

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
BENCH AT AURANGABAD.

SECOND APPEAL NO. 333 OF 2013

Kishor Baburao Kadam  
Age 43 years, occup. service,  
R/o Puntamba, Tal. Rahata,  
District Ahmednagar ..Appellant/orig. plaintiff

versus

- 01 Methodist Church in India,  
through Chief Justice,  
Bishop Rev. Mumbai Regional  
Conference, Bishop House,  
22 YMCA road, Mumbai Central,  
Mumbai.
- 02 Rural High School, Puntamba,  
through its Head Master,  
R/o of Puntamba, Tq. Rahata,  
Dist. Ahmednagar
- 03 The Manager / Secretary,  
Rural High School & Junior College,  
Puntamba, r/o Puntamba,  
Tq. Rahata, Dist. Ahmednagar
- 04 Santosh Rabhaji Pardhe,  
Age 44 years, occup. Service,  
Rural High School, Puntamba,  
Tq. Rahata, Dist. Ahmednagar
- 05 Education Officer (Secondary),  
Zilla Parishad, Ahmednagar Respondents / orig.  
Defendants

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Mr. Kiran M. Nagarkar, Advocate for appellant  
Mr. C. T. Jadhav, Advocate for respondents no. 1 to 3  
Mr. V. P. Golewar, Advocate holding for Mr. Arvind R.  
Joshi, Advocate for respondent no. 4.

CORAM : SUNIL P. DESHMUKH, J.  
19TH JANUARY, 2016

ORAL JUDGMENT:

1. The appellant – original plaintiff, aggrieved by judgment and order dated 08-02-2013 in regular civil appeal no. 10 of 2014 passed by District Judge-1, Kopergaon, confirming the judgment and decree in regular civil suit no. 89 of 2000 passed by the 2<sup>nd</sup> joint civil judge, junior division, Kopergaon, dated 03-12-2000, dismissing his claim for promotion to the post of junior clerk which has been hitherto occupied by respondent No. 4, is before this court.

2. Mr. Nagarkar, learned counsel for the appellant contends that appellant had been appointed as peon by respondents No. 1 to 3 in the school run by them. He further contends that while appellant was so appointed he had already possessed qualification required for appointment as a junior clerk. Since post of junior clerk then had not been vacant, he continued to work as peon. Around 1999, on retirement of earlier incumbent, post of junior clerk had fallen vacant and the appellant was entitled to be considered for promotion to said post, him being senior-most in the seniority list maintained pursuant to schedule F, clause (3) of the Maharashtra Employees of Private School

(Conditions of Service) Rules, 1981, however, respondents No. 1 to 3 - Management had asked him to submit formal application with assurance that his claim would be considered on priority.

3. According to appellant, promise was not kept by respondents No. 1 to 3 and respondent No. 4 came to be appointed as junior clerk and as such, suit had been instituted for declaration and injunction restraining respondent No. 4 from discharging duties as junior clerk.

4. Respondents resisted the claim, *inter-alia*, on the ground that in the face of alternate remedy the suit is not maintainable and that no notice pursuant to section 80 of the Code of Civil Procedure though required had been issued to respondent No. 5 who was a government employee. It is denied, any assurance as claimed had been given to the appellant and that the institution is a minority-institution. According to them, all necessary persons were not impleaded as parties to the suit.

5. Upon pleadings of the parties, trial court framed issues with regard to entitlement and eligibility of plaintiff to promotion, his entitlement to have mandatory directions; maintainability of suit without notice and permission and about junior clerk's post being immediately next post for promotion to the post of peon. While answering said issues, the trial court held that the plaintiff

is not entitled to promotion as junior clerk nor to mandatory injunction, suit is held to be not maintainable without notice under section 80 of the Code of Civil Procedure, 1908 but it can be maintained without permission and that junior clerk's post is a next promotional post, however, held that issue of eligibility of plaintiff to the post of clerk does not arise. The court dismissed the suit under judgment and decree dated 03-12-2003.

6. The matter was taken in appeal at plaintiff's instance and the appellate court framed points for determination viz; whether civil court had jurisdiction to try and decide the suit, whether the suit was bad for want of notice as well as permission, whether junior clerk's post is a promotional post for the post of peon and about entitlement of the plaintiff to preference in appointment and reservation for the post of junior clerk. The appellate court has answered in the affirmative that civil court had jurisdiction to decide the suit; suit is not bad either for notice under section 80 of the Code of Civil Procedure, 1908 or under section 280 of the Maharashtra Zilla Parishad and Panchayat Samittee Act and that permission under section 50 of the Bombay Public Trust Act, 1950 was not required and went on to give negative finding that junior clerk's post is not a promotional post for the post of peon and that plaintiff is not entitled to any preferential consideration.

7. Heard learned counsel for parties for a considerable length on various aspects referred to on either side. However, looking at the present situation, the appellant-plaintiff reconciles himself and resiles to a situation whereunder, upon instructions, learned counsel for the appellant-plaintiff submits that about June, 2016, a senior clerk's post is likely to fall vacant due to superannuation of the present incumbent holding said post. Said post is likely to be filled up by promotion of respondent no.4 presently holding post of junior clerk. In such a case, according to learned counsel, situation can be taken care of by observing that the appellant - plaintiff can be considered to the post of junior clerk.

8. Mr. Nagarkar, learned counsel for appellant – plaintiff places heavy reliance on two division bench decisions. First one is in the case of *Ashok Shankarrao Shinde v. Prabodhan Shikshan Sanstha, Nagpur*, reported in *1991 I CLR 446*. Learned counsel particularly relied on head note of the same which reads :

*" Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981: Sch.F, Clause 3, Schedule B, Clause IV- Petitioner entered service of Respondent No. 1 as a peon-In course of time he acquired eligible qualifications – He became eligible to hold post of clerk – School authorities did not consider him for promotion as junior clerk and appointed direct recruit – Hence he filed writ petition – Held : The petition is accepted to the extent that there is a possibility of a peon being promoted to*

*the post of a clerk as per Rule 12 of Schedule F read with Rule 2(1)(i) Scheduled 'B' and also clause (iv) of Sub-rule (1) and respondent is directed that as and when in future vacancy arises for the post of a clerk, the claim of the petitioner will be considered and it is left open to the management to take decision with regard to the merits of the claim on the basis of the material before it and in accordance with the Rules. “*

9. Relying on paragraphs 4, 5 and 6 of said judgment, learned counsel submits that finding recorded by appellate court in present case about post of junior clerk not being a promotional post for the post of peon is erroneous and incompatible with observations of division bench in aforesaid judgment.

10. Mr. Nagarkar further refers to a decision in the case of *Ramesh Shivram Khairnar vs. State of Maharashtra*, reported in 2003 (8) *LJSOFT (URC) 24*, and relies particularly on paragraphs no. 7, 8, 9 and 10 of the same and thus submits that in the eventuality as aforesaid, claim of the present appellant – plaintiff to promotional post of junior clerk from the one of laboratory attendant which he is presently holding may be considered.

11. Learned counsel for respondent no. 4 Mr. Golewar, however, submits that the appellant-plaintiff has already been promoted to the post of laboratory attendant which, according to him, is a promotional post for the post of peon lying somewhere

between the posts of junior clerk and peon. He submits that since said position of the appellant – plaintiff is not being disturbed as per the statement appearing on instructions on behalf of the appellant-plaintiff, he does not have any objection to the request as is being made by present appellant – plaintiff.

12. Mr. Golewar, in support of his submissions, refers to and relies on two decisions of the supreme court, one in *T.M.A. Pai Foundation v. State of Karnataka* reported in (2002) 8 SCC 481 and another in the case of *Sindhi Education Society vs. Chief Secretary, Government of NCT of Delhi*, reported in (2010) 8 SCC 49.

13. Mr. C.T. Jadhav, learned counsel appearing on behalf of for respondent-management submits that the institution is a minority-institution and as such, it is open for it to accommodate the appellant – plaintiff on any other suitable post.

14. In the circumstances, the second appeal can be disposed of, partly allowing it, setting aside findings recorded by appellate court in respect of points no. 4 and 5 having regard to the two decisions relied on by the appellant – plaintiff and two supreme court decisions by learned advocate Mr. V. P. Golewar for respondent no. 4 referred to *supra*, maintaining rest of the judgment as it is.

15. Having regard to the submissions of the parties, recruitment to promotional post may be made keeping in view the decisions referred to hereinabove by learned counsel for appellant – plaintiff.

16. With aforesaid, second stands disposed of.

SUNIL P. DESHMUKH, J.

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