

(1966) 04 BOM CK 0011
In the Bombay High Court
Case No : Spl. C.A. No. 108 of 1965

D.G. Asegaonkar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 25-04-1966

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227, 309

Citation : (1966) MhLj 874

Hon'ble Judges : N.L. Abhyankar, J;B.N. Deshmukh, J

Bench : Division Bench

Advocate : C.G. Madkholkar, for the Appellant; S.M. Hajarnavis, Addl. Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

N.L. Abhyankar, J.—This is a petition under Articles 226 and 227 of the Constitution.

2. The petitioner Shri Asegaonkar is a permanent Government servant. He was a permanent lower division clerk in the scale of pay of Rs. 50-5-70-4-90-EB-3-120 in the office of the Board of Revenue in the former State of Madhya Pradesh when Vidarbha region was part of the State. The petitioner was promoted to the post of Upper Division clerk, second grade, in the pay scale of Rs. 75-5-125-EB-10-175 with effect from 1st November 1950. The petitioner was holding this post and working on it continuously till the first re-organisation of the States in the year 1956. On re-organisation of the State and Vidarbha region having been included in the new State of Bombay, the petitioner was allocated to the successor State, the Bilingual State of Bombay. As a result of this allocation the petitioner became an allocated Government servant within the meaning of the States Re-organisation Act, 1956. The new State of Bombay framed allocated Government Servants (Absorption, Seniority, Pay and Allowances) Rules in exercise of the powers conferred upon it by Article 309 of the Constitution and the States Re-organisation Act. The Rules seem to have been promulgated under

Government Resolution dated 18th October 1957.

3. The Government passed a resolution on 22nd March 1958 in respect of equation of posts in certain departments. That resolution is Annexure B to the petition. That resolution decided the equation of the post held by the petitioner and entry No. 9 in the statement attached to the Resolution shows that the petitioner, who was an Upper Division second grade clerk was equated in the cadre of Aval Karkuns in the office of the Bombay Revenue Tribunal in the pay scale of Rs. 100-8-140-10-170. The Government was also required to pass an order of absorption in respect of Government servants who were allocated and that order was passed in respect of the petitioner by the State Government on 18th February 1959. That order was as follows:-

In pursuance of Rule 4. of the Allocated Government Servants" (Absorption, Seniority, Pay and Allowances) Rules, 1957, the allocated Government servants in the office of the Bombay Revenue Tribunal, Nagpur, shown in the accompanying list, are absorbed with effect from 1-11-1956 in the equivalent posts, shown against their names in column 4.

In accordance with Rules JO and 13 of the above said Rules, all the allocated Government servants, shown, in the accompanying list, should exercise their election in writing as required by Rule 11 of the above Rules, in the form accompanying to the Government Circular, Political and Services Department No. SR/INT-1058-VI, dated 30th July 1958.

The seniority of these Government servants as on 1-11-56 in the cadre of absorption in accordance with Rule 7 of the said Rules shall be determined separately.

Orders regarding fixation of pay of these Government servants in pursuance of said Rules u/s III-B of the above said Rules will be issued later on.

Orders of absorption of the remaining allocated Government servants will be issued in due course.

4. The relevant entry in the list of allocated Government servants absorbed in the Bombay Revenue Tribunal shows that the petitioner who was working in the office of Board of Revenue of the former State of Madhya Pradesh from which he was allocated, was absorbed as Aval Karkun in the pay scale of Rs. 100-8-140-10-170, the designation of equivalent post in the Bombay State being that of Aval Karkun.

5. It may be necessary at this stage to trace how the petitioner was actually working and in which capacity since the date of re-organisation i. e. since 1-11-1956. The petitioner was taken in the office of the Divisional Commissioner as an Aval Karkun from 27-12-1957 and that order is Annexure C to the petition. Paragraph 2 of the order says-

Shri D. G. Asegaonkar, Aval Karkun in the B. R. T. Nagpur and Shri N. V. Pant,

officiating First Grade clerk in the District Office, Nagpur, are appointed to officiate temporarily until further orders as Aval Karkuns in the Divisional Office, Nagpur, against the temporary posts sanctioned in the Government memorandum quoted above, with effect from the dates they take over in this office.

Since that date the petitioner is working in the office of Divisional Officer, now called the Commissioner, Nagpur Division, Nagpur.

6. The petitioner made a representation to the State Government through the Secretary, Revenue Department on 19th March 1964. That representation was forwarded by the Commissioner, Nagpur Division, Nagpur, with his note on 8th May 1964. Shortly stated, the prayer of the petitioner in the representation was that his seniority may be fixed in the cadre of Aval Karkuns and that he should be given a chance of promotion as a Mamlatdar as other Aval Karkuns are. The petitioner also seems to have made a grievance that had there been no re-organisation of States he would have been promoted to the post of a Superintendent in the Board of Revenue in Madhya Pradesh, but he has been deprived of all promotions and is not being given promotion to the post of Mamlatdar even though he has been equated and absorbed in the cadre of Aval Karkuns who are eligible for promotion as Mamlatdars. The Commissioner in forwarding that representation has observed that the contention of the petitioner that though the Government had equated Upper Division second grade clerks in the offices of the former Madhya Pradesh Government to the grade of Aval Karkuns, such persons were not considered for promotion to the post of Mamlatdars to which post Aval Karkuns are promoted, was correct. Apparently, the reason why the petitioner's case was not being properly considered is indicated in paragraph 4 of the forwarding letter of the Commissioner. This is what the Commissioner observed in paragraph 4:-

Shri Asegaonkar cannot also be considered for promotion to the post of Naib Tahsildar in the scale of Rs. 160-160-10.230 (Revised 210-210-10-280) because under Government orders First Grade clerks above 45 years of age are not eligible for appointment as a Naib Tahsildar....

7. Now, it is necessary to understand reference to first grade clerks in this forwarding letter. In this region there were first grade clerks in the office of the Deputy Commissioners. Admittedly first grade clerks in Deputy Commissioner's office held posts inferior to Upper Division second grade clerks in the office of the Board of Revenue. It appears, representations were made by first grade clerks on their being promoted to the office of the Board of Revenue or the Commissioner that they should be equated in the cadre of Aval Karkuns. In fact, they claimed that they had a right to be so equated. The State Government did not accede to this request. The matter was taken to Court and ultimately it was decided in the Supreme Court that there was no right of equation to a particular post. After this decision in the Supreme Court it appears the State Government decided to replace the posts of Aval Karkuns in the office of the Commissioner by

first grade clerks so far as Nagpur Division is concerned. Thus the posts of Aval Karkuns in the Commissioner's office came to be abolished and from then on it appears even the petitioner is being described as first grade clerk though in fact he has been already equated in the cadre of Aval Karkuns and also absorbed as such. It is not disputed now that the petitioner is not and is not treated as a first grade clerk and that he is in 1 he cadre of Aval Karkuns and absorbed as such.

8. The grievance of the petitioner is that even though there is a clear promise in the order of the Government dated 18th February 1959 that seniority of the Government servants mentioned in this order as on 1-11-1956 in the cadre of absorption will be determined separately according to rule 7, the Government failed to take that decision up to now. The Government was bound to fix the seniority of the petitioner after his absorption in the cadre to which he has been equated was determined. It is not disputed that the Government has not determined the seniority of the petitioner. We shall presently consider the justification put forth by the Government for failure to fix the seniority of the petitioner, but it is pertinent to point out that at any rate up to 1959 it seems to have been admitted that the Government was bound to fix the seniority of the petitioner in the cadre of absorption according to rule 7.

9. The second grievance of the petitioner is that though he belongs to the cadre of Aval Karkuns, he has not been given an opportunity like other Aval Karkuns for being considered for promotion to the post of Mamlatdar, and denial of such an opportunity cannot be justified on any valid ground.

10. Thus, the two main questions which fall for consideration in this petition are (I) whether the Government is not bound to fix the seniority of the petitioner, and if so on what principle; and (2) whether the petitioner is not eligible to be considered for promotion as Mamlatdar.

11. The petitioner has alleged in paragraph 4 of the petition that he was absorbed in the post of Aval Karkun in the senior scale of pay from 1-11-1956 and was asked to work in the office of the Bombay Revenue Tribunal, Nagpur, and subsequently was taken in the Commissioner's office in the post of Aval Karkun. With regard to this averment paragraph 4 of the return states as follows:-

It is submitted that the petitioner was absorbed as Aval Karkun, in an isolated post, created in the office of the Bombay Revenue Tribunal, Nagpur. It is further submitted that he was subsequently deputed to the Commissioner's office as Aval Karkun in one of the similar posts in that office.

Again in paragraph 5 of the return it is stated that the post of Aval Karkun in the case of the petitioner was in the office of the Bombay Revenue Tribunal, it was temporary and isolated post, and as there was no district cadre of Aval Karkuns in the Nagpur Division, the petitioner did not fulfill any of the conditions required for promotion to post of Mamlatdar and therefore he was not eligible for such promotion. The conditions required for promotion in the case of Aval Karkuns are

stated to be that they held senior posts in the district cadre in their own division, they had passed the Departmental examinations as prescribed and that they were confirmed as Aval Karkuns and had satisfactory confidential records.

12. There is yet another curious statement made in paragraph 11 of the return in these words:-

In fact the rules of promotion and prospects to the permanent Aval Karkuns have not been extended to the stray, temporary and isolated posts of Aval Karkuns in Vidarbha region as no regular cadre of Aval Karkuns exists in that region.

Again in paragraph 12 of the return it is stated as follows:-

It is submitted that the Aval Karkun's posts in the Bombay Revenue Tribunal have not the same terms and conditions and promotion prospects as attached to the posts on district establishments in the Bombay, Poona, Aurangabad areas. The two types of the above posts are not equal and the petitioner should seek promotion in his own office of Bombay Revenue Tribunal, if such promotion is possible and admissible, or he should accept transfer to the office of the Commissioner where he would be eligible for promotion as either Assistant Superintendent or Naib Tahsildars. Since this venue is kept open for him, the contention that equality is denied is not correct and the further contention that rights under Article 14 of the Constitution are violated is not correct.

13. In paragraph 13 of the return there is a reiteration of the contention that the petitioner's was a solitary post which the petitioner was holding, and therefore he was not eligible for promotion to the higher post in the office of the Maharashtra Revenue Tribunal either.

14. We are constrained to observe in this case that some of the averments made in the return, and particularly those in paragraph 12 (which are stated to be from record and yet copies of no such records have been filed to substantiate those averments), not only run counter to the orders of the Government but are contrary to the provisions of the Allocation orders and are evidently an attempt to wriggle out of the position arising from the fact that the petitioner has been equated as Aval Karkun in the State. The sheet anchor of the defence in this case appears to be that the petitioner has been equated not in the general cadre of Aval Karkuns in the State, nor absorbed in that cadre as such, but he has been equated to a single post of an Aval Karkun in the Bombay Revenue Tribunal at Nagpur. Such a contention on the face of it is contrary both to the Government Resolution regarding equation i.e. Resolution dated 22nd March 1958 as well as the Order of absorption dated 18th February 1959. The learned Additional Government Pleader appearing for the State sought aid in support of this contention from a note appearing in the accompaniment to the Government Resolution dated 22nd March 1958 in respect of the personnel of the Board of Revenue in the former State of Madhya Pradesh. The accompaniment was in respect of three Departments-(1) the office of the Development Commissioner in the former State of Madhya Pradesh, (2) Land Reforms Department in the former

State of Madhya Pradesh, and (3) Board of Revenue in the former State of Madhya Pradesh. The petitioner was working as Upper Division second grade clerk in the Board of Revenue in the former State of Madhya Pradesh, and his equation is to be found at item 9 in the list. The note above this entry shows that all posts in column 4 are in the offices of the Bombay Revenue Tribunal. But the note and the entries in the accompaniment cannot be read in isolation and are intimately connected with the text of the Resolution on Equation, dated 22nd March 1958. and that Resolution in terms states that the posts shown in column 4 should be deemed to have been included in the cadres in which the posts specified against them in column 4 thereof are included and the absorption and appointment of their incumbents should be regulated accordingly. There is thus no manner of doubt that the petitioner who was an Upper Division second grade clerk in the Board of Revenue in the former State of Madhya Pradesh, was equated in the cadre of Aval Karkuns in the offices of the Bombay Revenue Tribunal and was entitled to be absorbed as such.

15. Now, the Allocation rules do not define what a cadre means, but that word has been defined in the Bombay Civil Service Regulations and it says that a cadre means the strength of a service or part of a service sanctioned as a separate unit. It is thus clear that the cadre in which the petitioner was equated and was absorbed is the cadre of Aval Karkuns in the State. It is not now disputed before us that there is no distinction between Aval Karkuns posted in the offices of the Bombay Revenue Tribunal in the rest of the State and the Aval Karkuns working in the Collectorate or the Divisional Commissioner's office. So far as the rest of the State is concerned, an Aval Karkun working in the Bombay Revenue Tribunal is liable to be transferred back to the Collectorate and vice versa and there is no distinction between Aval Karkun working in the office of the Collectorate or in the office of the Bombay Revenue Tribunal. If that is the position of all Aval Karkuns in the rest of the State working in the cadre of Aval Karkuns, it is difficult to hold that only the petitioner was equated in some kind of special or isolated post which now the Government wants to be designated as Aval Karkun in the office of the Revenue Tribunal at Nagpur. There was no such equation and the contention is fallacious.

16. Once it is held that the petitioner was equated in the cadre of Aval Karkuns in the State, the equation being with regard to the cadre of Aval Karkuns in the pre-Reorganisation of the State of Bombay, it must follow, having regard to rule 7 of the Absorption rules, that the petitioner's seniority must be determined as prescribed by that rule. Rule 7 relevant for the purposes of this petition provides as follows in its sub-clause (i):-

7 (i). Subject to the provisions hereinafter contained seniority of an allocated Government servant in the post or cadre of absorption shall, as on the 1st November 1956, be determined by the length of continuous service, whether officiating or permanent, rendered by him immediately before that date in the corresponding post or posts on the same time scale in the former State excluding

periods of fortuitous appointments which are in the nature of stop-gap arrangements,

It is not the case of the State that the petitioner was working in the post of second grade Upper Division clerk in the Madhya Pradesh as a result of any fortuitous appointment or an appointment in the nature of stop-gap arrangement. The petitioner claimed that he has been promoted and has been working as an Upper Division second grade clerk from 1st November 1950, and therefore the seniority of the petitioner in the cadre of Aval Karkuns will have to be determined with reference to that date.

17. The contention of the State that the petitioner did not satisfy some of the conditions which were required to be satisfied by Aval Karkuns before being appointed as such is devoid of any substance. The principle on which allocated Government servants were equated to posts or in the cadre which may be taken as the norm of the cadre to which they were equated has been indicated in the return of the State itself. In determining the equation the Government took into consideration the following factors:-

- (1) The nature and duties of the posts;
- (2) the responsibilities and powers exercised by the officer holding the posts;
- (3) the minimum qualifications if any prescribed for the post; and
- (4) salary of the post.

Once the Government took a decision that Upper Division second grade clerks were to be equated to the cadre of Aval Karkuns, which were equivalent posts to which they equated, it must be held that the Government took into consideration all these factors and determined that it was proper that upper division second grade clerk like the petitioner should be equated and absorbed in the cadre of Aval Karkuns. The State Government therefore is not in a position now to turn back and say that the petitioner has not passed certain qualifying tests or examination before he was appointed or equated to the post of Aval Karkun and on that account would not be eligible to be considered for promotion as Mamlatdar.

18. We are also unable to see how the State is in a position to say that the post of Aval Karkun by which they really mean the cadre of Aval Karkuns, in which the petitioner was equated and absorbed by the two orders to which we have made a reference, could be called either temporary or isolated post.

There is no such indication in either of the two orders. It is not disputed that Aval Karkuns were appointed in the office of the Commissioner of a Division or in the offices of the Bombay Revenue Tribunal at various places in the State. Why only in the case of the petitioner it was necessary to create a temporary and an isolated post of Aval Karkun in the office of the Bombay Revenue Tribunal at Nagpur has not been clarified and we do not think that such a contention is at all

tenable in view of the Resolution and the order already passed by the Government. It seems to us it is a naive attempt to support the inaction of the Government in failing to determine the seniority of the petitioner and in not considering fairly the claim of the petitioner for promotion to the post of Mamlatdar. We are also unable to understand the contention raised in paragraph 11 of the return of the State that rules of promotion and prospects to the permanent Aval Karkuns have not been extended to stray, temporary and isolated posts of Aval Karkuns in the Vidarbha region. The learned counsel appearing for the State has not been able to throw any light as to what is intended to be conveyed by the statement. The fact that there was no cadre of Aval Karkuns in the Vidarbha region was precisely the reason why it was necessary for the Government of the successor State to take a decision to equate the posts held by allocated Government servants and to absorb them in the cadres which existed in the former State of Bombay, which were taken as cadres in which absorption had to be made and equation had to be found. It is not the fault of the petitioner that there was no cadre of Aval Karkuns in the former State of Madhya Pradesh and he did not belong to that cadre at the time of allocation. The rights of the petitioner as an allocated Government servant to have a chance for promotion are to be considered only after his equation and absorption is determined by a resolution of the Government. That decision having been taken by the Government resolution, in our opinion it is too late for the Government now to contest the claim of the petitioner that he is entitled to have his seniority determined in the cadre in which he is equated and absorbed, and his further claim that he is eligible for being considered for promotion to the post of Mamlatdar if otherwise found fit.

19. The State Government has rejected the representation of the petitioner dated 19-3-1964 by a two-lines communication stating that the request made by him in respect of promotion or absorption cannot be considered. We fail to see how the question of absorption is open for reconsideration by the Government. The absorption had already taken place by the order of the Government dated 18-2-1959, and what remains to be done as mentioned in that order, is to fix the seniority of the petitioner in the cadre of Aval Karkuns in the State. In our opinion, the Government having failed to do its duty as required by the law, the petitioner is entitled to a mandamus directing the State Government to fix the seniority of the petitioner in the cadre of Aval Karkuns of the State in accordance with the provisions of rule 7 of the Absorption rules.

20. We are further of opinion that the petitioner is entitled to be considered eligible for promotion to the post of Mamlatdar and that he cannot be denied this opportunity in derogation of his rights as an allocated Government servant absorbed in the cadre of Aval Karkuns in the State, which right he has earned as a result of the order of equation.

21. The result is that the petition is allowed and the petitioner is entitled to his costs of this petition.