

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 31ST DAY OF JULY 2015/9TH SRAVANA, 1937

WP(C).No. 5881 of 2014 (I)

PETITIONER:

SHEEJAMOL M.C., W/O.A.P.NANDAKUMAR,
AGED 33, RESIDING AT ALADY HOUSE,
IRINGOL P.O., PERUMBAVOOR-683 548.

BY ADVS.SRI.R.LAKSHMI NARAYAN
SMT.R.RANJINI

RESPONDENTS:

1. ERNAKULAM DIST.CO-OP.BANK LTD.,
THRIKKAKARA, KAKKANAD-682 030
REPRESENTED BY ITS SECRETARY.
2. KERALA PUBLIC SERVICE COMMISSION
REPRESENTED BY ITS SECRETARY,
KERALA PUBLIC SERVICE COMMISSION,
PATTOM, THIRUVANANTHAPURAM-695 004.

R1 BY ADV. SMT.I.SHEELA DEVI
R2 BY ADV. SRI.P.C.SASIDHARAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
31-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 5881 of 2014 (I)

PETITIONER'S EXHIBITS:

EXHIBIT-P1: THE TRUE COPY OF THE RANK LIST PUBLISHED BY THE 2ND RESPONDENT.

EXHIBIT-P2: THE PHOTOCOPY OF THE LETTER DATED 14.5.2014

EXHIBIT-P3: THE PHOTOCOPY OF THE RELEVANT PAGES OF THE CIRCULAR DATED 21.3.1997

EXHIBIT-P4: THE PHOTOCOPY OF THE NOTIFICATION DATED 15.3.2014

RESPONDENT'S EXHIBITS:

EXT.R1(a) A TRUE COPY OF THE ORDER NO.C.B(4)56149/2013 DATED 07.06.2014 ISSUED BY THE REGISTRAR OF CO-OPERATIVE SOCIETIES

EXT.R1(b) A TRUE COPY OF THE ENGLISH TRANSLATION OF EXT.R1(a)

EXT.R2(a) TRUE COPY OF THE SAID COMMUNICATION DATED 15.01.2014

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.5881 of 2014 I

Dated this the 31st day of July, 2015

JUDGMENT

The petitioner, an unemployed, applied for the post of Clerk-cum-Cashier in the first respondent Bank pursuant to the notification issued by the Kerala Public Service Commission, the second respondent. In Exhibit P1 rank list which came into force with effect from 31.12.2009, the petitioner secured Rank No.57, the validity of the rank list being up to 31.03.2014, originally.

2. On 21.06.2013, as the first respondent reported eleven vacancies, the second respondent advised persons up to the rank 56. It has, however, transpired that the person with Rank No.54, belonging to general category, did not join. Having expected that the petitioner would be accommodated in the non-joining vacancy, when no positive steps were taken by the respondent Bank in that regard, the petitioner has filed the present writ petition.

3. In the writ petition, the petitioner has sought the relief of a direction to the first respondent to report, within the validity of Exhibit P1 rank list, the vacancy of clerk cum cashier in the first respondent bank, which arose on account of the non-joining of the person holding 54th rank. The petitioner has also sought a direction to the second respondent to advise the petitioner for appointment to the post of clerk cum cashier, with a consequential direction to the first respondent to appoint the petitioner to the said post.

4. In the above factual background, the learned counsel for the petitioner submitted, chronologically, that the writ petition was filed on 28.02.2014, when the rank list was subsisting. Initially, the matter came up for consideration on 03.03.2014, and later it underwent many adjournments till 29.05.2014. The rank list was to have originally expired on 31.03.2014, but was extended till 30.06.2014.

5. According to the learned counsel, on 29.05.2014 this Court issued an interim direction to the effect that the respondent Bank shall report the vacancy caused by the non-joining of the candidate with Rank No.54, as otherwise it would lapse by 30.06.2014.

6. The learned counsel has submitted that though there is certain controversy whether the respondent Bank has reported the vacancy, it can be seen from Exhibit R2(a), coupled with the interim direction 29.05.2014, that the respondent Bank reported the vacancy. Even otherwise, in the light of the interim direction, contended the learned counsel, the very communication in Exhibit R2 (a) shall be treated as reporting of the vacancy.

7. It is the specific contention of the learned counsel that once a vacancy has been reported, it cannot be recalled and that the vacancy position shall be reckoned as on the date of the reporting of the vacancy, notwithstanding the subsequent changes, as is evident from Exhibit P3 circular.

8. The learned counsel, trying to refute the contentions of the respondent Bank that in course of time it was down-graded and even the existing posts were declared supernumerary, would contend that recently the respondent Bank appointed one Mr.Krishnankutty. Further, one Mr.Babu has also, subsequent to filing of the writ petition, retired from service as a Clerk-cum-Cashier.

9. The learned counsel would lay specific emphasis on the fact that in course of time the respondent Bank has also opened seven new branches. In elaboration of her submissions, she would contend that the aspects of fresh appointment and opening of branches have not been specifically denied, not even adverted to, by the respondent Bank in its pleadings.

10. Further, drawing my attention to Exhibit P4 notification by the second respondent calling for anticipated vacancies, the learned counsel would contend that it contains the name of the first respondent Bank as one of the

employers to report the anticipated vacancies. According to her, only in order to defeat the right of the petitioner, who had an indefeasible right at the time when the vacancy was reported, the respondent Bank has come forward with a defence of down-grading of the Bank, which, according to her, is much subsequent in point of time.

11. In essence, the singular contention of the learned counsel for the petitioner is that in the light of the interim order of this Court, dated 29.05.2014, the petitioner has a lien on the post of Clerk-cum-Cashier. In support of her submissions, the learned counsel has placed reliance on **Krishnan v. Joseph Desouza**¹, **State of Kerala v. Sreekantan**² and **Cheruvannoor Nallalam Grama Panchat v. Ravi**³.

12. The learned counsel has eventually contended that, if at all the reclassification of the Bank were to be a

¹ 1983 KLT 104

² CDJ 1992 Ker HC 327

³ 2006 (1) KLT 546

hurdle for further recruitment, it is difficult to support the action of the respondent Bank in reporting eleven more vacancies through communication dated 18.06.2015. She has also submitted that the petitioner has got reliable information that the respondent Bank is soon to be restored to its original grade. In the end, the learned counsel has urged this Court to allow the writ petition.

13. Per contra, the learned counsel for the respondent Bank has submitted that notwithstanding the rank list, no person can be thrust upon the employer, more particularly when the financial position or the grade of the Bank does not accommodate any more employees in any cadre. According to her, in the light of the down-grading of the respondent Bank, it has got thirty five employees in supernumerary position.

14. Meeting the allegation that seven new branches have been opened, the learned counsel for the respondent Bank, firstly, submits that the Bank has opened only five

branches, but no fresh recruitments were made. Secondly, she submits that, from among the supernumerary posts, eighteen posts have been adjusted and still the Bank has seventeen employees in supernumerary position.

15. The learned counsel, adverting to the issue of appointing Mr.Krishnankutty, submits that the said employee belongs to the Scheduled Caste and was appointed in the backlog vacancy reserved for the said category. Concerning the issue of reporting of eleven more vacancies despite down-grading of the Bank, the learned counsel would contend that it was towards meeting the constitutional obligation of the respondent Bank in filling up the backlog reserved vacancies. According to her, no fresh notification has been issued concerning the recruitment in open category.

16. The learned counsel has eventually contended that the interim direction given by this Court on 29.05.2014 is only subject to the outcome of the writ petition, and that

it would not confer any substantial right on the petitioner, if it was not available to him initially. The learned counsel for the respondent Bank has placed reliance on **Vakkom N. Vijayan v. Chief Justice**⁴.

17. The learned Standing Counsel for the second respondent, placing reliance on **Kerala Public Service Commission v. Shanil Kumar**⁵ has contended that non-joining vacancy cannot be said to be existing unless there is actual reporting of the said vacancy. According to him, the respondent Bank has not reported any vacancy. It is the contention of the learned Standing Counsel for the second respondent that Exhibit R2(a) is a mere intimation from the respondent Bank that a person has not joined. According to him, if a non-joining vacancy has to be reported, a proforma has to be submitted by following a specific procedure.

18. Heard the learned counsel for the petitioner, the learned Standing Counsel for the second respondent, as

⁴ 1994 (2) KLT 47 (FB)

⁵ 2002 (1) KLT 604

well as the learned Counsel for the first respondent, apart from perusing the record.

19. The principal issue to be considered in this writ petition is whether the petitioner will have any indefeasible right to be appointed in the non-joining vacancy, notwithstanding the subsequent changes. In other words, whether it is incumbent on the part of the respondent Bank to report the non-joining vacancy and to have the next ranked employee appointed in that vacancy, despite the subsequent changes in the staffing pattern in the light of the down-grading of the Society. We are also required to consider the impact of the interim direction of this Court issued on 29.05.2014.

20. The facts are not in dispute. It is, however, essential to begin our discussion by considering whether the respondent Bank has actually reported any vacancy pursuant to the interim direction of this Court on 29.05.2014. At any rate, it is the contention of the learned counsel for the

petitioner that Exhibit R1(a) shall be treated as reporting of vacancy pursuant to the interim direction of this Court, lest it should amount to contempt of Court. For the purpose of the present adjudication, I will take Exhibit R2(a), hypothetically though, as reporting of non-joining vacancy. If that be the eventuality, I may examine the consequences that flow therefrom.

21. Had the respondent Bank reported the non-joining vacancy, the moment the person with 64th rank did not join on 04.10.2013, no complications could have arisen and the petitioner could have secured employment in the open category. But that was not to be.

22. It is essential to observe that, as a matter of subsequent developments, the Bank has been down-graded in its classification as Class II society, thereby getting its staff pattern affected. It has, in fact, resulted in the respondent Bank having about thirty five supernumerary posts. Though the Bank did open five more branches in

course of time, indisputably the Bank was permitted to open the branches only on the pre-condition that it should provide personnel for the new branches from the existing staff, for it has already got supernumerary employees. Thus, indisputably, the Bank has so far not appointed any other person from 2013 to this day, save one person under the backlog SC/ST quota. True, the respondent Bank has also notified 11 more vacancies, but it was towards fulfilling its obligation to fill up the backlog vacancies in SC/ST category. To that extent, without fear of controversy, this Court could conclude that the respondent Bank has not indulged in any fresh recruitment in the open category to the exclusion of the petitioner.

23. In *Sreekantan* (supra) this Court directed the State to report seven vacancies to the Public Service Commission on or before 30.10.1987, the last date of the validity of the rank list. By 07.10.1987, the State, however, reported only three vacancies and they were advised by the

Commission. The remaining four vacancies could not be filled owing to the fact that the rank list had expired. In that context, a Full Bench of this Court in Sreekantan (supra) has held that it is for no fault of the direct recruits that the vacancies were not reported in time and they were not appointed. As a result, the learned Full Bench has felt that it would be proper for the authorities concerned to appoint those four persons and it accordingly directed.

24. Though in the first blush it appears that the issue in the present writ petition stands squarely covered by the ratio of the learned Full Bench of this Court in Sreekantan (supra), I am afraid, there is a difference in facts, subtle though. There the appointment has been denied to four persons despite the direction of this Court to report all seven vacancies, only owing to the fact that the rank list has expired. All through the contention of the learned counsel for the petitioner is that, if the petitioner had been appointed at the earliest point of time, even in the face of

the subsequent changes; namely, the down grading of the Society, the petitioner would have been in service by now, at least as a supernumerary employee. Be that as it may, the fact remains that this Court issued an interim direction on 29.05.2014 to the following effect:

“There shall be an interim direction to the first respondent to report the vacancy caused by the non-joining of the candidate ranked as Serial No.54 in Exhibit P1 on or before 31.05.2014. The candidate shall be advised only after getting further orders in this writ petition.”

25. The fact that the interim direction is conditional and is dependent on the eventual outcome cannot be lost sight of. It was issued with a view to protecting the interest of the petitioner, lest, on expiry of the rank list, the very lis should become infructuous. To that extent, the interest of the petitioner, indeed, stands protected.

26. The learned Standing Counsel for the second respondent has, nevertheless, contended that the first respondent Bank has not reported any vacancy. According to him, if it were to have an element of contempt, it was

open for the petitioner to take necessary steps in that regard. On the other hand, it is the contention of the learned counsel for the petitioner that Exhibit R2(a), for all practical purposes, is the communication in compliance with the interim direction dated 29.05.2014.

27. The learned counsel for the petitioner has also further contended that when the petitioner has incorporated a specific plea in his additional affidavit that both the learned counsel for the first and the second respondent have reported before the Court that the interim direction had been complied with, the said statement has not been contradicted by the respondents.

28. As a matter of legal fiction, if one were to assume that the rank list had never expired and that the non-joining vacancy still remained vacant, could it be still obligatory on the part of the respondent Bank to provide employment to the petitioner by reporting the said vacancy to the second respondent, and for the second respondent to advise the

petitioner for the said vacancy? The answer may have been, in the usual circumstances, a simple yes. However, in the present instance, we are constrained to take note of the subsequent developments.

29. It is axiomatic to observe that getting short listed in the rank list does not provide any indefeasible right. It is always open for the employer not to go for recruitment or appointment despite the rank list, if it is not in the interest of the organization. In the present instance, it is not denied that in course of time, the respondent Bank has been downgraded, resulting in the reduction of staff pattern. In fact, thirty five employees have been declared supernumerary. This Court, under these circumstances, regrettably, cannot issue a mandamus compelling the employer to appoint a person on the premise that he has secured the rank and that there is a vacancy.

30. On the converse, it would have been entirely a different scenario, had there been any further recruitment

and the respondent bank had appointed some other person, disregarding the petitioner's claim on the premise that the rank list had expired. As has already been indicated above, hypothetically I have taken the rank list to have been subsisting and in that light examined the issue as to the compelling obligation on the part of the respondent Bank to appoint the petitioner.

31. In Ravi (supra), this Court has held, placing reliance on the judgments of the Honourable Supreme Court and Privy Council, that an interim order is liable to be respected by the parties, so long as such order is in force, even if the order is subsequently vacated. Indeed, there can be no quarrel concerning the said proposition of law. The issue, on the contrary, is that, whether the interim direction of the Court can enlarge the scope of the writ petition or confer a new right on the person who invited the said interim direction.

32. It is trite to observe that interim directions are given only to preserve the lis, lest by the time the issue comes up for consideration passing through a serpentine queue of hearing matters, nothing would remain to be considered, by efflux of time, and owing to subsequent developments. Viewed in that context, I am of the considered opinion that this Court has issued the interim direction only to safeguard the interest of the petitioner, whose rights should not be defeated later on the premise that the rank list had expired.

33. As has already been observed, even assuming that the rank list has been subsisting, I am of the opinion that in the light of the changed circumstances, the respondent Bank, the employer, being unwilling and unable to accommodate any more employees, cannot be trust upon with more appointments. In that context, I am afraid, the ratio of Ravi (supra) does not come to the rescue of the petitioner.

34. In Krishnan (supra) a learned Single Judge of this Court has held as follows:

“Any action by which the process of the court is attempted to be thwarted has to be viewed seriously. If an order of injunction is violated, that violation has to be dealt with sternly and seriously, for, otherwise, it will undermine the very basis of the Rule of Law. There is no difference whether the violation pertains to an order, or to an undertaking made before a court of law, which too will have as much effect as an interim injunction in such circumstances. The court below disposed of such a serious complaint without considering it on merits. In so doing, it has erred; that error has to be corrected.”

35. In **Vimalakumari v. State**⁶, a learned Full Bench of this Court has held that a mere fact that a person's name has been included in a rank list does not give him any right to the post or to be appointed to the said post. This observation of the learned Full Bench is based on the dictum of the Honourable Supreme Court in **Shankarsan Dash v. Union of India**⁷. In the present instance, the difference is that it is not only the question of getting reflected in the rank list, but also getting advised, especially

⁶ 1994 (2) KLT 47 (FB)

⁷ AIR 1991 SC 1612

in the light of the interim direction. In Vakkom N.Vijayan (supra) this Court has reiterated the same principle as found in Vimalakumari (supra).

36. Though the learned counsel for the second respondent has placed reliance on Shanil Kumar (supra), that decision too deals with the issue of expiry of the rank list and the consequences that flow therefrom.

37. In the present instance, the respondent Bank does not intend to take advantage of the fact that the rank list has expired. On the contrary, it is the specific contention of the Bank that in the light of the changed circumstances, it is not in a position to accommodate any further employees.

38. The upshot of the above discussion is that, taking as unchanged all circumstances: that there is a non-reporting reporting vacancy, and that the list has so far not expired, one cannot straight away come to a conclusion that an appointment has to be thrust upon an unwilling

employer, which has already many supernumerary employees. It only ensures that the successful candidate cannot be passed up or ignored under a mere stratagem.

39. What cannot be wished away are the following facts: (1) the petitioner secured rank; (2) the candidate just above petitioner's rank did not join; (3) there is a clear non-joining vacancy; (4) the non-joining vacancy ought to have been reported, but not, at least soon thereafter, reported; (5) had it been reported on time, i.e., before the down-grading of the bank, the petitioner would have been advised; and (6) the interim direction dated 29.05.2014, is to the effect that the vacancy should be reported to the second respondent.

40. Having held in the first limb of the discussion that, in view of the down-grading of the respondent Bank and in view of the resultant position, the Bank having excess staff, now I will consider the other limb: what is the impact of reporting the vacancy, taking the interim

direction as having been complied with.

41. I am conscious that the learned Standing Counsel for the second respondent has contended that it has not been reported, and once it has not been reported, and in the meanwhile, the rank list expires, there is nothing that can be done. I may, thus, examine the consequences that flow in the event of the implementation of the interim direction on one hand, and in the event of its non-implementation on the other, so that the imbroglio could be resolved, hopefully.

42. Firstly, had the respondent Bank reported the non-joining vacancy, as soon as the candidate with rank No. 54 did not join, the petitioner could have been advised then itself. For the Bank's failure, the petitioner cannot be blamed; much less, the Bank can be allowed to take advantage of it. Secondly, on 29.05.2014, this Court issued an interim direction to the respondent Bank to report the vacancy. It only imposed a limitation on actual appointment.

43. There is any amount of controversy whether the Bank has reported it. The Bank and the petitioner contend that Exhibit R2(a) is, in fact, a communication from the respondent Bank to the second respondent in compliance with the said interim direction. The second respondent, PSC, on the other hand, contends that it does not pass the muster as actual reporting of vacancy. According to it, it is a mere piece of information provided by the respondent Bank to the second respondent.

44. If it were to be concluded that there is no reporting of the vacancy, despite the direction of this Court, what are the consequences? Pat comes the answer, of course, from the second respondent that the respondent Bank could be hauled up for contempt. Is that all?

45. Not in dispute is the proposition that contempt proceedings are not remedial in nature; they are, at best, penal and retributive, aimed at protecting the dignity and majesty of the Courts, i.e., the Rule of Law. The contempt

proceedings are not even adversarial. Can one, especially the contemnor, disregard the judicial directive and simply brace for the punishment, so that the Court is left with no mechanism to have its orders implemented, for punishment cannot amount to compliance? In my view, the Court's power of punishing for contempt, be it under Article 215 of the Constitution of India, or under Section 12 of the Contempt of Courts Act, is in addition to its inherent power to ensure that its orders are not only respected, but also implemented. Neither the executive deference towards the judicial order nor the meeting out punishment to the errant is solace to the litigant, who, despite having a binding judicial directive in his favour, is still left remedy less; left high and dry, as it were.

46. I have already observed that Neelakantan (supra) does not contain a proposition of law to disregard the changed circumstances and thrust upon a groaning employer another candidate - in the present instance owing

to the down-grading and resultant excess staff. The ratio of the learned Full Bench therein binds me on all fours to the extent that no party to the lis can take advantage of its own wrong.

47. In Neelakantan (supra), this Court, per a learned Single Judge, directed the State to report seven vacancies to the Public Service Commission on or before October 30, 1987, the last date of the validity of the ranked list. By October 7, 1987, three vacancies were already reported and those candidates were advised by the Commission against the same. There remained four more vacancies which were required to be reported, but not reported, despite the direction. The rank list having expired, the question of directing the Public Service Commission to advise the petitioners did not arise. Under those circumstances, the learned Full Bench has observed thus:

“It is for no fault of the direct recruits that the vacancies were not reported in time and they were not appointed. In these circumstances, it would be proper to direct the

concerned authorities to appoint these four persons and we accordingly direct the appellant-State and the Board of Revenue to appoint the aforesaid four persons in the quota of direct recruits as expeditiously as possible, if not already appointed.”

48. In **Delhi Development Authority v. Skipper Construction Co. (P) Ltd.**⁸, the Supreme Court has observed that the principle that a contemner ought not to be permitted to enjoy and/or keep the fruits of his contempt is well settled. Placing reliance on **Mohd. Idris v. Rustam Jehangir Babuji**⁹ the Court has further held that undergoing the punishment for contempt does not mean that the court is not entitled to give appropriate directions for remedying and rectifying the things done in violation of its orders. In fact, Neelkantan (supra) has echoed the same legal view.

49. The result of the above discussion is two-fold: Firstly, the respondent bank cannot be forced to appoint the petitioner when it already has surplus staff. Secondly,

⁸ (1996) 4 SCC 622

⁹ (1984) 4 SCC 216

whether Exhibit R2(a) amounts to reporting or not, the interim order dated 29.05.2014, of this Court cannot be ignored. This Court, under these circumstances, calls to aid the legal fiction that there was reporting of vacancy by the respondent Bank to the second respondent. What, inevitably, follows is that the said fiction is to be taken to its logical end and all eventualities emanating therefrom given effect to.

50. In the facts and circumstances, though the respondent Bank cannot be compelled to appoint the petitioner forthwith, since I have treated Exhibit R1(a) as reporting of vacancy, as has been contended by the learned Counsel for the respondent Bank also, it shall be concluded for all practical purposes that whatever the advantage that flows out of that reporting shall be extended to the petitioner, notwithstanding the expiry of the rank list.

51. As this Court is conscious of the fact that in the light of down grading of the respondent Bank to Class B, it

is not in a position to appoint the petitioner presently. If the position of the respondent Bank improves in course of time or if it were to go for fresh recruitment of open category candidates, in the light of the reporting of the non-joining vacancy, the petitioner shall be given preference at the time of actual appointment, as if he were in the rank list of that recruitment.

With the above observations, the writ petition is disposed of. No order as to costs.

Dama Seshadri Naidu, Judge

tkv/DMR