

(2002) 04 BOM CK 0013

In the Bombay High Court

Case No : Letters Patent Appeal No. 88 of 2001 in Writ Petition No. 5802 of 1995

Mohammad Hasan Khan

APPELLANT

Vs

Mohammad Majidulla and Others

RESPONDENT

Date of Decision : 24-04-2002

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 226, 227

Citation : (2002) 4 ALLMR 512 : (2002) 104 BOMLR 544

Hon'ble Judges : N.H. Patil, J; B.H. Marlapalle, J

Bench : Division Bench

Judgement

B.H. Marlapalle, J.—The appellant was initially appointed in a Primary School run by the present respondent No. 2 Madarse Madinatual Uloom as Assistant Teacher on 16th June, 1975, though untrained with S.S.C. qualifications. He was, by an order dated 29.6.1979 appointed as a Junior Clerk under the Madinatual Uloom Boys Primary School, Nanded w.e.f. 20.10.1978 and he continues to be in the said post till this date and presently, he is posted as Head Clerk pursuant to the order passed by the School Tribunal in his Appeal No. 174/1994.

2. It appears that the respondent No. 2 also runs a High School by the same name i.e. Madinatual Uloom High School, Nanded and the respondent No. 1 came to be appointed in the said High School as Laboratory Assistant w.e.f. 13.9.1979. He was appointed to the post of Junior Clerk on or about 7.1.1981 and immediately, on the next day, he was promoted to the next higher post i.e. Senior Clerk in the High School. Admittedly, the respondent No. 1 holds qualifications of B.Sc. The respondent No. 3 came to be appointed as Junior Clerk in the High School w.e.f. 4.12.1985 and he was consequently, promoted to the post of Senior Clerk on 1.8.1988 by the respondent No. 2. The respondent No. 3 holds the qualifications of S.S.C. only. Whereas, the respondent No. 4 who also possesses the qualifications of S.S.C., was initially appointed as Librarian by the respondent No. 2 in the High School on 4.2.1985 and he was appointed to the post of Junior Clerk in the said High School w.e.f. 21.12.1989.

3. It appears that the petitioner, some times in August, 1981, submitted representation against the promotion of respondent No. 1 to the post of Senior Clerk and by reply dated 23rd August, 1981, he was informed that his representation was kept pending. Nothing further happened and at the relevant time, when the respondent No. 1 was promoted to the post of Senior Clerk, the provisions of the Secondary Schools Code were in operation for the employees of the High School and the Bombay Primary Education Rules, 1949 framed under the Bombay Primary Education Act, 1947 were in operation for the employees of the Primary Schools.

4. The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 came into force w.e.f. 15th July, 1981 (for short M.E.P.S. Act) and the Rules framed thereunder namely, the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 came into force from 16th July, 1981 (for short, referred to as the M.E.P.S. Rules). Section 9 of the M.E.P.S. Act, as it originally stood, read as under :

9. (1) Notwithstanding anything contained in any law or contract for the time being in force, any employee in a private school who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the management and who is aggrieved, shall have a right of appeal and may appeal against any such order to the Tribunal constituted u/s 8 :

Provided that, no such appeal shall lie to the Tribunal in any case where the matter has already been decided by a Court of competent jurisdiction or is pending before such Court, on the appointed date or where the order of dismissal, removal, otherwise termination of service or reduction in rank was passed by the management at any time before the 1st July, 1976.

(2) Such appeal shall be made by the employee to the Tribunal, within thirty days from the date of receipt by him of the order of dismissal, removal, otherwise termination of service or reduction in rank, as the case may be :

Provided that, where such order was made before the appointed date, such appeal may be made within sixty days from the said date.

(3) Notwithstanding anything contained in Sub-section (2), the Tribunal may entertain an appeal made to it after the expiry of the said period of thirty or sixty days, as the case may be, if it is satisfied that the appellant has sufficient cause for not preferring the appeal within that period.

(4)

Though the said section provided for an appeal, it is clear that the right of appeal was not available for redressal of grievance regarding supersession or denial of promotion as per the rules. This right came to be, for the first time, incorporated under the M.E.P.S. Act by amendment to Section 9 by Maharashtra 30 of 1987 which was brought in force from 7th August, 1987. The said amended section reads, as under :

9 (1) Notwithstanding anything contained in any law or contract for the time being in force, any employee in a private school -

(a) who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the order passed by the management; or

(b) who is superseded by the Management while making an appointment to any post by promotion and who is aggrieved, shall have a right of appeal and may appeal against any such order or supersession to the Tribunal constituted u/s 8 :

Provided that, no such appeal shall lie to the Tribunal in any case where the matter has already been decided by a Court of competent jurisdiction or is pending before such Court, on the appointed date or where the order of dismissal, removal, otherwise termination of service or reduction in rank was passed by the management at any time before the 1st July, 1976.

(2) Such appeal shall be made by the employee to the Tribunal, within thirty days from the date of receipt by him of the order of dismissal, removal, otherwise termination of service or reduction in rank, as the case may be :

Provided that, where such order was made before the appointed date, such appeal may be made within sixty days from the said date.

(3) Notwithstanding anything contained in Sub-section (2), the Tribunal may entertain an appeal made to it after the expiry of the said period of thirty or sixty days, as the case may be, if it is satisfied that the appellant has sufficient cause for not preferring the appeal within that period.

(4) Every appeal shall be accompanied by a fee of five hundred rupees, which shall not be refunded and shall be credited to the Consolidated Fund of the State.

Under the amended Section 9(1)(b), a right for appeal is provided if an employee under a private school is superseded by the management while making appointment to any post by promotion and who is aggrieved by such an order of supersession.

5. When the respondent No. 1 was promoted to the post of Senior Clerk on 8.1.1981, the appellant being senior to him, though was superseded, did not take any steps to challenge the said promotion after he received reply from the management on 20.3.1981, before an Appropriate Authority as may be permissible under the rules prevailing at the relevant time i.e. upto 7th August, 1987. Even after the right of an appeal was provided by amendment to Section 9 of the M.E.P.S. Act in August, 1987, the appellant did not file an appeal either against the promotion of respondent No. 1 to the post of Senior Clerk w.e.f. 8.1.1981 or the promotion of respondent No. 3 w.e.f. 1.8.1988 to the post of Senior Clerk. The respondent Nos. 1 and 4 were subsequently, promoted to the post of Head Clerk and Senior Clerk respectively, w.e.f. 2nd January, 1992 and immediately, thereafter, he submitted a representation to his Head Master for promotion to the post of Senior Clerk/Head Clerk and this was acknowledged by

the said Head Master on 7.1.1992. These promotions came to be approved by the Education Officer (Secondary), Zilla Parishad, Narided. As there was no decision, even for a period of about two years, he submitted a fresh representation on 1.8.1994, which came to be replied by the authority concerned on 26th August, 1994. He, therefore, moved the School Tribunal in Appeal No. 174 of 1994 some times, on 20th September, 1994 and prayed for the following substantial reliefs :

(A) The respondent Nos. 1, 5, 6 and 7 may please be directed to give the promotion to the appellant to the post of Senior Clerk with a deemed date from the year, 1981 and to give promotion to the post of Head Clerk with a deemed date from 2nd Jan., 1991.

(A1) The communication dated 26th August, 1994 made by the Respondent No. 1 to the appellant may kindly be quashed and set aside;

(B) The Respondent Nos. 5, 6 and 7 may kindly be directed to make the payment of arrears of the appellant by considering the deemed date for the post of Senior Clerk from 1981.

(C) The promotion orders issued in favour of the Respondent Nos. 2, 3, and 4 may please be quashed and set aside.

6. The present respondent No. 2 management was impleaded as respondent No. 1 before the School Tribunal and the present respondents Nos. 2, 3 and 4 were impleaded as respondent Nos. 2 to 4 respectively. In addition, the Education Officer (Secondary), Zilla Parishad, Nanded and the Deputy Director of Education, Aurangabad as well as the Head Master of the High School and Junior College were also included as additional respondents. The management filed its written statement before the School Tribunal and opposed the appeal, inter alia, on the ground of limitations. The appeal came to be decided by the School Tribunal on 30.9.1995. The ground of limitation as raised by the management was turned down and the appeal was allowed in terms of the following order :

The communication dated 26th August, 1994 made by the respondent No. 1 to the appellant is hereby set aside.

The respondent Nos. 5, 6 and 7 are directed to give promotion to the appellant to the post of Senior Clerk with a deemed date from the year 1981 and to give promotion to the post of Head Clerk with a deemed date from 2nd January, 1992.

The respondent Nos. 1, 5, 6 and 7 are directed to make the payment of arrears of the appellant by considering the deemed date for the post of Senior Clerk from 1981 and that of post of Head Clerk w.e.f. 2.1.1992.

Promotion orders issued in favour of the respondent Nos. 2, 3, and 4 are hereby quashed and set aside.

The respondents are directed to pay the cost of appeal of Rs. 300/- (Rupees Three hundred only) to the appellant, within one month.

7. Being aggrieved by the reliefs granted by the School Tribunal in favour of the present appellant, two writ petitions came to be filed before this Court i.e. Writ Petition No. 5304/1995 by the present respondent Nos. 3 and 4 and Writ Petition No. 5802/1995 by the present respondent No. 1. Writ Petition No. 5802/1995 came to be decided by this Court (Single Bench) on 13th September, 2001 and the petition was allowed by quashing and setting aside the judgment and order impugned. Writ Petition No. 5304/1995 came to be allowed in view of the judgment in Writ Petition No. 5802/1995. Both these writ petitions were filed under Article 227 of the Constitution and the substantial prayer was only to the effect of quashing and setting aside the judgment and order of the School Tribunal in Appeal No.174/1994. Being dissatisfied with the said view taken by this Court in Writ Petition No. 5802/ 1995, the appellant has filed this Letters Patent Appeal which was admitted on 6th October, 2001 and by a separate order in Civil Application No. 5772/2001, the interim relief granted by the Single Bench was continued, as a result of which, the appellant continued to work in the post of Head Clerk.

8. This Court in Writ Petition No. 5802/1995, held that :-

(1) That Appeal No. 174/1995 was not only filed beyond limitation as provided u/s 9(2) of the M.E.P.S. Act but, there was no application for condonation of delay and, therefore, it was not open for the Tribunal to exercise power of condoning the delay. Appeal suffered from inordinate delay and the Tribunal committed an error in law in entertaining the said appeal inasmuch as, it did not have the powers or the jurisdiction to entertain the said appeal;

(2) The present appellant did not have any right to claim the promotional post of Sr. Clerk in the secondary school as the post of Sr. Clerk was created in an establishment governed by the provisions of the School Code and, therefore, the employee in primary school could not make any claim to the promotional post in the cadre of non teaching staff in the secondary school.

(3) When the present respondent No. 1 was granted promotion to the post of Sr. Clerk, the M.E.P.S. Act and the Rules thereunder, were not in force and the present appellant could not challenge the promotion of the respondent No. 1 to the post of Head Clerk when his appointment to the post of Senior Clerk went without challenge and the challenge so raised also failed.

9. On the first point regarding delay in filing Appeal No. 174/1994, Shri Dhage, the learned Counsel for the appellant invited our attention to the decision dated 30.11.1999 of this Court (Single Bench) in the case of Secretary, Shiorai Education Society, Wani v. Presiding Officer, School Tribunal, Aurangabad and Ors. 2002 (2) Mh. L.J. 752 wherein, the learned Single Judge (Sinha, J.) considered the amended provisions of Section 9 as compared to the un-amended provisions and recorded an opinion that the limitation clause as set out in Sub-section (2) therein did not apply to an appeal, which came to be filed u/s 9(1)(b) of the M.E.P.S. Act. The learned Counsel, therefore, submitted that when this was

the view taken by a Co-ordinate Bench, it was not in keeping with the judicial discipline to take a view contra while deciding the Writ Petition No. 5802/95 and it could have been more appropriate to refer the issue of limitation, in case, a different view was to be taken than the view taken in the case of Shiorai Education Society's case. In this regard, reliance has been placed on the judgment of the Supreme Court in the case of Dr. Vijay Laxmi Sadho Vs. Jagdish, . Referring to the issue of precedents, the Apex Court in paragraph 28 noted thus :-

As the learned Single Judge was not in agreement with the view expressed in Devlal's case, it would have been proper, to maintain judicial discipline, to refer the matter to a Larger Bench rather than to take a different view. We note it with regret and distress that the said course was not followed. It is well settled that if a Bench of Co-ordinate Jurisdiction disagrees with another Bench of Coordinate Jurisdiction whether on the basis of "different arguments" or otherwise, on a question of law, it is appropriate that the matter be referred to a Larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs.

10. On the other hand, the learned Counsel for the respondents have referred to a decision of this Court (Single Bench) in the case of The Secretary and another Vs. Shri Chintamani Birjaprasad Dubey and others, and The Executive President and Others Vs. Bhaskar Bhagwant Yadav and Others, and urged before us that the limitation clause under Sub-section (2) of Section 9 of the M.E.P.S. Act is also applicable to an appeal filed under Sub-section (1)(b) of the said section. We are not persuaded by these arguments. In the case of Jamnadas Adukia Charity Trust (supra), while filing an appeal u/s 9(1)(b), there was delay of about five years and an application for condonation of delay was submitted and the same was allowed and in the final judgment, the appeal was also allowed. The learned Single Judge held that the Tribunal had committed an illegality in entertaining the appeal and more so, when there were no sufficient reasons made out to condone the delay. In the case of Pune Vidyarthi Griha (supra) an appeal was filed u/s 9(1)(b) of the M.E.P.S. Act and there was delay of three years and hence, an application for condonation of delay was also filed. This was allowed by an interlocutory order which was carried in a writ petition which was allowed on 23.6.2000. It was held by relying upon the decision of the Supreme Court in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, that the appellant had failed to make out good and sufficient reasons to condone the delay and appeal suffered from inordinate delay. The Tribunal, therefore, committed serious error in condoning the delay by its order dated 17.12.1997 and thus, the petition was allowed. In both these cases, a specific issue which fell for consideration in the case of Shiorai Education Society was not raised and the decision in the said case rendered by Sinha, J. was not brought to the attention of the respective Benches at Mumbai. The decisions in both these

cases decided at Mumbai do not have any bearing on the view taken by Sinha, J. in the case of Shiorai Education Society (*supra*).

11. The original scheme of Section 9, if considered, would show that the limitation clause was incorporated in Sub-section (2) when there was no provision for an appeal on account of supersession or denial to appoint to a particular post by promotion, by the management under the scheme of Sub-section (1) and, therefore, the language of Sub-section (2) was confined to the orders to be appealed against under Sub-section (1) alone. However, when Sub-clause (b) to Sub-section (1) was incorporated by the amendment brought into force w.e.f. 7th August, 1987, the provisions of Sub-section (2) regarding limitation were not amended and they remained as they were originally. This act of the Legislature must be deemed to be deliberate and, therefore, the provisions of Section 9 of the M.E.P.S. Act, in totality, are required to be read as they appear after the amendment of 1987. The language of Sub-section (1) and Sub-section (2) is clear and unambiguous and if the Legislature, at any time, had intended to provide limitation period for an appeal against the order of supersession within the meaning of Sub-clause (b) of Sub-section (1), it was not prevented from providing for such a contingency by amending the language of Sub-section (2). The Legislature, in its wisdom did not do so and, therefore, the view taken by Sinha, J. must be upheld. The reasoning given in the said case does not, in our considered view, permit any other interpretation than the interpretation adopted. We must also keep in mind the doctrine of *Casus Omissus* while interpreting the statutory provisions.

12. The substantial question that we are required to consider in the case at hand is whether the appellant could approach the School Tribunal at any time even though his appeal did not attract the limitation clause in Sub-section (2) of Section 9. The learned Counsel for the appellant fairly conceded before us that even if there was no specific limitation provided for filing an appeal, such an appeal must be filed within a reasonable period and the appeal cannot be moved before the School Tribunal at any time at the choice and convenience of the appellant. He has invited our attention to a decision of the Division Bench of this Court in the case of *Sulabha Govind Vidwans Vs. Shravan M. Shevale and Others*, wherein, the writ petition against a grievance of denial of promotion by a private school was moved before this Court after two years with reference to the grievance of promotion to the post of Head Mistress and within a period of eight years, with reference to the grievance for promotion to the post of Assistant Head Mistress. This Court (*D. R. Dhanuka and Vishnu Sahai, JJ.*), on the point of delay and laches, held that the petitioner was the senior most teacher and otherwise, the only claimant for the respective promotions if the said posts were not reserved and the petitioner had registered her protest in respect of denial of promotion to her, the management also had agreed about her claim and even the Education Officer stated on affidavit that the petitioner could have been promoted to the respective posts if they were not reserved. Both the posts were wrongly marked as reserved when they were isolated posts and in total disregard

to the law laid down by the Apex Court in the case of Chakradhar Paswan Vs. State of Bihar and Ors, . This Court opined that it was a fit ease to condone the delay and decided the petition on merits. Relying upon this decision, the learned Counsel for the appellant submitted that when he was superseded in disregard to the provisions of the M.E.P.S. Rules and he had submitted representation, which was acknowledged on 7.1.1992, and was not decided by the management, he had approached the Tribunal within a reasonable period and more so, when his reasonable period and more so, when his second representation dated 1.8.1994 came to be decided for the first time on 26.8.1994. We are willing to accept this proposition only with reference to the promotion order granted in favour of the respondent No. 4 w.e.f. 2.1.1992 and not in respect of the promotion orders granted in favour of the respondent No. 1 w.e.f. 2.1.1992 and respondent No, 3 w.e.f. 1st August, 1998. We hold that there was no reason to entertain the petitioner's grievance against the appointment of respondent No. 1 to the post of Senior Clerk w.e.f. 8.1.1981 and the appointment/promotion of respondent No. 3 w.e.f. 1.8.1988. The view taken by the Tribunal in condoning the delay with respect to the promotion order dated 2.1.1992, therefore, does not call for any interference, as the said view does not suffer from any error in law.

13. Corning to the merits of the petitioner's challenge to the promotion of respondent No. 1 to the post of Head Clerk w.e.f. 2.1.1992, we have noted that he was promoted to the post of Senior Clerk w.e.f. 8.1.1981 which promotion had received its finality and, therefore, his promotion to the post of Head Clerk at the instance of the appellant was not required to be examined when admittedly, the respondent No. 1 was a Senior Clerk right from 8th January, 1981 and the petitioner remained as Junior Clerk even when he approached the Tribunal. The appellant himself was to be blamed for the said state of affairs and the delay and laches in this regard are totally attributable to him. The cases of promotions which have been settled for over a period of decade could not be reopened specially, when the claimants to such promotions, who were aggrieved, remained silent by their own choice.

14. Having taken out the cases of promotion orders granted in favour of the respondent Nos. 1 and 3, we are only required to consider the petitioner's challenge to the promotion granted in favour of the respondent No. 4 to the post of Senior Clerk on 2.1.1992. There is no dispute that the said respondent was appointed as Librarian in the High School w.e.f. 4.12.1985. Schedule F under Rule 12 of the M.E.P.S. Rules has provided guidelines for fixation seniority and Clause 3 therein deals with the guidelines for fixation of seniority of non teaching staff. The said provisions in respect of clerk and librarian read thus :-

Clerks : The clerical and supervisory posts in the channel of promotion comprise Junior Clerk, Senior Clerk, Head Clerk and Superintendent, Seniority of Junior Clerks in a School or Schools shall be determined on the basis of the date of appointment of the persons concerned. The post of Senior Clerk shall be filled in by promotion of seniormost Junior Clerk. The posts of Head Clerk and

Superintendent shall be filled in respectively by promotion of seniormost Senior Clerk and seniormost Head Clerk, respectively.

Librarian : In the case where the Management runs only one School a seniority list of Librarian need not be maintained as the post is an isolated one. In case where the Management runs more than one School a seniority list of Librarians shall be maintained on the basis of the date of appointment. The Librarian shall not be held eligible for promotion to any other post.

Similarly, Note 1 to 3 under the said clause are also relevant and they are reproduced for ready reference :

Note 1.- Where Management runs more than one School the seniority list for particular cadre shall be a combined seniority list of all persons in that cadre working in all the schools of the Management. The total service rendered by the persons in a particular cadre in any of these Schools shall be taken into consideration for the purpose of seniority. The various promotions shall be effected on the basis of such common seniority list.

Note 2,- If the date of appointment of two or more persons in the same cadre happens to be the same the person who is senior by age shall be considered as senior.

Note 3. For the purpose of promotion the vacancies occurring in all the Schools run by the same Management shall be pooled together.

It is evident that an employee appointed as Librarian is not eligible for promotion to any other post. Seniority of Junior Clerk in a school or schools shall be determined on the basis of date of appointment of the persons concerned and the post of Senior Clerk is required to be filled in by promotion of seniormost Junior Clerk. The posts of Head Clerk and Superintendent shall be filled in respectively, by promotion of the seniormost Senior Clerk and seniormost Head Clerk. Where the management runs more than one school, the seniority list for a particular cadre shall be a combined seniority list of all persons in that cadre working in all the schools of the Management. The total service rendered by the persons in a particular cadre in any of these Schools shall be taken into consideration for the purpose of seniority. The various promotions shall be effected on the basis of such common seniority list. In addition, for the purpose of promotion the vacancies occurring in all the Schools run by the same Management shall be pooled together.

15. The respondents contended before us that the respondent No. 4 was promoted to the post of Senior Clerk which had occurred in the High School and the petitioner having been employed in Primary School, was not eligible for being considered to the said promotion. It is also submitted that his purported representation acknowledged on 7.1.1992 was to the Head Master of the Primary School and the Head Master of the Secondary School was not in its knowledge. He did not approach the respondent No. 2 Management at any time and raised a

grievance till 1.8.1994. On the point of delay in approaching the School Tribunal in challenging the promotion of respondent No. 4 to the post of Senior Clerk w.e.f. 2.1.1992, as we noted earlier, the approach of the School Tribunal cannot be termed as erroneous and we hold that the appellant approached the School Tribunal within a reasonable period and his appeal did not suffer from delay or laches. On the point of his eligibility for promotion to the post of Senior Clerk in the High School run by the respondent No. 2, the submissions made by the said respondents against the appellant's eligibility arc required to be considered only for being rejected. These submissions are apparently, against the guidelines set out under Schedule F to the M.E.P.S. Rules. The appellant was eligible for promotion and his being the seniormost, was not disputed, if it was a combined seniority list of all the Junior Clerks working in different schools run by the respondent No. 2. Notes No. 2 and 3 read together, make out a specific case that the appellant was eligible for being considered for promotion to the post of Senior Clerk in place of the respondent No. 4 who was evidently, junior to the appellant as the said respondent came to be appointed to the post of Junior Clerk for the first time on 21.12.1989, leave aside the legality of the said appointment from the post of Librarian. The appellant's appeal before the School Tribunal, therefore, deserved to be allowed to the extent of promotion granted to the respondent No. 4 in the post of Senior Clerk w.e.f. 2.1.1992 and his appeal challenging the promotions granted in favour of the respondent Nos. 1 and 3 was required to be rejected.

16. We now come to the preliminary issue raised by the respondents regarding maintainability of this Letters Patent Appeal. Shri Sunil Kulkarni, the learned Counsel appearing for the respondent Nos. 1, 3 and 4 has relied upon the decision of the Apex Court in the case of M/s. Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad, and a decision of this Court in the case of Shri Kondiba Dhondiba Dalvi Since Deceased by His Lrs. and Others Vs. Shri Narayan Namdeo Nanware, and has submitted that Writ Petition No. 5802/1995 was filed under Article 227 of the Constitution, the substantial prayer in the said petition was for quashing and setting aside the impugned order passed by the Tribunal, thus, invoking the powers of this Court only under Article 227 and not Article 226 of the Constitution. Even, the averments set out in the petition did not make out a case for invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution and, therefore, in the set of circumstances, the Letters Patent Appeal filed before us is not tenable, urged the learned Counsel.

17. When the appeal was admitted by the Division Bench of this Court (Barde and Dr. Upasani, JJ.) on 6.10.2001, the issue of maintainability of this appeal was not left open and therefore, an inference is required to be drawn that this Court was satisfied regarding the maintainability of the appeal. Notwithstanding this position, we have examined the submissions made before us regarding the maintainability of the Letters Patent Appeal. It is true that Writ Petition No. 5802 of 1995 has been filed under Article 227 of the Constitution, the relief prayed for invokes the powers of this Court only under the said Article and there arc no

averments invoking the powers of this Court under Article 226. The decision in the case of M/s. Lokmat Newspapers Pvt. Ltd. (supra) was rendered by a two Judges Bench (S. B. Majmudar and S.S. Mohammed Quadri, JJ.) on 19th July, 1999. The said decision as well as the view taken by this Court in the case of Kondiba Dhondiba Dalvi (supra), prima Jade, appear to support the arguments advanced regarding the maintainability of this appeal. However, we may refer to an earlier decision of the two Judges Bench of the Apex Court (S. B. Majmudar and K. Venkataswami, JJ.) in the case of Vinita M. Khanolkar Vs. Pragna M. Pai and Others, and in paragraph 3, the Apex Court stated thus:-

Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under Letters Patent.

Friday, 26th April, 2002.

18. In the case of Baddula Lakshmaiah and Others Vs. Sri Anjaneya Swami Temple and Others, the Apex Court, on the scope of appellate jurisdiction in a Letters Patent spoke thus,-

It is the internal working of the High Court which splits it into different Benches and yet the Court remains one. A Letters Patent Appeal, as permitted under the Letters Patent, is normally an intra-Court appeal whereunder the Letters Patent Bench, sitting as, a Court of Correction, corrects its own orders in exercise of the same jurisdiction as was vested in the Single Bench, Such is not an appeal against an order of a Subordinate Court. In such appellate jurisdiction the High Court exercises the powers of a Court of Error. So understood, the appellate power under the Letters Patent is quite distinct, in contrast to what is ordinarily understood in procedural language.

If a case has been made out that a legal right created by law within the meaning of Article 13(3)(a) or a fundamental right under the Constitution has been breached or denied or the claimant has been deprived of such a right or a case of legal error apparent on the face of the record has been made out, the High Court should be slow in shutting its door for an appeal under the Letters Patent which is an intra-court appeal for correction of its own orders else, unless of course such a remedy is barred specifically under a special statute, lest it would result in grave miscarriage of justice. In the case at hand, the appellant had a right under the M.E.P.S. Rules for promotion to the post of Senior Clerk, he was eligible for such a promotion on the basis of his seniority and the guarantee in such a case, given under Article 14, namely, the guarantee of equality before law or the equal protection of law was denied, as we have pointed out in the above part of our judgment. On the point of limitation, there is a legal error inasmuch as, the view taken by a Co-ordinate Bench in the case of Shiorai Education Society (supra) was not considered and a contrary opinion has been recorded on

the basis of which a legal and legitimate claim for promotion is denied. It is for these reasons, we reject the preliminary ground taken regarding the maintainability of this Letters Patent Appeal and we have done so in the facts and circumstances of this case.

19. We have been informed that the appellant came to be promoted to the post of Head Clerk consequent to the judgment of the School Tribunal but, as noted earlier, his claim for the post of Senior Clerk was only untenable vis-a-vis respondent No. 4. In addition, he would be due for a such a promotion in place of respondent No. 4 w.e.f. 2.1.1992 but, he would not be eligible to draw backwages in the said post for the period he has not worked. Nevertheless, for the purpose of counting of his seniority for any further purposes, the same shall be counted from 2nd January, 1992. The relief granted by the School Tribunal, therefore, requires to be modified accordingly.

20. In the result, we allow the appeal partly and quash and set aside the promotion of Respondent No. 4 to the post of Senior Clerk granted from 2.1.1992. We uphold the Appellant's claim to the said post. This promotion shall not, in any way, affect the promotion already granted to the respondent No. 1 to the post of Head Clerk. The promotion so granted to the appellant shall be in place of the respondent No. 4 whose claim, the management, is at liberty to consider as per the rules in case there is any additional vacancy in the post of Senior Clerk. The appellant shall be entitled to count his seniority in the post of Senior Clerk from 2.1.1992 but, he shall not be eligible for arrears in payment for the period he has actually not worked in the said post. The order of promotion already granted to him in the post of Head Clerk consequent to the order of the Tribunal, shall accordingly, stand modified. We clarify that in case the respondent No. 1 has been reverted on the basis of the Tribunal's order, he shall stand restored to the post of Head Clerk and the salary paid to the petitioner for the post of Head Clerk till to date shall not be recovered.