliberately suppression of material facts was done by the petitioner stating that she was substantially appointed on the post of Hostel Superintendent by way of promotion. For these reasons, it has to be held that the petitioner is not entitled to any relief in the present writ petition.

13. In view of the discussion made herein above, the writ petition fails and is hereby dismissed. However, there shall be no order as to cost.

(K.K. Trivedi)
Judge

Skc