

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

WA.NO. 2014 OF 2015 () IN WP(C).24461/2014

AGAINST THE ORDER/JUDGMENT IN WP(C) 24461/2014
OF HIGH COURT OF KERALA DATED 17-08-2015

APPELLANT(S)/ADDITIONAL 5TH RESPONDENT:

JAMEELA
DEPUTY GENERAL MANAGER
THE THRISSUR DISTRICT CO-OPERATIVE BANK LTD
KOVILAKATHUMPADAM, THRISSUR.

BY ADV. SRI.P.N.MOHANAN

RESPONDENT(S)/PETITIONER/RESPONDENTS 1 TO 4:

1. JAMES JOSEPH V
S/O.V.A.OUSEPH, VADAKKUM, AMBIZHAPPILLY HOUSE
CHITILAPPILLY PO, THRISSUR DISTRICT, PIN 680 551.

2. THE THRISSUR DISTRICT CO-OPERATIVE BANK LTD.
REPRESENTED BY GENERAL MANAGER, KOVILAKATHUMPADAM
THRISSUR 680 020.

3. KERALA PUBLIC SERVICE COMMISSION
PATTOM, THIRUVANANTHAPURAM, PIN 695 004
REPRESENTED BY ITS SECRETARY.

4. KERALA PUBLIC SERVICE COMMISSION
CHEMBUKKAVU, THRISSUR, PIN 680 020
REPRESENTED BY ITS DIRECTOR OFFICER

WA.NO. 2014 OF 2015 () IN WP(C).24461/2014

5. THE JOINT REGISTRAR OF CO-OPERATIVE SOCIETIES
THRISSUR 680 001.

R2 BY ADV. SRI.GEORGE POONTHOTTAM

R1 BY ADV. SRI.K.K.MOHAMED RAVUF

R BY SRI.DEVAN RAMACHANDRAN

R BY SENIOR GOVERNMENT PLEADER SHRI P.I. DAVIS

R BY SRI.P.C.SASIDHARAN, SC, KPSC

R BY SRI.D.SREEKUMAR, SC, THRISSUR DIST. CO.OP. BANK

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
30.09.2015 ALONG WITH WA. 2016/2015, THE COURT ON 09.10.2015
DELIVERED THE FOLLOWING:

“C.R.”

ASHOK BHUSHAN, C.J.

and

A.M. SHAFFIQUE, J.

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W.A. Nos.2014 & 2016 of 2015

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Dated this the 09th day of October, 2015

J U D G M E N T

Ashok Bhushan, C.J.

These two Writ Appeals have been filed against the common judgment dated 17.08.2015 by which the Writ Petition filed by the 1st respondent herein has been allowed. W.A. No.2016 of 2015 has been filed by the 1st respondent to the Writ Petition No.24461 of 2014, i.e., Thrissur District Co-operative Bank Ltd and W.A. No.2014 of 2015 has been filed by the additional 5th respondent in the Writ Petition. Parties shall be referred to as described in the Writ Petition.

2. Brief facts giving rise to the Writ Petition are: The 1st respondent, Thrissur District Co-operative Bank (for short, “the Bank”) is the Central Society registered under the Kerala Co-operative Societies Act, 1969 (for short, “the 1969 Act”). There are three sanctioned posts of Dy.General

Manager in the Bank. One vacancy in the post of Dy.General Manager was notified by the Bank to the Kerala Public Service Commission (for short, "the Commission") vide letter dated 20.12.2003 for direct recruitment. After reporting of the said vacancy, the Commission issued notification dated 13.11.2009 in two parts; Part I and Part II. Part I (category No.404/09) mentioned one vacancy of Deputy General Manager in the Bank along with other vacancies in the different banks by direct recruitment. By part II, (category No.405/09) the Bank invited applications for anticipatory vacancies in the banks which are to be filled up by direct recruitment from qualified employees of the member societies/primary societies affiliated to the concerned District Co-operative Banks. On the basis of the above notification, petitioner and other candidates submitted their applications against both the Notifications, i.e., Part I and II. The Commission published a rank list against the notification dated 13.11.2009 for both Part I and II. In both the rank list petitioner was at serial No.2. The first person in the rank list, P.R.Ravichandran could be given appointment as a

direct recruit after an order of this Court in W.P(C) No.17209 of 2011 dated 05.03.2012. Order of this Court was challenged before the Apex Court by the Bank which appeal was dismissed and consequently, the 1st person in the rank list could be appointed in the Bank only on 02.09.2014. After preparation of the rank list which was enforced with effect from 26.09.2011 at least nine vacancies arose in the Bank in the post of Dy.General Manager which vacancies were filled up by promotion. Petitioner who was at serial No.2 in the rank list filed the Writ Petition praying for the following reliefs:

“(i) issue a writ of mandamus or any other appropriate writ, order or direction, directing the 1st respondent to report the 3 vacancies of Deputy General Manager to the 3rd respondent.

(ia) to declare that the promotions given to the post of Deputy General Manager to the vacancies which arose from 01.12.2012 onwards, including the 5th respondent overlooking the claim of the petitioner, is illegal.

(ib) issue a writ of mandamus or any other appropriate writ, order or direction, directing the 1st respondent to report one vacancy of Deputy General Manager to respondents 2 and 3 forthwith.

(ii) issue writ of mandamus or any other appropriate writ, order or direction directing the 3rd respondent to advise the name of the petitioner to be appointed to the post of Deputy

General Manager in the 1st respondent bank.

(iii) issue a writ of mandamus or any other appropriate writ order or direction, directing the 1st respondent bank to appoint the petitioner as Deputy General Manager as per advice of the respondent No.3.”

3. In the Writ Petition counter affidavit was filed by the 1st respondent pleading that the petitioner has no right to claim appointment on the basis of the rank list dated 26.09.2011, since on the basis of the rank list appointment of P.R.Ravichandran has already been made as a direct recruit and the vacancy for which the rank list was prepared having filled, the rank list has come to an end. It was pleaded that there being only three sanctioned posts of Dy.General Manager, the first post is to be filled up by promotion, second by direct recruitment and the third by promotion. One post having been filled by direct recruitment, there is no vacancy for direct recruitment which can be offered to the petitioner.

4. The 5th respondent also filed a counter affidavit claiming that the 5th respondent is working as Dy.General Manager from 01.12.2014 on a vacancy which arose on

29.11.2014. The first post having been filled up by promotion and the second post by direct recruitment, there is no vacancy on which the petitioner can be appointed. It was pleaded that Rule 186 of the Kerala Co-operative Societies Rules, 1969 (for short, "the 1969 Rules") providing qualification for appointment in the post of Dy.General Manager having been amended with effect from 26.11.2014, petitioner cannot be appointed on a vacancy which arose subsequent to the amendment of the Rules.

5. The Assistant Registrar of Co-operative Societies also filed a counter affidavit.

6. Petitioner filed reply affidavits.

7. Learned Single Judge after hearing the parties held that petitioner is entitled to be appointed on the basis of the rank list dated 26.09.2011. The Bank committed illegality having filled all the vacancies which arose after publication of the rank list by promotion whereas the vacancies are to be filled up in the ratio of 1:1, i.e., promotion:direct recruit. The rank list dated 26.11.2009 still continues to be in force which should be utilised for

appointment. Learned Single Judge held that promotion of the 5th respondent was illegal. The Bank was directed to report the vacancy of Dy.General Manager occupied by the 5th respondent to the Commission who shall advise candidates from the rank list. Following directions were issued by the learned Single Judge:

“In the above circumstances, it is declared that the vacancies in the post of Deputy General Manager in the 1st respondent bank were liable to be filled up applying the ratio of 1:1 between promotion and direct recruitment, on the substantive vacancies and that the candidates in the ranked lists are entitled to be appointed at least against the 1st and third vacancies which arose after 1.1.2012. It is also declared that the appointment of the 5th respondent by promotion against the vacancy earmarked for direct recruits is illegal. The 1st W.P(c) No.24461 of 2014-G 15 respondent is therefore directed to report the vacancy of Deputy General Manager occupied by the 5th respondent to the Public Service Commission before 8th September 2015; PSC shall thereupon advise the candidate from the ranked list in accordance with law without any delay and on such advice, 1st respondent Bank shall appoint him without any further delay.”

8. Both respondents 1 and 5 aggrieved by the judgment of the learned Single Judge have come up in these appeals.

9. We have heard Shri George Poonthottam, learned

counsel for the appellant-Bank, Shri P.N.Mohanan, learned counsel for the appellant in W.A. No.2014 of 2015, Shri Devan Ramachandran, learned counsel appearing for the respondent (writ petitioner), Shri P.C. Sasidharan and Shri G.Sreekumar, learned Standing Counsel for the Commission and Shri P.I.Davis, learned Senior Government Pleader for the State.

10. Shri George Poonthottam, learned counsel for the Bank contended that the rank list published by the Commission on 26.09.2011 stood exhausted after the appointment of first candidate in the rank list, the rank list being prepared against only one vacancy reported by the Bank and no further appointment can be made from the rank list. It is submitted that there being only three posts of Dy.General Manager, the first post will go to promotee, second post will go to the direct recruit and the third post will go to the promotee. The first post is held by a promotee, the second post is held by direct recruit and hence the Bank rightly promoted the 5th respondent on the third post of Dy.General Manager. There is no post meant for direct

recruit out of the three posts existing in the Bank and filled up in the above manner. It is submitted that appointment by promotion and direct recruitment has to be made against the posts in the Bank and occurrence of vacancies has no relevance. It is submitted that the learned Single Judge has committed error in issuing directions to advise the petitioner.

11. Shri P.N.Mohanan, learned counsel for the appellant (5th respondent) submitted that the 5th respondent has been promoted to the third post which has to go to the promotee. Prior to promotion of the 5th respondent the third post was occupied by the promotees which promotions were never challenged by the petitioner. It is submitted that Rule 186 providing qualifications have been amended with effect from 26.11.2014 and the vacancy on which the 5th respondent was promoted on 01.12.2014 arose on 29.11.2014, i.e., after amendment of the Rules, hence petitioner has no right to claim the post occupied by the 5th respondent. Learned Single Judge committed error in declaring the promotion of the 5th respondent illegal.

12. Shri Devan Ramachandran, learned counsel for the petitioner refuting the submissions of the learned counsel for the Bank and 5th respondent contended that as per Rule 185(3) of the Rules, appointment of promotee and direct recruit has to be made on occurrence of vacancies which is the intendment of the Rules. It is submitted that number of sanctioned posts and cadre strength have no relevance with regard to making of appointment by promotion or direct recruitment and both promotee and direct recruit had to take their turn on occasion of arising a vacancy. It is submitted that after declaring the rank list by the Commission, 9 vacancies arose which all were filled up by the Bank by promotion without reporting to the Commission which is clearly illegal and against the statutory provisions. It is submitted that the rank list declared by the Commission on 26.09.2011 does not come to an end by advising a candidate at serial No.1 whereas all the vacancies arising during the currency of the rank list meant for direct recruitee has to be filled up from the rank list which was clearly stipulated in the notification issued by the Commission dated

13.11.2009. Rank list containing the name of the petitioner at serial No.2 was valid and the Bank ought to have filled up the vacancies which was meant for direct recruitment out of the rank list published by the Commission. It is submitted that the promotion of the 5th respondent was illegal and rightly declared so by the learned Single Judge. Replying the submissions of the learned counsel for the 5th respondent, it is contended that amendment of the Rules on 26.11.2014 has no effect on the rank list prepared by the Commission. It is submitted that the rank list shall continue to operate despite the amendment of the Rules on 26.11.2014. He further submitted that vacancies which ought to have been filled up by direct recruitment arose prior to the amendment of the Rules which vacancies were never reported by the Bank to the Commission and the claim of the petitioner cannot be denied on the basis of the amendment of Rules on 26.11.2014.

13. Learned counsel for the parties have placed reliance on various judgments of the Apex Court and this Court which shall be referred to while considering the

submissions in detail.

14. We have considered the submissions of the learned counsel for the parties and perused the records. From the submissions made by the learned counsel for the parties and the materials on record, the following are the issues which arose for consideration:

1. Whether Rule 185(3) of the 1969 Rules contemplates filling up of the vacancies in the ratio of 1:1, i.e., promotee and direct recruits on occurrence of vacancies or the posts are to be filled up in the ratio of 1:1 according to number of posts?

2. Whether the rank list prepared by the Commission for one vacancy of Dy.General Manager shall stand exhausted on filling up of the one post of Dy.General Manager by appointment of the candidate at serial No.1 and the petitioner had no right to claim any appointment on the basis of the said rank list?

3. Whether the rank list shall stand exhausted on filling up of one vacancy for which the rank list was prepared or it shall continue to operate during the period of currency of the rank list and it was obligatory for the Bank to report vacancies to be filled by direct recruits during the currency of the

rank list?

4. Whether the Bank acted contrary to the statutory requirements in not reporting vacancies in the ratio of 1:1, i.e., promotee : direct recruit on occurrence of vacancies and committed error in filling up all the vacancies arising after publication of the rank list by promotion?

5. Whether the learned Single Judge committed error in issuing directions to the Bank to report one vacancy to be filled up by direct recruitment?

6. Whether in view of the amendment to Rule 186 with effect from 26.11.2014 any vacancies arising thereafter cannot be filled up from the rank list prepared on the basis of the unamended Rules?

All the issues being interconnected are taken together.

15. The first issue which needs to be answered is what is contemplated by Rule 185 regarding apportionment of the post or vacancies as per quota 1:1, i.e., promotee:direct recruit. Whether in the post of Dy.General Manager ratio of 1:1, i.e., promotee:direct recruit is to be maintained as per occurrence of vacancies. In this context the provisions of the 1969 Act and 1969 Rules have to be

looked into.

16. As per Section 80, all appointments for which direct recruitment is to be resorted for the post as mentioned in schedule 1 shall be made from the rank list of the candidates furnished by the Commission. The Bank is included in Schedule I. Rule 185 deals with promotion. Relevant portions of Rule 185 is quoted below:

“185. Promotion.- (1) Subject to the provisions of sub-rules (2), (3) and (4), appointments to the categories of posts in a society, other than those mentioned in sub-rules (2), (3) and (4), shall be made by promotion, on the basis of seniority in the feeder category. The feeder categories for this purpose shall be specified by the society by framing suitable regulations, with the approval of the Registrar.

(2) Substantive vacancies in the following posts shall be filled up by promotion and direct recruitment in the ratio of 3:1 namely:-

(a) Accounts Officer in the Kerala State Co-operative Bank Ltd.

(b) Branch Manager and equivalent posts in the District Co-operative Banks.

(iii) Deputy Manager in the Kerala State Co-operative Agricultural and Rural Development Bank.

(iv) Assistant Secretary/Manager and equivalent posts in Primary Co-operative Societies and Urban Banks having a deposit of more than 10

crores.

Provided that at no point of time the number of direct recruits shall exceed twenty five per cent of the total strength of the respective posts mentioned above.

(3) Substantive vacancies in the following posts shall be filled up by promotion and direct recruitment in the ratio 1:1 namely:-

(i) Deputy General Manager in the Kerala State Co-operative Bank and in the District Co-operative Bank.

(ii) Administrative Officer and Regional Manager and equivalent posts in Kerala State Co-operative Agricultural and Rural Development Bank Ltd."

As per Rule 185(1) appointments to the categories of posts in a society other than those mentioned in sub-rules (2) and (3) shall be made by promotion. As per Rule 185(2) substantive vacancies in the posts mentioned there are to be filled up by promotion and direct recruitment in the ratio of 3:1 whereas sub-rule (3) provides that substantive vacancies in the posts shall be filled up by promotion and direct recruitment in the ratio of 1:1. What is intended by sub-rule (3) of Rule 185 regarding filling up of posts/vacancies by promotion or direction recruitment is the main bone of contention between the parties. According to

the learned counsel for the 1st respondent (Bank) in filling the post of Dy.General Manager, the ratio of 1:1 is to be maintained looking to the number of posts of Dy.General Manager whereas according to the learned counsel appearing for the writ petitioner the ratio of 1:1 is to be followed on occurrence of substantive vacancies. A perusal of sub-rule (3) of Rule 185 indicates that the said sub-rule begins with the words “substantive vacancies in the following posts shall be filled up by promotion and direct recruitment in the ratio of 1:1.....”. The same phraseology has been used in sub-rules (2) and (4) of Rule 185. A plain reading of the above sub-rules indicate that filling up of vacancies by promotion and direct recruitment is to be undertaken on occurrence of substantive vacancies. Thus as and when substantive vacancy arises in the post mentioned therein, the post shall be filled up by promotion and direct recruitment in the ratio of 1:1. No other meaning of the words is possible. The contemplation in Rule 185(3) is clear that the ratio of 1:1 by promotion and direct recruitment is to be followed as day and night on occurrence of substantive

vacancies. The said seriatem is not to be broken. It is well established that it is for the Legislature to lay down a particular scheme for filling up of the posts/vacancies and when a statutory scheme has been laid down the said scheme is to be followed in its letter and spirit. Shri George Poonthottam, learned counsel for the Bank submitted that what is contemplated is filling up of the post and the post of Deputy General Manager cannot be filled up by direct recruitment by more than 50% since the ratio is 1:1, therefore while filling up the vacancies the question to be looked into is as to what is the ratio in the cadre of Dy.General Manager and whether 50% for direct recruitment is complete or not. He has referred to the judgment of the Apex Court in **R.K.Sabarwal and Others v. State of Punjab and Others** ([1995] 2 SCC 745). In the above case, the Apex Court had occasion to consider the application of the rule of reservation for members of the Scheduled Castes and Backward Classes as per the Rules, viz., the Punjab Service of Engineers, Class I, P.W.D. (Irrigation and Branch) Rules, 1964. In the above context the Apex Court had

occasion to consider the expressions “posts” and “vacancies”. The following was laid down in paragraph 6:

“6. The expressions "posts" and "vacancies" often used in the executive instructions providing for reservations, are rather problematical. The word "post" means an appointment, job, office or employment. A position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.”

In the above context the Apex Court held that since the percentage of reservation has to be worked out in relation to the number of posts which forms the cadre strength the concept of vacancy has no relevance in operating the percentage of reservation. The Apex Court had referred to the earlier Larger Bench judgment of the Apex Court in ***Sawhney v. Union of India*** (AIR 1993 SC 477) which has been quoted in paragraph 7 which is quoted below:

"Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and

Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e. 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes, At a given point of time, let us say the number of members of OBCs in the unit/service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, than the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500 i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit as the case may be".

From the above it is clear that observations made by the Apex Court in paragraph 6 were in the context of operation of percentage of reservation which percentage is referable to cadre strength. Hence for operating percentage of

reservation, the Apex Court held that the concept of vacancies has no relevance. There cannot be any dispute to the above proposition of law laid down by the Apex Court. But Rule 185(3) does not provide for any percentage on the post or cadre rather Rule 185(3) relates to filling up of substantive vacancies in the ratio of 1:1. Rule 185(2) which provides for filling up of substantive vacancies in certain other posts by promotion and direct recruitment in the ratio of 3:1 contains a proviso which is to the following effect:

“Provided that at no point of time the number of direct recruits shall exceed twenty five percent of the total strength of the respective posts mentioned above.”

Addition of the above proviso in Rule 185(2) and there being no such proviso in 185(3), clearly indicate that while filling up of substantive vacancies under Rule 185(2) by promotion and direct recruitment, cadre strength has to be looked into since number of direct recruits are not to exceed 25% of the total strength. There being no such proviso in Rule 185(3) nor any such condition in sub-rule (3) it is clear that the rule making authority never contemplated cadre strength or the number of posts while deciding as to whether a particular

vacancy is to be filled up by promotion or direct recruitment. Vacancy is to be filled up in the ratio of 1:1, clearly means that the vacancies have to be allocated to the stream of promotion and direct recruitment one after another in the order in which they occur in point of time. As per the Rule promotion to the post of Dy.General Manager has to be made by the Bank whereas for direct recruitment the vacancy has to be reported to the Commission. Operation of Rule 185(3) thus has to be followed in the simple manner, i.e., filling up of the vacancy first by promotion, then by direct recruitment, then by promotion, then by direct recruitment and so on. In view of the above we come to the conclusion that Rule 185(3) contemplates filling up of vacancies one by one in the ratio of 1:1 by promotion and direct recruitment. The Bank is not entitled to take its own decision disregarding the mechanism provided in Rule 185(3) for deciding as to whether a particular vacancy has to be filled up by promotion or direct recruitment. In the present case it has come on record that after publication of the rank list on 26.09.2011, 9 vacancies arose in the post of Dy.General Manager. In

ground B of the Writ Petition, the petitioner has given details of 8 vacancies which arose from 01.01.2012 to 01.08.2014 in the post of Dy.General Manager. One more vacancy arose on 29.11.2014 which was filled up by promotion of the 5th respondent. Thus in the total 9 vacancies arose after publication of the rank list and, all vacancies were filled up by promotion by the Bank. The action of the Bank in filling up all the vacancies only by promotion is clear breach of Rule 185(3). The Bank could not have filled up all the vacancies by promotion. The vacancies ought to have been reported to the Commission in the ratio of 1:1 as mandated by Rule 185(3). We are thus of the view that the learned Single Judge did not commit any error in directing the Bank to report the vacancy for direct recruitment since none of the above vacancies were reported to the Commission. The Bank misinterpreted the Rule to the benefit of the promotees which action is unsustainable.

17. The issue next to be considered is as to whether the rank list published by the Commission on 26.09.2011 shall come to an end after advise is made against one

vacancy of direct recruitment which was notified on 13.11.2009. The submission which has been pressed by Shri George Poonthottam is that on filling up of one vacancy for which requisition was made to the Commission by the Bank, the rank list stand exhausted and could not have been utilised for filling up of any subsequent vacancy which arose after the publication of the rank list.

18. Before we proceed to consider the submission, it is necessary to look into the notification issued by the Commission on 13.11.2009. By notification dated 13.11.2009 Part I, 10 vacancies in different District Co-operative Banks including the 1st respondent-Bank were advertised. Note 1 of the notification is quoted below:

“NOTE:-1. Separate ranked lists will be prepared for each District Co-operative Bank in pursuance of this notification. The ranked lists thus prepared and published by the Commission shall remain in force for a minimum period of one year subject to the condition that the said list continue to be in force till the publication of new lists after the expiry of the minimum period of the one year or till the expiry of three years whichever is earlier. Candidates will be advised for appointment against the aforesaid vacancies and also against the vacancies, if any reported during the currency of the lists.

2. The selection in pursuance of this notification will be

made on district wise basis.”

A perusal of the Note indicate that it was contemplated that the rank list shall remain in force for a minimum period of one year subject to the condition that the said list will be in force till the publication of new lists after the expiry of the minimum period of one year or till the expiry of three years whichever is earlier. However, the last sentence in the Note indicate that candidates will be advised for appointment against the aforesaid vacancies and also against the vacancies, if any reported during the currency of the lists. Thus reporting of vacancies for direct recruitment during the currency of the rank list was contemplated by the notification itself. Notification cannot be read to mean that rank list was confined to only one post which was advertised and after appointment on the said post, the rank list shall come to an end. Shri George Poonthottam has relied on the judgment of the Apex Court in **State of Punjab v. Raghbirchand** ([2002] 1 SCC 113) in which case notification was issued for one post. The first candidate in the select panel accepted appointment, joined and later resigned. The

issue was as to whether the panel ceased to exist and and outlived its utility. The following was held by the Apex Court in paragraph 4:

“ 4. We have carefully considered the submissions of the learned counsel on either side. In our view, the judgment rendered by the learned Single Judge as well as the Division Bench of the Punjab and Haryana High Court cannot be sustained. As rightly contended for the appellant State, the Notification issued inviting applications was in respect of one post and the first candidate in the select panel was not only offered but on his acceptance of offer came to be appointed and it was only subsequently that he came to resign. With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select panel prepared, the panel ceased to exist and has outlived its utility and, at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently. The Circular Orders dated 22.3.1957, in our view, relates to select panel prepared by the Public Service Commission and not a panel of the nature under consideration. That apart, even as per the Circular Orders as also the decision relied upon for the first respondent, no claim can be asserted and countenanced for appointment after the expiry of six months. We find no rhyme or reason for such a claim to be enforced before Courts, leave alone there being any legally protected right in the first.”

In the above case there was no such stipulation that the rank

list shall continue till the preparation of the next list or for a period of one year or three years. The said case was clearly distinguishable and not applicable to the facts of the present case. To the similar effect is another judgment of the Apex Court reported in **Thrissur District Co-op. Bank Ltd. v. Delson Davis** (2002 (1) KLT 852) where with regard to one vacancy for the post of Data Entry Officer for which the list was prepared and the person at rank No.1 was appointed but he resigned from service. Second person in the panel claimed right which was repelled. The following was observed in paragraph 3:

“3. We fail to understand the reasoning of the High Court in this regard. When once the selection process is complete and appointment had been made, that process comes to an end and if any vacancy arises on the appointee having joined the post leaves the same, it must be treated as a fresh vacancy and fresh steps in accordance with the appropriate rules should be taken. This view is fortified by the judgment of this Court in *State of Punjab v. Raghubir Chand Sharma & Anr.* (JT 2001 (9) SC 266). Any temporary arrangement made during the interregnum will not entitle respondent No. 1 to claim for permanent employment. In that view of the matter, we allow this appeal, set aside the order made by the High Court and dismiss the Writ Petition filed by the respondent No. 1.”

Though in the above cases selection undertaken was for only one post but there was no such contemplation that the select list shall remain current for certain period, nor there was such stipulation that vacancies arising during the currency of the period is to be reported. In the present case the advertisement contained Note I as stated above which provided for currency of the select list and also contemplated reporting of the vacancies during the currency of the list. The above two judgments of the Apex Court relied on by Shri George Poonthottam are not applicable to the facts of the present case.

19. It is also relevant to refer to Rule 14 of the Kerala Public Service Commission Rules of Procedure, 1976 which also contemplated that vacancies which were reported to the Commission during the currency of the rank list can be advised. Rule 14 is quoted below:

“14. The Commission shall advise candidates for all the vacancies reported and pending before them and the vacancies which may be reported to them for the period during which the ranked lists are kept alive in the order of priority, if any, and in the order of merit subject to the rules of reservation and rotation, wherever they are applicable.”

In view of the above, we are not persuaded to accept the submission of learned counsel for the Bank that the rank list came to an end after the appointment of the first rank holder. The rank list was to continue till its natural life and all vacancies arising during the currency of the rank list to be filled up by direct recruitment were required to be reported to the Commission. Thus submission of the learned counsel for the Bank that the rank list dated 26.09.2011 could not have been utilised by the petitioner cannot be accepted.

20. As noted above, in all the nine vacancies which arose after the publication of the rank list, the last vacancy arose was on 29.11.2014 on which vacancy the 5th respondent, Jameela was appointed. We have held that filling up of the substantive vacancies has to be made in the ratio of 1:1, one promotee, one direct recruit, then one promotee one direct recruit and so on. The Commission has filed counter affidavit where it has been pleaded in paragraph 8 that candidate with rank No.1 was advised on 27.04.2012. It has come on record that all vacancies which arose in the post of Dy.General Manager were filled up by the Bank by

promotion only. Petitioner filed the Writ Petition on 20.09.2014. Even after filing of the Writ Petition by the petitioner, the 5th respondent was promoted with effect from 01.12.2014. The 5th respondent was a party to the Writ Petition. The learned Single Judge in the judgment has held that promotion of the 5th respondent is illegal on the ground that vacancy ought to have been reported to the Commission for being filled up by direct recruitment. We fully endorse the view taken by the learned Single Judge that the vacancy which arose due to the retirement of Smt.K.K.Remani on 29.11.2014 was required to be reported to the Commission for being filled up by direct recruitment. Admittedly, even prior to the said vacancy, earlier vacancy was also filled up by promotion. We thus are of the view that at least the last vacancy which arose on account of the retirement on 29.11.2014 was required to be reported to the Commission for direct recruitment.

21. Now we come to the last issue as to whether after amendment of Rule 186(1)(ib) with effect from 26.11.2014 the rank list published on 23.09.2011 can be

utilised for filling up of the vacancies. Learned counsel for the 5th respondent vehemently contended that after the amendment of Rule 186 with effect from 26.11.2014 no appointment can be made on the basis of the rank list which was prepared on the basis of the Rules then in existence. Submission made by the learned counsel for the 5th respondent is that in view of the amendment to Rule 186(1)(ib), the petitioner is now no more qualified for being appointed on the post of Dy.General Manager. Rule 186(1)(ib) prescribes qualifications for different posts. For the post referred to in Rule 185(3) the qualification prescribed is mentioned in Rule 186(1)(ib) which is to the following effect:

“186(1)(ib). All posts to be filled up by direct recruitment under sub-rules (3) and (4) of Rule 185

(ii) Master's Degree in Business Administration or any other equivalent qualification, in Banking or Finance as the main subject, recognized by the Universities in the State or Membership of the Institute of Chartered Accountants of India, with experience of not less than 5 years in Managerial Supervisory Cadre in Kerala State Co-operative Bank/ Kerala State Co-operative Agricultural and Rural Development Bank/

District Co-operative
Bank/Nationalized
Banks/Scheduled
Banks/Government/
Quasi Government
Institutions/Public
Limited Companies
in Public Sector”

Question which was raised before us is as to whether appointment of petitioner can be made on the basis of the rank list prepared prior to the amendment of Rules. Submission which is pressed by the learned counsel for the 5th respondent is that the vacancy on which the 5th respondent has been promoted arose on 29.11.2014, i.e., subsequent to the amendment of the Rules and the vacancy arising after amendment of the Rules has to be filled up in accordance with the amended Rules.

22. What is the consequence of the amendment in the Rules on selection process/select list has been considered by the Apex Court in a large number of cases. The Apex Court had occasion to consider in **N.T.Devin Katti v. Karnataka PSC** ([1990] 3 SCC 157) where advertisement was issued for the post of Tahsildar under the 1975 Rules on 23.05.1975. Advertisement was issued for in service

candidates to the 50 posts of Tahsildar. List of successful candidates was also published by the PSC on 18.03.1976. In preparing the select list and making reservation to various categories, the Commission followed the directions and procedure contained in the Government Order dated 06.09.1969. The State did not approve the list prepared by the Commission on the ground that reservation for SC/ST/OBC should have been made in accordance with the provisions and the procedure contained in the Government Order dated 09.07.1975. Commission prepared a fresh list in which the name of the appellant did not figure. Appellant challenged the validity of the Government Order dated 23.04.1976 and the revised list. Law on the subject was considered and the Apex Court held that the candidates who apply and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement. However, if the recruitment rules are amended retrospectively during the pendency of the selection, the selection must be held in accordance with the amended

Rules. The following was laid down by the Apex Court in paragraph 11:

“11. There is yet another aspect. of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing Rules or Government Orders, and if it further indicates the extent of reservations in favour of 'Various categories, the selection of candidates in such a case must be made in accordance with the then existing Rules and Government Orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication, if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the Rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant Rules and orders. Lest there be any confusion, we would

like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right for selection, but if he is eligible and is otherwise qualified in accordance with the relevant Rules and the terms contained in the advertisement, he does acquire a vested right for being considered for selection in accordance with the Rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of Rules during the pendency of selection unless the amended Rules are retrospective in nature”.

The Apex Court quoted with approval the earlier judgment of the Apex Court in ***Y.V. Rangaiah v. J.Sreenivasa Rao*** ([1983] 3 SCC 284) where the Apex Court held that vacancies which occur prior to the amended rules would be governed by the old Rules and not by the amended rules. It is useful to quote paragraph 13 of the judgment in ***N.T.Devin Katti v. Karnataka PSC*** (supra):

“13. In *Y. V. Rangaiah v. J. Sreenivasa Rao*, (1983 (3) SCC 284 : AIR 1983 SC 852) similar question arose relating to recruitment by promotion. The question was whether promotion should be made in accordance with the Rules, in force on the date the vacancies occurred or in accordance with the amended Rules. The Court observed as under (para 9 of AIR):

"The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub Registrar Grade 11 will be according to the new rules on the zonal basis and not on the Statewise basis and,

therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

The same view was taken in *P. Ganeshwar Rao v. State of Andhra Pradesh*, (1988 Supp SCC 740 : AIR 1988 SC 2068). Similar view was taken in *A. A. Calton v. Director of Education*, (1983 (3) SCC 33 : AIR 1983 SC 1143). It is a well accepted principle of construction that a statutory rules or Government order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government orders and any amendment of the rules or the Government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections. See *P. Mahendra v. State of Karnataka*, (JT 1989 (4) SC 459 : AIR 1990 SC 405)."

In the above case the Apex Court held that the Government Order dated 09.07.1975 made it clear that the revised directions contained in the Government Order would not apply to the selection for the advertisement has already been issued. Therefore the direction to prepare revised list was uncalled for.

23. Much reliance has been placed by the learned counsel for the 5th respondent on the Full Bench judgment of this Court in **Mohanan v. Director of Homeopathy** (2006 [3] KLT 641 (F.B.)). In the case before the Full Bench the Kerala Public Service Commission had invited application for selection to the post of Pharmacist Gr.II in the Department of Homeopathy by notification dated 02.09.1995. Rank list was published on 27.06.2003. In the meanwhile Government had issued Special Rules for the Homeopathy Subordinate Service Rules, 1999 changing the previously existing qualifications for the post of Pharmacist Gr.II. A dispute arose as to whether after the amendment of the rules vacancies could be filled up from the list published by the PSC which was prepared based on the pre-revised qualification. So the candidates included in the list filed Writ Petition for a direction to the Director of Homeopathy to report all vacancies of Pharmacist including the vacancies occupied by unqualified provisional promotees to the PSC forthwith. The matter was placed before the Full Bench for answering the conflict between two Division Bench decisions on the

aforesaid issue. In paragraph 7 the Full Bench has formulated the question which was to be answered by the Full Bench which is to the following effect:

"Whether the vacancies which arose subsequent to the amendment of the Special Rules for the Kerala Homeopathy Subordinate Services on 12-4-1999 can be filled up from the rank list prepared by the Kerala Public Service Commission pursuant to the selection process initiated before the amendment and completed after the amendment."

The Full Bench after referring to several judgments of the Apex Court recorded its conclusion in paragraphs 21, 22 and 26 thus:

"21. It is worth noting that these decisions recognise a right in those persons who have applied pursuant to the selection process initiated prior to the date of coming into force of the Special Rules, for being considered for selection in accordance with the rules in force at that time. By the same coin, an equally enforceable right has to be recognised in those persons who possess the new / amended qualifications as per the Special Rules to get recruitments made in accordance with the new / amended rules, in which they also can compete to the vacancies which have arisen subsequent to the coming into force of the new / amended rules. Apart from consistency in applying law, failure to concede such right would amount to violation of the fundamental rights of those who have the new / amended qualifications, under Art.14 and 16 of the Constitution of India. In other words, both the rights should mutually coexist and in that

view also our conclusion is perfectly in accord with the constitutional principles which cannot be negated to both sets of people.

22. In fact, we feel that it is the only reasonable conclusion possible, since, otherwise, the very purpose of amendment would be defeated. When the position that the Government is empowered to amend recruitment rules even retrospectively is unquestionable, it cannot also be forgotten that after the amended rules have come into force if appointments are allowed to be made from the list prepared in accordance with the unamended rules, notwithstanding the amendment, that would amount to postponing of the date of commencement of the amended rule itself, which no authority other than the Government can do. Therefore, we have no doubt in our mind that once an amendment regarding qualifications and method of appointment etc., in respect of a particular post comes into force, any vacancy which arises subsequent to the commencement of the amended rules can be filled up only in accordance with the amended rules notwithstanding the currency of any rank list published by the P.S.C., selection of which was initiated prior to the amendment of the rules.

The Full Bench ultimately held that notwithstanding the currency of the rank list prepared by the PSC in accordance with the recruitment rules in force prior to the introduction of the Special Rules 1999, the vacancies which arose subsequent to the amendment rules shall be filled up only in accordance with the Special Rules 12.4.1999. The following

was laid down in paragraph 26:

“26. In the result, we hold that notwithstanding the currency of the rank list prepared and published by the P.S.C. in accordance with the recruitment rules in force prior to the introduction of the Special Rules for the Kerala Homeopathy Subordinate Service, 1999 with effect from 12-4-1999, the vacancies which arose subsequent to the amendment of the Rules on 12-4-1999 shall be filled up only in accordance with the Special Rules promulgated with effect from 12-4-1999.”

24. Learned Single Judge has issued directions to report one vacancy for direct recruitment to the Commission and further directed the Commission to appoint the petitioner from the rank list dated 23.09.2011.

25. Even if the rank list dated 23.09.2011 ought to have been utilised for subsequent vacancies which were required to be filled up by direct recruitment, after amendment of the Rules changing the qualifications for appointment, appointment on the vacancies subsequent to the amendment of the rules cannot be made on the basis of rank list dated 23.09.2011. The vacancy which is being held by the 5th respondent is a vacancy which arose subsequent to the amendment of the rules. Although it is true that even

earlier vacancies which arose on the post of Dy.General Manager were required to be reported to the Commission for direct recruitment in the ratio of 1:1, i.e., promotee:direct recruitee, no challenge having been made earlier and the incumbent who occupied the said vacancies having retired, causing of fresh vacancy, petitioner's case as on date could have been considered only against the vacancy which was occupied by the 5th respondent who was promoted with effect from 01.12.2014. It is true that the vacancy on which the 5th respondent has been promoted ought to have been reported to the Commission to be filled up by direct recruitment and we affirm the direction issued by the learned Single Judge to the above effect. But we do not approve that part of the direction issued by the learned Single Judge by which the Commission was directed to advise the petitioner on the basis of the earlier rank list on the post which is held by the 5th respondent.

26. In view of the foregoing discussion we are of the view that the judgment of the learned Single Judge deserves to be affirmed except to the extent it directed the

appointment of the petitioner from the rank list dated 23.09.2011 on the post of Dy.General Manager occupied by the 5th respondent which direction is set aside.

In the result, the Writ Appeals are disposed of with the following directions.

1. Judgment of the learned Single Judge dated 17.08.2015 is affirmed except to the extent directing the Commission to advise the name of the petitioner for appointment on the post of Dy.General Manager held by the 5th respondent from the rank list dated 23.09.2011. The above direction stand deleted.

2. Direction of the learned Single Judge in so far as it directed the 1st respondent to report one vacancy to the Commission to be filled up by direct recruitment is maintained. The 1st respondent is directed to report one vacancy of Dy.General Manager to be filled up by direct recruitment to the Commission, which exercise shall be completed within two weeks from today.

3. Direction of the learned Single Judge declaring the promotion of the 5th respondent against the vacancy which ought to have been reported for direct recruitment as illegal is affirmed.

However, it shall be open for the 1st respondent to permit the 5th respondent to continue on the post of Dy.General Manager treating her promotion as temporary and stop gap till directly recruited candidate from the Commission is available to hold the post.

Parties shall bear their costs.

**ASHOK BHUSHAN,
CHIEF JUSTICE.**

**A.M. SHAFFIQUE,
JUDGE.**