

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.774 OF 2014

Mrs. Madhu Kishore Keny
Age: 53 years, presently residing at
C-03, AYJNIHH Quarters, Bandra Recl. West
Mumbai – 400 050. Petitioner

- Versus -

1. Ali Yavar Jung National Institute for
Hearing Handicapped, Bandra
Reclamation, Bandra (West)
Mumbai – 400 050.
2. Ministry of Social Justice & Employment
Department of Disability Affairs
Shastri Bhavan, New Delhi.
3. Central Bureau of Investigation
Anti Corruption Branch
11-A Tanna House, Nathalal Parekh
Marg, Near Sahakari Bhandar,
Colaba, Mumbai – 400 039. Respondents

WITH
NOTICE OF MOTION NO.331 OF 2015
IN
WRIT PETITION NO.774 OF 2014

Mrs. Madhu Kishore Keny Applicant
In the matter between
Mrs. Madhu Kishore Keny Petitioner
Vs.
Ali Yavar Jung National Institute for
Hearing Handicapped & Others Respondents

Mr. V.M. Thorat with Ms Pooja Thorat & Mr. Anukul Seth for the Petitioner/Applicant.
Mr. R.R. Shetty with Mr. M.S. Bharadwaj & Mr. P.S. Gujar for Respondent No.1.
Mrs. Neeta V. Masurkar with Mr. P.S. Gujar for Respondent Nos.2 & 3.

CORAM: S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.

DATE : DECEMBER 04, 2017

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. This Court had admitted this petition which was then on a stamp number by order dated 7-1-2014.

2. That order reads as under:-

“Leave to amend by placing on record the impugned orders dated 5 December 2013 and 12 December 2013 as Exh.N & Exh.O respectively. Amendment to be carried out by 10 January 2014.

Heard learned counsel for parties.

2. *Rule. Petition shall be listed for final hearing on 28 April 2014. Affidavits-in-reply shall be filed by 28 February 2014. Rejoinder, if any, shall be filed by 24 March 2014.*

3. *Having heard learned counsel for parties on the*

question of interim relief, we are inclined to grant stay against implementation of the impugned order dated 12 December 2013 transferring the petitioner from Mumbai to Ahmedabad for the following reasons:-

(i) There is no dispute about the fact that the petitioner was appointed as a Head-clerk at the respondent No.1-institute way back on 3 May 1991. The petitioner's appointment was on a post reserved for a scheduled tribe candidate. The petitioner applied for the said post as she had married Mr.Kishore V. Keny belonging to a scheduled tribe on 6 July 1979. The marriage was registered with the Registrar of Marriage, Bandra, Mumbai on 10 July 1980. Exh.A to the petition is a copy of the marriage registration certificate. It is the petitioner's case, which has thereafter been accepted by the Inquiry Authority in the inquiry report dated 10 April 2010, Exh.G (page 63) that the petitioner had not submitted any bogus or false caste certificate to claim the benefit of reservations. The specific finding in paragraph 7.3 of the inquiry report reads as under:-

“7.3 While appraising the evidence it is concluded that this is a peculiar case where Mrs.Keny has not submitted any bogus/false caste certificate to claim the reservation. However, she has been selected against ST vacancy apparently based on her husband's caste certificate and as such she cannot be held guilty for the charges leveled against her in Annexure I and II of the Memorandum no.Estt/498 dated 14/5/2009 (Exhibit-M). Accordingly, the Inquiry Authority has exonerated Mrs.Keny from all the charges leveled against her in the aforesaid Memorandum.”

(ii) Writ petition No.1386 of 2010 was filed by one Mr.Digambar Manikrao Bhosale challenging the petitioner's appointment on a post reserved for scheduled tribe. The said writ petition came to be dismissed by

another Division Bench of this Court by order dated 27 July 2010 on the ground that the petitioner therein had not offered any explanation for laches in filing a writ petition in the year 2010 challenging the appointment order dated 3 May 1991.

(iii) Now the petitioner is sought to be transferred from Mumbai to Ahmedabad on the ground that the CBI inquiry has been instituted for investigating whether the petitioner had submitted any false/bogus documents. It appears from the communication dated 29 November 2013, Exh.M, that the Government of India in the Ministry of Social Justice & Empowerment has taken the impugned decision to transfer the petitioner from Mumbai to Ahmedabad on the ground that the department has been advised to transfer the petitioner immediately as it is apprehended that she may tamper or destroy the documents.

(iv) The decision of the Supreme Court taking a view that a woman not belonging to reserved category, but marrying a male belonging to reserved category is not entitled to claim the benefit of reservation as rendered in Valsamma Paul vs. Cochin University & ors. AIR 1996 SC 1011, was obviously rendered long after the petitioner's appointment in the year 1991.

(v) Learned counsel for the petitioner has invited our attention to the specific statement made in para 6 of the petition that respondent No.1-institute had issued an office order bearing reference no.DIR/2013/289 dated 5 December 2013 directing the petitioner to be transferred to ISL Cell at respondent No.1-institute in the office at Mumbai. The petitioner contends that no prejudice will be caused to the respondent authorities, if such order is issued even now.

4. In the facts and circumstances of the case and particularly having regard to the fact that the petitioner was appointed way back as Head-clerk in May 1991 and that the Inquiry Authority appointed by Director of

respondent No.1-institute under order dated 7 July 2009 submitted a report dated 10 April 2010 specifically holding that the petitioner had not submitted any bogus/false certificate to claim the benefit of reservation and that she was selected against the ST vacancy apparently on her husband's caste certificate and therefore she was not guilty of the charges leveled against her in the Memorandum dated 14 May 2009 and also having regard to the fact that writ petition challenging the petitioner's appointment came to be dismissed by this Court as far back on 27 July 2010, we are prima facie of the view that presently there does not appear to be any justification for transferring the petitioner from Mumbai to Ahmedabad on the ground of pendency of a CBI inquiry.

While granting interim stay against implementation of the impugned transfer order dated 12 December 2013, we make it clear that this order of interim stay shall not preclude the respondent No.1-institute from transferring the petitioner from office of Director of respondent No.1-institute to ISL Cell of respondent No.1-institute in its office at Mumbai.

5. In view of the above, the petitioner will be entitled to resume the duty from tomorrow i.e. 8 January 2014, but the petitioner shall be treated as in continuous service and shall be paid her salary without depriving any monetary benefits for the intervening period from 12 December 2013 till today.”

3. That order followed an order of the learned Vacation

Judge dated 3-1-2014. That order of 3-1-2014 reads as under:-

“Heard.

2. Ms. Thorat, learned Advocate for the petitioner submits that her client has received a peremptory

order of transfer to Composite Regional Center, Ahmedabad. She claims that the action against her is punitive and without valid justification, and taken on the basis that she has submitted false or incorrect caste documents. This the petitioner vehemently denies.

3. In my view, no prejudice would be caused to the respondent if an extremely limited protection is granted to the petitioner in the following terms.

(i) The transfer order in respect of the petitioner shall not be given effect to till Wednesday, 8th January 2014.

(ii) The petitioner agrees and undertakes that in order that there should be no complaint of the safe custody and preservation of essential documents said to have been in her custody, as a Section officer, she will not attend work in Mumbai till that date.

4. Place the matter on 7th January 2014, and, subject to the permission of the regular Court, “high on board”.

4. After this petition was moved before us and we noted that the petitioner has vacated the service quarter, that part of the controversy did not survive for consideration. Then, what survived for consideration is the prayer of the respondents, and particularly regarding the inquiries proposed against the petitioner.

5. Reliance was placed upon an order in a litigation, namely, Writ Petition No.1386 of 2010. That was a petition against the present petitioner and the Union of India seeking to challenge her appointment, as also the impending proceedings – departmental as well as criminal.

6. With regard to that petition, which came to be eventually dismissed, there appeared to be some confusion. The respondents in this petition rely upon an order dated 28-4-2014 of a Division Bench in Notice of Motion (L) No.260 of 2014 preferred in this writ petition which reads as under:-

“Learned counsel for respondents prays for time to file affidavit-in-reply.

2. Affidavit-in-reply shall be filed by 16 June 2014. Rejoinder, if any, may be filed by 3 July 2014.

3. Till the next date of hearing, respondents shall not conduct any inquiry/investigation in respect of the subject matter for which Writ Petition No.1386 of 2010 was earlier filed for challenging the petitioner's appointment and that writ petition was dismissed by the Division Bench of this Court by order dated 27 July 2010.

Parties to act on an ordinary copy of this order

duly authenticated by the Registry as a true copy.”

It is in the above circumstances, we deemed it fit and proper to take the petition itself so that it can be disposed of finally.

7. At the hearing of this petition, Mr. Thorat, on seeking instructions, stated that the petitioner is ready and willing to face the inquiry/investigation by the Central Bureau of Investigation (“CBI” for short). All that the petitioner prays is she should not be transferred out of Mumbai. The argument of Mr. Thorat is that the alleged incident which is being investigated by the CBI has occurred at Mumbai. The concerned officials and offices of the Union of India, including the Ali Yavar Jung National Institute for Hearing Handicapped and others are situated at Mumbai. That being the reason, no useful purpose will be served by transferring the petitioner out of Mumbai, and particularly when the grievance of the respondents that she may influence the witnesses and tamper with the records is duly taken care of by the petitioner's posting at a distinct office of the first respondent-Institute and not at the office or the

establishment where the incident allegedly occurred and where the records are maintained.

8. The CBI/respondent No.3 to this petition is represented by Mrs. Neeta Masurkar. Upon taking instructions, she states that the CBI will conduct the investigations and conclude them as expeditiously as possible and the CBI is not concerned with the posting or transfer of the petitioner. It is really concerned with the conclusion of the investigations and taking them to a logical end, in the sense if they disclose commission of offence punishable under the penal laws, then, the CBI should be allowed to file a charge-sheet in the competent Criminal Court against all accused.

9. Mr. Shetty appears for respondent No.1-Institute. He would rely upon the affidavits filed in the petition and which are primarily based on the understanding of the Institute. The Institute's understanding of the interim order is that the petitioner has secured an appointment and contrary to law. The petitioner also must face departmental proceedings. However,

what has been relied upon is that the departmental proceedings have been set aside on account of the investigations by the CBI. The department, if it chooses to proceed with this departmental inquiries, then, that should not be prevented and even that aspect of the matter should be clarified.

10. What we have on record are the affidavits which have been filed by both the respondents. It is common ground that there was an affidavit filed by the first respondent on 18-3-2014. In that it is stated that the petitioner was involved in an irregular appointment/recruitment to the post of Head Clerk, reserved for Scheduled Tribe category in the first respondent-Institute. She belonged to the General category. She claims she was married to a Scheduled Tribe person and hence was appointed against a vacancy in the post reserved for the Scheduled Tribe. The first respondent relies upon several Government of India Office Memorandums and Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. There were two inquiries initiated - one was internal and another was external. As far as the internal preliminary inquiry

is concerned, the outcome thereof has been revealed and secondly the external inquiry. The external inquiry has been conceded to have resulted in the charge-sheet to the petitioner being withdrawn.

11. Thereafter, the case was examined at a higher level and particularly after the CBI stepped in. Hence, the first respondent states that the matter being serious, a show cause notice has been issued on 18-2-2014 as per the Central Civil Services Conduct Rules.

12. It is in relation to this that Mr. Shetty would submit that the Government of India should be allowed to proceed and equally the Institute. Affidavits have been filed thereafter as well but in that we find that the petitioner was informed that there is no vigilance case either pending or contemplated against certain other officials. That has nothing to do as far as the anxiety of the first respondent to proceed against the petitioner is concerned.

13. Then, there is an affidavit styled as additional affidavit. The additional affidavit also indicates that the first

respondent desires to proceed against the petitioner departmentally. That is particularly after the Revisionary Authority, namely, Secretary, Department of Disability Affairs' communication dated 25-4-2014. He quashed the order closing the departmental inquiry and acceptance of the report in regard thereto (known as B.R. Gaikwad Inquiry Committee Report). He directed that a fresh inquiry be conducted against the petitioner. The affidavit and the chronology of events are relied upon to disclose the intent of the first respondent that they wish to conduct departmental proceedings as well.

14. This is clear from this additional affidavit and the chronology of events attached thereto and filed in this petition on 25-4-2016.

15. Then there is another affidavit which is filed by one Sauranshu Sinha. That is an earlier affidavit and we need not make any reference to that. Thus the stand is clear from that affidavit and the chronology filed on 25-4-2016.

16. From a perusal of these materials, we are of the

opinion that when neither the first respondent nor the CBI has brought any materials which would disclose that they seriously apprehend that the petitioner may tamper with the record or threaten the witnesses or influence the inquiry in any manner, then, we do not think that in the facts and circumstances of the present case the order of transfer be allowed to continue. Meaning thereby, there is no question of the investigations being hampered or otherwise affected, much less adversely by the retention of the petitioner at Mumbai, particularly when her services are not being retained at the office of the first respondent, namely, at Bandra Reclamation, Bandra (West), Mumbai. She has been transferred to another office of the first respondent in Mumbai itself. There is no complaint thereafter about the petitioner having tampered with the record or not co-operated with the investigations. In such circumstances, we do not think that for any larger or wider issue this petition be kept pending. The petition is disposed of by directing that the petitioner be retained at Mumbai purely for the purposes of the ongoing investigations so also the proposed

departmental/disciplinary inquiries and the petitioner will have to face them and take all the consequences arising therefrom. Of course, without prejudice to her rights and contentions to defend the same. All contentions of the petitioner on the merits of the charges in the departmental proceedings or criminal proceedings are kept open and remain unaffected by the disposal of this petition.

17. The CBI can complete the investigations and conclude them in accordance with law. If any interim order prevents the CBI, and if any interim order passed in this petition is understood as preventing the CBI from conducting or concluding the investigations, as above, then, we clarify that all such orders stand vacated by the disposal of this petition. Equally there is no stay against any departmental or disciplinary proceedings proposed to be initiated by the first respondent. They can also be initiated and concluded in accordance with law.

18. Once we have clarified that everything must go on in

accordance with law, then, neither parties are prejudiced. We have not touched upon the merits of the allegations of the petitioner with regard to her transfer within Mumbai. That aspect is taken care of by the order passed by this Court in January, 2014 and which is continued till date. The petitioner has been retained at Mumbai albeit at a different office of the first respondent. Since no prejudice is caused to the respondents by her retention in Mumbai, in the peculiar facts and circumstances and without this order being treated as a precedent we have allowed the petitioner's retention at Mumbai. The Transfer order stands quashed and set aside.

19. In the event the petitioner does not co-operate with the ongoing investigations by the CBI or is otherwise proved to have prevented the said Bureau from carrying out the investigations or has indulged in tampering with the record or has tampered with the record or threatened the witnesses, then, nothing will prevent the respondents from taking appropriate steps and in accordance with law.

20. The rule is made absolute in above terms with no order as to costs.

21. In view of the above, Notice of Motion No.331 of 2015 does not survive and it accordingly stands disposed of.

(SMT. BHARATI H. DANGRE, J.)

(S.C. DHARMADHIKARI, J.)