

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.
WRIT PETITION NO.2154 OF 2018**

Nilesh Triyambak Pasarkar ... Petitioner

Vs

The State of Maharashtra & Ors. ... Respondents

Mr.S.B. Talekar i/b Talekar & Associates for the Petitioner
Mr.Amit Shastri, AGP, for the Respondent No.1
Mr.Rahul Nerlekar with Mr.N.C. Walimbe with Mr.Pavan S. Patil for
Resp. Nos.2 & 3

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

**JUDGEMENT RESERVED ON: JULY 18, 2019
JUDGEMENT DELIVERED ON: JULY 30, 2019**

JUDGEMENT (Per Akil Kureshi, J.):

1. We had heard the learned Counsel for the parties for final disposal of the petition. The petitioner has challenged the impugned communication dated 3.3.2018 issued by the In-Charge Principal Judge, City Civil Court, Bombay, conveying to the petitioner the decision of the High Court not to allow the petitioner to join the duty on the establishment of the said Court.

2. Brief facts are as under:

An advertisement was issued on 8.7.2013 inviting eligible candidates to apply to various Clerical positions in the Courts

subordinate to the High Court of Bombay. In response to such advertisement, the petitioner applied for the post of Junior Clerk. His first preference of posting was City Civil Court, Mumbai. The petitioner appeared in the written examination as well as typing test followed by the oral interview. On the basis of his performance during such tests, the petitioner was selected. The petitioner was placed at serial No.9 in the waitlist of 104 candidates prepared for the post of Clerk-Typist on the establishment of the Bombay City Civil and Sessions Court which was notified on the notice board on 17.11.2014. The list would be valid for a period of two years. The validity of the list was extended by one year under notice dated 16.11.2016. By a further notice dated 30.10.2017, it was extended by a further period of one year.

3. The petitioner was offered appointment to the post of Clerk cum Typist on the establishment of Bombay City Civil and Sessions Court under order dated 5.10.2017. Such appointment would be subject to terms and conditions contained therein. The relevant conditions being 2, 7 and 8 are reproduced hereinbelow:

“2. Your appointment shall be subject to Rules/Circulars as may be issued from time to time by the Hon’ble High Court

and on such terms & conditions as may be decided by the Hon'ble Principal Judge, Bombay City Civil & Sessions Court, Gr.Bombay.

7. You will have to submit declaration stating that you have not taken any dowry (those male candidates who have married on or after 20/10/2005) as per provisions of Rule 3(4) (I) of the Maharashtra Dowry Prohibition Rule, 2003 and declaration (Form-A) as per provisions of rule 4 of the Maharashtra Civil Service (Small Family Declaration) Rule, 2005.

8. You will have to submit your consent and willingness by way of undertaking on the terms & conditions fixed by this office."

4. As per Condition No.7 of the appointment order, the petitioner had to submit a declaration stating that he had not taken any dowry as per the provisions of Rule 3(4)(i) of Maharashtra Dowry Prohibition Rules, 2003 and Declaration Form A as per the provisions of Rule 4 of the Maharashtra Civil Services (Small Family Declaration) Rule, 2005. As we would see later, such declaration would have to be signed by the wife, father and the father-in-law of the candidate. The petitioner was provided a proforma for making such a declaration. According to the petitioner, soon after his marriage on 28.4.2015, on account of some misunderstanding, his wife had left matrimonial home on 12.7.2015 and thereafter, despite efforts, there was no immediate

reconciliation. The wife had in fact subsequently filed an FIR before Balapur police station on 28.11.2016 alleging harassment and dowry demand by the petitioner. On account of these disputes between the husband and wife, the petitioner was unable to make a declaration duly supported by the wife, as required by the administration. The petitioner had also written to the Registrar, Bombay City Civil and Sessions Court on 30.10.2017 pointing out that barely within two months of the marriage, there was separation between him and his wife. She had filed a police complaint as well as proceedings under the Protection of Women from Domestic Violence Act against him and his family members. Under the circumstances, he was unable to give the necessary declaration. He may, therefore, be exempted from filing the same. The petitioner was conveyed by the administration under the impugned communication dated 3.3.2018 that he cannot be allowed to join the duties on the establishment of the City Civil Court, Bombay. The petitioner has, therefore, filed this petition challenging the said communication. His prayer is that he may be allowed to join duty as per his order of appointment.

5. Appearing for the petitioner, learned Counsel Mr.Talekar raised following contentions:

- i) There is no requirement for the employees of the City Civil Court to make a declaration in terms of Rule 3(4)(i) of the Maharashtra Dowry Prohibition Rules, 2003.
- ii) Counsel pointed out that the High Court has inserted Rule 23A in the Bombay High Court (Conduct) Rules, 1989 by way of amendment dated 20.10.2005 which Rule requires such a declaration to be made. However, the service conditions of the employees of the subordinate Courts are not governed by the said Rules. The service conditions of the employees of the City Civil Court, Bombay, are governed by the set of Rules contained in the Civil Manual. There is no amendment in the Civil Manual similar to Rule 23A of the Bombay High Court (Conduct) Rules. The declaration in question, therefore, could not have been insisted upon.
- iii) Counsel further submitted that even otherwise, the failure on the part of the petitioner to make such a declaration could not result into denial of appointment as per his performance in the recruitment tests.

iv) Counsel submitted that the petitioner had not demanded any dowry from his wife. On account of differences between the husband and wife, the wife was not willing to sign any such declaration. Even the FIR filed by the wife against the husband and other relatives, did not allege acceptance of dowry. It only refers to a demand being made by them.

v) It was contended that no such requirement is imposed in various District Courts.

vi) The Counsel submitted that subsequently, all disputes between the husband and wife have been resolved. The couple has opted for a mutual consent divorce which has been granted by the competent Court. All allegations have been mutually withdrawn. Presently, therefore, the petitioner is unable to give any declaration duly signed by his wife since she has already obtained divorce and the marriage is annulled. A copy of the judgment dated 19.6.2019 passed by the learned Civil Judge, Senior Division, Buldhana, dissolving the marriage between the petitioner and the wife is produced on record.

vii) The Counsel relied on various decisions reference to which will be made later.

6. On the other hand, the learned AGP opposed the petition contending that the requirement of declaration flows from the letter of appointment which also specified that the appointment would be subject to Rules and Circulars as may be issued from time to time by the High Court regarding terms and conditions of his service. He drew our attention to a Circular dated 23.11.2005 issued by the High Court making requirement of such a declaration compulsory for the staff of subordinate Courts. He, therefore, submitted that the petitioner cannot secure appointment unless he made the declaration. His letter of appointment was, therefore, correctly cancelled when he failed to satisfy this requirement. He further submitted that by now, the waitlist has expired and fresh selection process has commenced and a select cum waitlist has been prepared to the extent of available vacancies. The petitioner in any case, therefore, cannot be accommodated on the basis of his previous selection.

7. As noted, the letter of appointment of the petitioner contained a clause that the appointment will be subject to Rules

and Circulars as may be issued by the High Court from time to time and on such terms and conditions as may be decided. Clause 7 of the conditions of appointment required him to submit a declaration of not having taken dowry as per the provisions of Rule 3(4)(i) of Maharashtra Dowry Prohibition Rules, 2003. The Counsel for the petitioner had argued that this condition is not contained in the Recruitment Rules nor was mentioned in the advertisement inviting applications. According to him, such a clause was added in the Bombay High Court (Conduct) Rules under the newly inserted Rule 23A, which would not apply to the employees of the subordinate Courts.

8. It is undoubtedly true that the recruitment and service conditions of the employees of the Bombay City Civil and Sessions Court are governed by the provisions contained in the Civil Manual. Appendix A to the Manual contains set of Rules as envisaged in Recruitment Rules for recruitment to Group C and Group D services in subordinate Judicial Service. It is not the case of the respondents that the Civil Manual was amended so as to include requirement of any such declaration. However, the respondents have brought to our notice a Circular dated

23.11.2005 issued by the High Court providing a declaration as per Rule 3(4)(i) of the Maharashtra Dowry Prohibition Rules, 2003 to be made by all the employees of the subordinate Courts. The contents of the Circular read thus:

“CIRCULAR

On perusing the judgement and order dated 02.05.2005 in Writ Petition No.499/97 (2005 AIR S.C.W. 2517) passed by the Hon'ble Supreme Court of India and as per directions issued by the Hon'ble Apex Court therein, the Hon'ble the Chief Justice and the Judges have been pleased to direct that the provisions of Rule 3(4)(i) of the Maharashtra Dowry Prohibition Rules, 2003 shall be made applicable to all the staff members of the Subordinate Courts and every employee working on the establishment of the Subordinate Courts, if married after coming into force of this Rule, shall after his marriage furnish a declaration stating that he has not taken any dowry, to the head of the Department. Such declaration should be counter-signed by the wife and father and father-in-law, if alive, of such employee.”

9. The service conditions of the employees are governed by the provisions of the Civil Manual which would be in the nature of executive instructions and not in the nature of statutory Recruitment Rules. In exercise of superintending powers, the High Court, therefore, had ample authority to issue the said Circular which would be in the nature of executive instructions supplanting the service conditions of the employees of the subordinate Courts.

Even if the service conditions are governed by statutory rules, the executive instructions as long as they do not conflict with such statutory rules, would always be within the domain of the High Court to issue. The first contention of the Counsel for the petitioner that the condition imposed in the appointment order was inoperative or unauthorised, cannot be accepted.

10. Learned Counsel for the petitioner however relied on certain decisions reference to which would be necessary. Reliance was placed in the case of **Ramana Dayaram Shetty vs. international Airport Authority of India and Others**¹ to contend that the standard of eligibility laid down in the notice cannot be departed arbitrarily or else the same would amount to the denial of equality of opportunity. Reliance was placed on the decision in the case of **Secretary, Department of Home Secretary, A.P. and others vs. B.Chinnam Naidu**² to contend that appointment or selection cannot be denied unless the same is based on some statutory provisions. Reliance was placed on the decision in **K.Manjusree vs. State of Andhra Pradesh & anr.**³ in which it was observed that no conditions of eligibility can be added thereby

1 (1979) 3 SCC 489

2 (2005) 2 SCC 746

3 (2008) 3 SCC 512

changing the rules of the game once the selection process has begun. Reference was made to the decision in **Sarva Uttar Pradesh Gramin Bank & Others vs. Manoj Kumar Chak**⁴ in which it was observed that the persons cannot be denied appointment on the basis of any disqualification not found place in the recruitment rules.

11. None of these decisions, however, would govern the present situation. We have already held that the executive instructions issued by the High Court through its Circular dated 23.11.2005 held the field when the recruitment process in question had commenced. This Circular required the staff of the subordinate Courts to make a necessary declaration of not having taken dowry. The requirement that a candidate being appointed on any post in such establishment must also make declaration was thus, concomitant to the fundamental requirement noted above. This, therefore, is not a case where a condition not being a part of the governing recruitment rules, was being imposed, nor is a case where the rules of game are sought to be changed after the game has begun.

4 (2013) 6 SCC 287

12. The learned Counsel for the respondents may also be correct in pointing out that there was no provision for exempting the petitioner from filing such a declaration. However, the moot question is what would be the effect of the failure of the petitioner to make such a declaration. This question would have to be answered having regard to the relevant facts and subsequent developments.

13. The respondents had insisted on the petitioner making a declaration that he had not taken dowry and further that such declaration should be counter-signed by his wife, father and father-in-law, if alive. In the service rules governing the employees of the City Civil and Sessions Court, there is no consequence of an employee not filing such a declaration. The Circular issued by the High Court dated 23.4.2005 requiring all the staff members of the subordinate Courts to make such a declaration also does not prescribe the consequences of the failure of an employee to make such a declaration. Rule 23A of the Bombay High Court (Conduct) Rules also requires making of a declaration without providing the consequences of failure to do so. Such a declaration, therefore, would only enable the employer to gather necessary facts

concerning its male employees in connection with the dowry acceptance. If such dowry demand has been made and dowry accepted, the general principles of misconduct and employer-employee relationship would take over the situation from then on. If an employee fails to make such declaration counter-signed by his wife, father or father-in-law, the employer may be justified in gathering reasons behind it and if sufficient material is available, to proceed departmentally for having taken dowry. The employee would have proper opportunity to defend himself in such proceedings. However, mere failure to produce such declaration duly supported by his wife, etc. would not automatically establish that the employee had accepted dowry. Mere non-filing of a declaration that too for special reasons automatically, therefore, may not result into adverse consequences.

14. The situation can be looked from a slightly different angle. The requirement is that not only the male married employee should make a declaration that he has not accepted the dowry, such a declaration should also be counter signed by his wife, father and father-in-law. There could be multiple reasons why anyone of these persons may refuse to counter-sign such

declaration. Whether dowry was demanded or not, whether accepted or not, if the husband and wife have uneasy relations, by the time, the husband receives an offer of appointment by the Government organisation, the wife may refuse to sign the declaration simply to frustrate his attempt to get a decent employment. Similar situation may arise in the case of the father-in-law or even in case of the father of the employee. For example, if the couple have got married against the wishes of either the father of the wife or of the husband, it can be easily envisaged that such a person not happy with the marriage, may only with a view to spite the husband, refuse to counter sign the declaration. We do not think that this requirement can be enforced in such a manner that by mere failure to provide declaration counter-signed by wife, father and father-in-law for any such genuine reason on the part of the job aspirant, he could be denied the opportunity to serve the organisation, though he may have been found meritorious.

15. In the present case, as we have noted, barely two months after the marriage, matrimonial disputes led to the wife to leave the matrimonial home. When the petitioner received the offer of

appointment, the relations between the husband and wife were sour. The wife obviously, therefore, would not give such a declaration, so also her father. She had in fact filed a complaint alleging the dowry demand by the husband and his relatives. The complaint we may recall was for demand of dowry and not acceptance. Be that as it may, this complaint remained undecided. The husband never got an opportunity to prove himself innocent of the charges levelled against him. The husband and wife decided to bury the disputes. They applied for mutual consent divorce which was granted by the concerned Court. All allegations against each other stood withdrawn.

16. Under the circumstances, even at the outset, in the facts and circumstances of the present case, the petitioner could not have been denied appointment pursuant to the order dated 5.10.2017 simply because he failed to provide a necessary declaration counter-signed by his stated relatives.

17. We have perused the decisions of the Supreme Court in the case of **Enforcement and Implementation of Dowry Prohibition Act, 1961, In Re**⁵ which is the genesis for the insistence on the

5 (2005) 4 SCC 565

declaration. However, nothing stated by us in this judgement runs contrary to the said decision. In the said decision, the Supreme Court had given suitable directions for proper implementation of the dowry prohibition law requiring collection of information whether any of the male persons seeking employment in the government or those already in service had taken dowry and if taken, the same has been returned to the wife or not.

18. Before giving final directions, we must be cognisant of the further developments as pointed out by the Counsel for the High Court administration. It is true that the life of the waitlist in question has expired. However, the petitioner was issued order of appointment when the waitlist was operative. He was not allowed to join duty for the reasons which we have found unjustified. We are, therefore, not asking the respondents to operate a waitlist which has expired. We are only asking the respondents to offer appointment to the petitioner on the basis of the appointment order already issued by the administration which was wrongly denied to him. While doing so, we must be conscious of the fact that as pointed out by the learned Counsel for the High Court, fresh selection process has commenced and select cum waitlist has

been prepared. The petitioner, therefore, can be appointed on the post of Clerk cum Typist without disturbing the candidates, who are already placed in select cum waitlist.

19. Under the circumstances, the petition is disposed of with following directions:

- i) The respondents shall appoint the petitioner to the post of Clerk cum Typist on the establishment of Bombay City Civil and Sessions Court on the first available vacancy without disturbing any of the candidates who are already placed in the select cum waitlist pursuant to the fresh selection process undertaken by the administration.
- ii) His appointment would be effective from the actual date of taking charge without any benefits for the past period.

20. Writ Petition is disposed of accordingly.

(S.J. KATHAWALLA, J.)

(AKIL KURESHI, J.)