
(1989) 11 BOM CK 0031

In the Bombay High Court

Case No : Writ Petition No. 3971 of 1983 and 2719 of 1985

Gopal Ramchandra Potdar

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 22-11-1989

Acts Referred:

Constitution of India, 1950 — Article 309, 311

Citation : (1990) 1 BomCR 630

Hon'ble Judges : S. Kotwal, J; M.L. Dudhat, J

Bench : Division Bench

Advocate : N.H. Gursahani, A.A. Irani and S.H. Gursahani, for the Appellant; W.S. Devnani and D.L. Patil, Asstt. Government Pleader for respondent Nos. 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Dudhat, J.—These two writ petitions are filed by the petitioner Gopal Ramchandra Potdar and they are being disposed of by this common judgment. Few facts which are germane to both these petitions are as under :

2. The petitioner joined as a clerk in the Collector of Raigad at Uran, District Raigad, in the year 1961. In the year 1962 he was provisionally confirmed in the said post. In the year 1963 the petitioner was transferred to the Office of the Divisional Commissioner, Bombay Division, Bombay, and was posted as a Clerk-cum-Typist on some administrative grounds. In the year 1975 the petitioner was transferred to Pen in Raigad District on administrative grounds as Tagai Aval Karkoon which is a post higher than the post of clerk. It appears that on 13th of July, 1981, respondent No. 2 reverted the petitioner as a clerk in the Office of the Special Land Acquisition Officer (VII). Against the said order of reversion the petitioner made a representation to the Revenue Authorities, but the same was turned down by the Joint District Collector Bombay Suburban District, vide his order dated 31st of July, 1981. The petitioner therefore, challenged the aforesaid order by filing a writ petition on the Original Side of this Court being Writ Petition

No. 1297 of 1981. The said petition came up for admission on 7th December, 1981, and this Court granted interim injunction against respondent No. 2 directing him to continue the petitioner as Aval Karkun retrospectively in his office at Bombay with full pay and allowances attached to the said post. However, it was observed that in the said petition though the petitioner submitted that his junior was promoted earlier as Aval Karkun contrary to the rules, still the petitioner failed to seek relief in that connection and, therefore, on 30th of September, 1983, the Court allowed the petitioner to withdraw the said petition and liberty was given to him to file a fresh petition, if advised.

3. After the withdrawal of the aforesaid writ petition, the petitioner filed Writ Petition No. 3971 of 1983 on the Appellate Side of this Court challenging the validity and propriety of upgradation list of clerks prepared in the year 1982. In the said petition the petitioner also challenged the order of his reversion to the post of clerk from Aval Karkun. The petitioner further prayed that respondent Nos. 2 to 4 be directed to fix the pay of the petitioner as Aval Karkun with effect from the year 1968 as also the allowances and personal pay and pay him the arrears forth-with. The said writ petition was admitted on 21st of December, 1983, and this Court granted interim relief in terms of prayer Clause (e) of the said petition, whereby the said reversion order dated 7th of October, 1983, passed by respondent No. 2 and the consequential order dated 12th of October, 1983, were stayed.

4. While the aforesaid writ petition was pending the petitioner filed Writ Petition No. 2719 of 1985 for fixing his seniority and considering him for promotion as Naib Tahsildar from the date of his appointment as Aval Karkun from the year 1968 and also for recovery of an amount of Rs. 44,000/- as difference between the pay of Aval Karkun and the amount which he had actually received from the year 1968 to 1975. Today both the aforesaid two writ petitions came up before us for final hearing and are being disposed of by us by this common judgment.

5. Mr. Gursahani, the learned Counsel, appearing on behalf of the petitioner contended that in the year 1968 the petitioner was promoted as officiating Aval Karkun and since that date till the order of his reversion was passed in the year 1981, he was officiating as a Tenancy Aval Karkun. In order to support this contention Mr. Gursahani relied upon various documents and orders passed by the Revenue authorities which are annexed to these petitions and in the affidavit in rejoinder filed by the petitioner to the reply filed by the petitioner to the reply filed by the respondents. Firstly, he relied on the order dated 28th of June, 1969, which reads as under:

"The Commissioner Bombay Division is hereby pleased to sanction personal pay for a period of six months from 14-5-1968 to 13-11-1968 to Shri G.R. Potdar, Clerk in Commissioner's office Bombay, Dn. Since he has become due for promotion to Aval Karukun's post in his parent district and since he is retained in this office on administrative grounds. The personal pay should be paid as shown below."

This order is passed by the Commissioner, Bombay Division, Bombay, and it is also pertinent to note that Raigad also comes within Bombay Division. In the said order it is specifically stated that the petitioner had become due for promotion to the post of Aval Karkun in the parent department in Raigad District, but since he is required in Bombay on administrative grounds, he is retained at Bombay. This order clearly states that from the year 1968 the petitioner has become due for promotion as Aval Karkun in his parent department. However, he was retained in Bombay on administrative grounds. In view of the aforesaid position the Commissioner has also granted him personal pay for a period of six months from 14th May, 1968, to 13th of November, 1968. The petitioner has also specifically stated in his petition that since the year 1968 till he was reverted back by order dated 13th July, 1981, he was continuously officiating as Tenancy Aval Karkun. However, this has been denied by the respondents since according to them, the petitioner continued to be a clerk at Bombay office and the personal pay was given to him from 14th of May, 1968, to 13th of November, 1968, only on a stop gap arrangement. We are sorry, we cannot accept the aforesaid stand taken by the respondents because of the subsequent orders and also the lack of explanation given by the respondents to the subsequent orders passed by them. On the contrary, Mr. Gursahani relying on the order dated 24th of December, 1976, passed by the Collector of Kolaba District, submitted that since Shri S.K. Yadav who joined as Aval Karkun on 12th of February, 1974, is junior to the petitioner, the petitioner is allowed to get the benefits from 12th of February, 1974. This order clearly negatives the claim of the respondents that till the year 1975 the petitioner was serving as a clerk and not as a Tenancy Aval Karkun.

6. Mr. Gursahani also relied on other orders which are at Exhs. C, D and E to Writ Petition No. 2719 of 1985 wherein everywhere the petitioner is referred to as Aval Karkun. Apart from the aforesaid documents, there is another aspect of this case which fully supports the version of the petitioner that he was officiating as Tenancy Aval Karkun from the year 1968. In Writ Petition No. 1297 of 1981 which was filed by the petitioner on the Original Side while pending, the petitioner took out contempt proceedings being Contempt Notice of Motion No. 1199 of 1982 on the allegation that the respondent failed to carry out the orders passed by Lentin, J. dated 7th December, 1981. It also appears that during the pendency of the said contempt proceedings there was discussion between the petitioner and his senior Counsel on one hand and the Addl. Collector on the other on 14th of September, 1982, and the said Notice of Motion was withdrawn by the petitioner on 17th of September, 1982. According to the petitioner, he withdrew the said motion as the Addl. Collector agreed to consider the grievance of the petitioner that he was working as an officiating Aval Karkun from 14th of May, 1968, continuously till the date of his reversion. This contention of the petitioner is also supported by the letter addressed by the petitioner dated 18th of September, 1982 i.e. immediately after the withdrawal of the said contempt notice of motion. In the aforesaid letter dated 18th of September, 1982, the petitioner has specifically stated as to how from 14th of May, 1968, he was

officiating as Aval Karkun till the year 1975. There is another letter dated 24th of September, 1982, addressed by the Addl. Collector, Bombay Suburban District, Bombay, to the Commissioner, Konkan Division, New Bombay, which refers to the aforesaid letter dated 18th of September, 1982, addressed by the petitioner. In the said letter dated 24th of September, 1982 in para 3 it is stated---

"It is the contention of Shri G.R. Potdar that he was working in the Office of the Commissioner Bombay Division as an Aval Karkun from 1968 till 10th of December, 1975, and his pay in that grade is yet to be fixed."

In the above letter the Addl. Collector requested the Commissioner, Konkan Division, to fix the pay of the petitioner after due verification. In the letter dated 26th of September, 1984, addressed by the Commissioner, Konkan Division, to the Addl. Collector, Bombay, Suburban District, Bombay, it has been stated that the petitioner was granted six months personal pay from 14th of May, 1968, to 13th of November, 1968, in view of fact that he had then become due for promotion in the cadre of Aval Karkun in his parent district viz. Raigad. However, from 13th of November, 1968, the said personal pay was not granted to him. In our opinion, if the petitioner was appointed on a stop-gap arrangement for a short period as contended by the respondents, then this type of observations would not have been made in the letter addressed by the Commissioner, Konkan Division, to the Addl. Collector, Bombay, since this letter itself supports the contention of the petitioner that in fact he was acting as an Aval Karkun, though from 13th of November, 1968, he was not being given the pay of Aval karkun.

7. The petitioner also relied in his affidavit-in-rejoinder, a letter dated 5th of April, 1976, addressed by the Addl. Collector (Encroachment), Bombay and Bombay Suburban District addressed to the Chief Executive Officer, Bombay Building Repairs and Reconstruction Board. In the said letter it is stated that the petitioner is described as Aval Karkun born on the establishment of the Collectorate of Kolaba, presently working in the Office of the Chief Executive Officer, Bombay Building Repairs and Reconstruction Board. This also supports the contention of the petitioner that all the time the respondents treated the petitioner as officiating Aval Karkun born on the establishment of the Collectorate of Kolaba, but only for the administrative convenience he was to work as a clerk at Bombay. The petitioner also relied on the order at page 102 of his affidavit in rejoinder. The said order also refers to the petitioner as Aval Karkun from Kolaba District who was then working in the office of Bombay Building Repairs and Reconstruction Board and further posted him as officiating Aval Karkun in the office of the Tahsildar at Andheri. All these orders were relied upon by the petitioner in his Writ Petition No. 3971 of 1983 and part of these documents were relied upon by him in the contempt proceedings and also in Writ Petition No. 2719 of 1985. The petitioner also specifically contended that in fact he withdrew the said contempt proceedings because of the discussion which he and his senior Counsel had with the Addl. Collector and as pointed out above, the letters addressed by the petitioner and acknowledged by the respondents also support

the contention of the petitioner.

8. In spite of the aforesaid factual position it is surprising that in the reply which was filed by the respondent in Writ Petition No. 3971 of 1983 at the stage of admission, no reference is made about these various documents and orders passed by the respondents. In the said reply what was stated was that the petitioner was serving as a clerk till the year 1975 and was not officiating at any time from 1968 to 1975, and no attempt whatsoever was made in the said affidavit-in-reply to explain away these documents and orders which are issued by the responsible officials of the respondents. Even when both the aforesaid petitions came up for final hearing before us no attempt is made by the respondents to explain away these various documents relied upon by the petitioners.

9. We may, however, mention here that the request of the learned Counsel for the respondents for the adjournment was allowed by us with a clear understanding that no new material or affidavit from the respondents would be accepted. Still, after the said adjournment when the matter was called out the respondents submitted a fresh affidavit. However, in order to see that no injustice is caused to the other employees, we reluctantly allowed the said affidavit to be taken on record and also allowed the petitioner to file rejoinder. Even in this fresh affidavit the respondents reiterated their earlier position that from the year 1968 to 1975 at no stage the petitioner officiated as a Tenancy Aval Karkun, but only served as a clerk. However, in our opinion as already pointed out above, several orders issued by the officials of the respondents and the other documents clearly falsify this stand. Apart from the above, even at this late stage the respondents have failed to give any explanation of the various orders and the letters issued by these responsible officers of the respondents. At the same time, we are surprised to see that in the affidavit in reply filed on behalf of the respondents in Writ Petition No. 3971 of 1983 a false allegation is made against the petitioner that these orders were passed by these responsible officers on the mis-representation and fraud practised by the petitioner. On a mere perusal of these orders it is clear that these various orders were passed by the high officials of the respondents on the ground of administrative convenience of their department and, therefore, it can safely be inferred that these orders were passed even without the knowledge of the petitioner for the administrative convenience of the department of the respondents. Apart from this, we are also of the opinion that this stand taken by the respondents in the affidavit-in-reply is not of any consequence because the said affidavit is not filed by any signatory of these orders. Though these orders were passed by the responsible officers of the respondents like the Collector and the Commissioner, none of them did bother to come forward to file the affidavit-in-reply to support the stand taken by the respondents, but they merely deputed an employee working with them as Chitnis to do this job who, in our opinion, could have no personal knowledge as to what had happened when these orders and letters were issued by these high officials of the respondents. If this type of contentions are accepted, then it will lead to a

chaotic situation as any employee can assail the order of his superior by taking any stand by filing any type of affidavits. We, therefore, reject the contention raised by the respondents that these various orders were passed by these responsible officers of the respondents on the misrepresentation and fraud practised by the petitioner or on non-application of their mind.

10. We may now refer to the following authorities cited by Mr. Gursahani on behalf of the petitioner:

1. Ashok P. Aghav v. State of Maharashtra, Judgment of Justice M.L. Pendse in writ Petition No. 1365 of 1980 with Writ Petition No. 138 of 1981 and Writ Petition No. 164 of 1982.

2. V.J. Patwardhan v. State of Maharashtra, Judgment of Mr. Justice B. Lentin in Writ Petition No. 1797 of 1984.

3. A. Janardhana Vs. Union of India (UOI) and Others, .

4. O.P. Singla and Another Vs. Union of India (UOI) and Others, .

5. Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, .

6. S.B. Patwardhan and Another Vs. State of Maharashtra and Others, .

7. A.Y. Dappevardha v. State of Maharashtra, Judgment of Chandurkar & Pendse, JJ. in Writ Petition No. 955 of 1983.

8. G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others, .

11. In all the aforesaid cases it is held that in a case of officiating appointments, unless a contrary rule is shown the services rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation determining the place in the seniority list. In the present case we have already come to a conclusion that from 14th of May, 1968, till 10th of December, 1975, the petitioner was officiating as Aval karkun. This being the position, his length of continuous officiation will have to be taken into consideration for fixing his seniority amongst other alike candidates. Mr. Devnani, the learned Counsel, appearing on behalf of the respondents while agreeing with this proposition which is also supported by several judgments of this Court and the Supreme Court, submits that there is a difference between officiating appointment and the confirmation. According to him, since the petitioner has not passed the Revenue Qualifying Examination he was not entitled himself to be confirmed as Tenancy Aval Karkun as it was only on 8th of January, 1985, when the petitioner completed his age of 45 years, he was exempted from appearing in the said examination. That being so, the petitioner is entitled to get himself promoted as a Tenancy Aval Karkun from 8th of January, 1985. Mr. Gursahani, also agrees with this proposition. He further submits that after fixing the seniority of the petitioner as officiating Aval Karkun from 1968, his seniority may be fixed as confirmed Aval Karkun from 8th of January, 1985. In view of this legal position accepted by both learned Counsel, it is unnecessary for us to discuss any more

on this point.

12. However, Mr. Devnani has contended that the respondents had prepared the seniority gradation list of Aval Karkuns in the years 1972, 1973, 1977, 1979, 1981 and 1982 showing therein the position of the petitioner as a clerk from the year 1968 to 1975. According to him, inspite of the aforesaid gradation lists published at different times, the petitioner had not taken any objection and, therefore, the petitioner's case that he was officiating as Tenancy Aval Karkun from the year 1968 to 1975 should be discarded. We have already discussed that in fact whether the petitioner was officiating or not is to be seen from the actual orders which were issued by the department of the respondents from time to time and after reading the various orders we have come to the conclusion that the petitioner was officiating as Aval Karkun from 14th of May, 1968, to 10th of December, 1975. Further, there is nothing on record to indicate that at any time such seniority gradation list, if prepared, was published or circulated. According to the petitioner, it was only at the time of the filing of Writ Petition No. 3917 of 1983 he came to know about the said gradation list and we find substance in this contention of the petitioner. Moreover, it is stated in para 13 of the affidavit-in-reply of Writ Petition No. 2719 of 1985 that the rules do not provide for any procedure regarding the preparation as well as publication of the gradation list. This averment is made with reference to the averment made by the petitioner in para 12 of his petition wherein he has specifically stated that the gradation list prepared by the respondents was never published or circulated for objections. In other words, according to the respondents, as per the rules and regulations, publication and circulation of graduation list showing the seniority of various Aval Karkuns was not necessary. In view of the above, we find no substance in the contention made by the learned Counsel on behalf of the respondents that the petitioner failed to object to the gradation list published on earlier occasions.

13. After going through the aforesaid orders and the various documents, we hold that the petitioner was officiating as Aval Karkun from 14th of May, 1968, till 10th of December, 1975, and still he was not given the personal pay of Aval Karkun (except for the period from 14th of May, 1968, to 13th of November, 1968) but was paid the pay of a clerk during this period. Therefore, the petitioner is entitled to get the difference between the personal pay of Aval Karkun and that of a clerk from 14th of May, 1968, till 10th of December, 1975, as per the Government Resolution dated 10th of July, 1975. Mr. Devnani, the learned Counsel appearing on behalf of the respondents submitted that respondent No. 3, Shri Bhatkhande, is senior to the petitioner. In this judgment we need not to go into this controversy. Mr. Gursahani, the learned Counsel, appearing on behalf of the petitioner has contended that the petitioner's seniority as officiating Aval Karkun viz-a-viz to the other Aval Karkuns may be fixed by a fresh seniority gradation list of Aval Karkuns, after taking into consideration that the petitioner was officiating as Aval Karkun from 14th of May, 1968. Since we have already come to a conclusion that the petitioner was officiating from 14th of May, 1968, as Aval Karkun, the respondents are bound to

prepare a fresh gradation list of Tenancy Aval Karkuns fixing the seniority of the petitioners viz-a-viz to other Aval Karkuns by taking into consideration his appoint as officiating Aval Karkun from 14th of May, 1968.

14. In the view that we have taken, we allow both these writ petitions preferred by the petitioner and set aside the order dated 7th of October, 1983, passed by respondent No. 2 as well as the consequential order dated 12th of October, 1983, passed by the Addl. Tahsildar, N.A. Andheri as the same are passed without taking into consideration the earlier orders passed by the department of the respondents appointing him as an officiating Aval Karkun from the year 1968.

15. We direct that the respondents shall pay the difference between the personal pay of the Aval Karkun and that of a clerk to the petitioner from 14th of May, 1968, till 10th of December, 1975, as per Government Resolution dated 19th of July, 1957, within three months from today.

16. We direct that the respondents shall prepare a fresh gradation list of seniority of Aval Karkuns after taking into consideration the petitioner's date of appointment as officiating Aval Karkun from 14th of May, 1968, and fix the seniority of the petitioner as Aval Karkun in the fresh gradation list, in accordance with law.

17. Accordingly, rule in Writ Petition No. 3971 of 1983 is made absolute with costs to the extent of the aforesaid directions.

18. As far as Writ Petition No. 2719 of 1985 is concerned, the said petition is filed by the petitioner to fix his seniority as Naib Tahsildar or Tahsildar, in accordance with law, after taking into consideration his continuous officiating service as Aval Karkun from 1968. We have already come to the conclusion that the petition is entitled to get his seniority as Officiating Aval Karkun from the year 1968. However, without passing the revenue Qualifying Examination the petitioner was not entitled to get himself appointed as Tenancy Aval Karkun. Admittedly, the petitioner has not passed the said examination. However, on 8th January, 1985, the petitioner completed his 45 years of age and, therefore, he was exempted from passing the said examination. In view of the aforesaid clear legal position, the petitioner is entitled to claim promotion to the post of Aval Karkun or Naib Tahsildar only after 8th January, 1985, and not earlier. Mr. Gursahani has also fairly conceded this position and restricted the petitioner's claim to consider him to the post of Naib Karkun of Naib Tahsildar from 8th January, 1985, onwards.

19. In view of the above, we direct that the petitioner's claim to the post of Aval Karkun or Naib Tahsildar may be considered in accordance with law along with the other candidates from 8th of January 1985, onwards.

20. Rule in Writ Petition No. 2719 of 1985 is also made absolute with costs only to the extent of the aforesaid direction.

21. After the delivery of this judgment, the learned Counsel on behalf of the respondents made an oral application for the stay of the operation of the

aforesaid order. However, since the issue of payment of the amount of difference between the post of Aval Karkun and that of a clerk from 1968 to 1975 is pending for such a long time, we do not think it desirable to further delay the said payment to the petitioner. We may also add here that in Writ Petition No. 1297 of 1981 filed by the petitioner on the Original Side of this Court, this Court on 7th of December, 1981, directed respondent No. 2 to forthwith appoint and continue the petitioner as Aval Karkun retrospectively in his office with full pay and allowances attached to the said post, during the pendency of the said writ petition. A similar direction was also given in Writ Petition No. 3971 of 1983 at the stage of admission. Even the contempt proceedings were withdrawn by the petitioner on 17th of September, 1982, on the basis of assurance given by the Addl. Collector on behalf of the respondents that the order of this Court would be given effect to, inspite of all this the respondents have wilfully avoided to make the said payment to the petitioner. We feel this application deserves no consideration and, therefore, the same is rejected.