

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 21ST DAY OF MAY 2015/31ST VAISAKHA, 1937

WP(C).No. 11038 of 2014 (D)

AGAINST THE JUDGMENT IN AP 26/2008 of KERALA CO-OP. TRIBUNAL,
THIRUVANANTHAPURAM, DATED 28-05-2010

PETITIONER : -

A.O. PAUL, JUNIOR CASHIER,
IRINJALAKKUDA TOWN CO-OPERATIVE BANK LTD.,
IRINJALAKKUDA, THRISSUR,
RESIDING AT ARANATTU KARAKARAN HOUSE,
NADAVARAMBATHU P.O., IRINJALAKKUDA,
THRISSUR - 680 661.

BY ADVS. SMT. SUMATHI DANDAPANI (SR.)
SRI. MILLU DANDAPANI
SRI. PREMCHAND R. NAIR

RESPONDENTS : -

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1. IRINGALAKUDA TOWN CO-OPERATIVE BANK,
REPRESENTED BY ITS GENERAL MANAGER,
IRINGALAKUDA, THRISSUR - 680 661.
 2. THE PRESIDENT, IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR - 680 661.
 3. TESSY DAVID, SENIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR - 680 661.
 4. SUSHMA P.K., JUNIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR - 680 661.
 5. TESSY JOSEPH P., SENIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR - 680 661.

6. RUBY JOHN PARAKKA, SENIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR - 680 661.
7. SEEMA LEO, SENIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR - 680 661.
8. JOLLY A.V., SENIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR - 680 661.
9. SHERIN CASPER, SENIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR -680 661.
10. MANY C.V., SENIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR -680 661.
11. PREETHA K., JUNIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR -680 661.
12. SATHISHKUMAR V.K., SENIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR -680 661.
13. SATHISH P., JUNIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR -680 661.
14. BHAVANI M., SENIOR CLERK,
IRINGALAKUDA TOWN CO-OPERATIVE BANK,
IRINGALAKUDA, THRISSUR -680 661.

R1-R2 BY ADV. SRI.N.P.SAMUEL

R1-R2 BY ADV. SRI.PLEASANT.T.SAMUEL

R3,R4,R6-R9,R11,R13,R14 BY ADV.SRI.B.K.GOPALAKRISHNAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
21-05-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 11038 of 2014 (D)

APPENDIX

PETITIONER'S EXHIBITS : -

- EXT.P1 : THE TRUE COPY OF THE AWARDIN ARC. NO.7/2005 DATED
19/9/2007.
- EXT.P2 : THE TRUE COPY OF THE JUDGMENT IN AP NO.26/2008 DATED
28/5/2010 OF KERALA CO-OPERATIVE TRIBUNAL.
- EXT.P 3: THE TRUE COPY OF THE JUDGMENT IN WPC NO.24043/2010 DATED
28/2/2014.
- EXT.P4 : THE TRUE COPY OF THE SENIORITY LIST PUBLISHED ON
16/08/2006.

RESPONDENTS' EXHIBITS : - NIL.

// TRUE COPY //

P.A. TO JUDGE

DMR/-

C.R.

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 11038 of 2014

Dated this the 21st day of May, 2015

JUDGMENT

The petitioner, who is to retire on 31.05.2015, laid a challenge in this writ petition against the final seniority list prepared and published on 16.08.2006—more particularly after an initial round of litigation, beginning with proceedings before an Arbitrator and culminating in a writ petition before this Court, as could be seen from Exhibit P3 judgment.

2. The facts in brief are that the petitioner joined the service of the first respondent Co-operative Bank in 1976 as a Peon and had his services confirmed in 1977. When the petitioner acquired the qualification of Junior Diploma in Co-operation (JDC) in 1993, the respondent Bank provisionally promoted the petitioner in 1994 against a leave vacancy. After joining the promotional post, while on probation, the petitioner went on leave without allowance in November 1994 seeking greener pastures abroad. After three years, when the petitioner returned on 13.08.1997, the respondent Bank placed him in his entry carder as Peon, instead of letting him

discharge duties as a Junior Clerk, which position the petitioner held while he proceeded on leave.

3. Aggrieved by the action of the respondent Bank, after initial unsuccessful representations to the Registrar, Co-operative Societies, the petitioner eventually raised a dispute before the learned Arbitrator by invoking Section 69 of the Co-operative Societies Act ('the Act' for brevity) in ARC No. 7/2005. After the dismissal of the said arbitration proceedings through Exhibit P1 Award, dated 19.09.2007, the petitioner filed an appeal before the Kerala Co-operative Tribunal, Thiruvananthapuram in A.P. No. 26/2008, which was also dismissed through Exhibit P2 judgment dated 28.05.2010.

4. Further aggrieved, when the petitioner filed W.P. (C) No. 24043/2010, this Court closed the writ petition through Exhibit P3 judgment dated 28.02.2014, holding that the petitioner might challenge the final seniority list in respect of the Junior Clerks in the Bank, if such a right survives. Accordingly, the petitioner filed the present writ petition questioning Exhibit P4 seniority list dated 16.08.2006.

5. In the above factual background, Smt. Sumathi Dandapani, the learned Senior Counsel, appearing for the

petitioner, has, to her credit, fairly begun her submissions by admitting that the petitioner did not assail the seniority list in the earlier round of litigation. However, as it is, according to her, a pure question of law, the petitioner has chosen to file the present writ petition laying challenge against Exhibit P4 final seniority list. The singular contention of the learned Senior Counsel is that in terms of Clause 4 of Appendix XII A of Kerala Service Rules, the petitioner on his resumption of duties after initial leave without allowance ought to have been continued by the respondent Bank in the same position that the petitioner occupied when he had left the service. In other words, since the petitioner was functioning as a Junior Clerk prior to his going on leave in November 1994, on his return after three years, he ought not to have been placed in a lower position than what he had occupied earlier. According to the learned Senior Counsel, it is nothing but a demotion. In support of her submissions, the learned Senior Counsel has placed reliance on **Mohammed Abdulla v. State of Kerala** [2008 (1) KLT 712 (SC)].

6. Eventually, the learned Senior Counsel has urged this Court to allow the writ petition without disturbing the seniority

list by providing notional seniority to the petitioner, inasmuch as the petitioner is to retire by 31st of this month.

7. Sri. B.K. Gopalakrishnan, the learned counsel for the respondents 3, 4, 6 to 9, 11, 13 and 14, has strenuously opposed the claims and contentions of the petitioner. To begin with, the learned counsel would contend that on 18.06.1994, the petitioner was only provisionally placed as a probationary Junior Clerk against the leave vacancy of one Mr. Mohandas, but not against any substantive vacancy. While the petitioner was on leave without allowance, Mr. Mohandas, against whose leave vacancy the petitioner was accommodated, resumed service on 1.3.1995, thereby relegating the petitioner to his entry cadre, the Peon. The learned counsel has also submitted that the petitioner was promoted on 01.02.2000 as a Junior Clerk and later on 17.11.2014 as a Senior Cashier, in which capacity he is due to retire.

8. Referring to Section 69 (2) (d) of the Co-operative Societies Act, the learned counsel has contended that the petitioner ought to have laid challenge, if at all, before the learned Arbitrator against the final seniority list, which was prepared way back in 2006. According to him, since the final

seniority list was published by the time the petitioner initiated arbitration proceedings in 2007, nothing prevented the petitioner to have the necessary amendment to the pleadings before the learned Arbitrator for laying a proper challenge against the seniority list.

9. The learned counsel has also contended that right to be promoted is not a fundamental right, but only a civil right, in support of which he has placed reliance on **State of Haryana and others v. Rameshwar Das** [(2009) 7 SCC 400] and **Jaswant Singh Lamba v. Haryana Agricultural University and others** [(2008) 5 SCC 656]. According to the learned counsel, once a person is promoted in a leave vacancy, he warms the chair in the absence of the incumbent, but only until the said person resumes his duties. In support of the said submission, the learned counsel has placed reliance on **Deepamol v. State of Kerala**, [2007 (4) KLT 173].

10. It is also the specific contention of the learned counsel that once the seniority list has not been assailed within a reasonable time, the sit-back theory comes into operation and the persons who have been promoted based on the said seniority list could not be disturbed at a much later point of

time. In support of the said submission, the learned counsel has placed reliance on **Y. Rammohan and others v. Government of India and Others** [(2001) 10 SCC 537], **Prakasini v. Joint Registrar** [2006 (1) KLT 199], **Raveendran v. State of Kerala** [2007 (3) KLT 558 and **S. Sumnyan and others v. Limi Niri and Others** [(2010) 6 SCC 791].

11. Eventually, the learned counsel has summed up his submissions by contending that there is no lien on the leave vacancy and in the absence of the petitioner's having been promoted against the substantive vacancy, he could not stake any claim on a promotional post, which he could only be entitled to on a regular turn, based on his seniority.

12. The learned Standing Counsel for the respondent Bank, having substantially adopted the submissions of the learned counsel for the contesting respondents, has submitted that despite the fact that the final seniority list was prepared and published on 16.08.2006, long prior to the petitioner's filing of the present writ petition in 2014, till recently he had not chosen to challenge it. According to him, in the last eight years many persons have been promoted, based on the said

seniority list; it is inequitable to disturb their position, even assuming that there is any merit in the petitioner's contentions. The learned counsel has also drawn my attention to the observations of the learned Tribunal in its Exhibit P2 judgment regarding the fatality of the petitioner's not challenging the seniority list. In sum and substance, the learned Standing Counsel has contended that the writ petition is devoid of any merit and it is required to be dismissed.

13. In reply, the learned Senior Counsel has contended that this Court through Exhibit P3 judgment has given liberty to the petitioner to lay challenge against Exhibit P4 final seniority list. She has also further contended that since the petitioner is on the verge of retirement, he does not gain anything by upsetting the seniority list; on the other hand, his grievance is confined to have only retroactive service benefits with a deemed promotion from the date of his resumption of duties, after the initial leave without vacancy.

14. Heard the learned Senior Counsel for the petitioner and the learned Standing Counsel for the first respondent Bank, as well as the learned counsel for the contesting respondents, apart from perusing the record.

15. The issues that fall for consideration in the present writ petition are as follows:

(1) Whether the present writ petition is maintainable against Exhibit P4 final seniority list without the petitioner taking recourse to arbitration proceedings in terms of Section 69 (2) (d) of the Act.

(2) Whether this Court in Exhibit P3 judgment has given liberty to the petitioner to lay challenge against Exhibit P4 seniority list at a belated point of time, more pertinently by bypassing the statutory regime under Section 69 (2) (d) of the Act.

(3) Whether the petitioner is entitled to be readmitted in the position of Junior Clerk after resumption of his service in 1997 in terms of Clause 4 of Appendix XII A of Kerala Service Rules and

(4) Whether Exhibit P4 final seniority list could be disturbed at this point of time ignoring the judicially recognized dictum of the sit back theory.

In re, issue No:2

16. To begin with, I may address the second issue, because the learned Senior Counsel has contended that this

Court has given liberty to the petitioner to approach this Court once again to lay challenge against Exhibit P4 final seniority list. It is apposite, in that context, to appreciate the observations of this Court in Exhibit P3 judgment, a part of which reads as follows:

"2. Heard. The dispute involved in this case is with regard to the seniority in the cadre of Junior Clerk in the first respondent Co-operative Bank. Learned counsel for the first respondent submits that as early as on 16.08.2006, a final seniority list of employees of the Bank has been published in which the seniority of the persons in the cadre of Junior Clerk also has been finalized. Going by that seniority list, the petitioner is junior to the contesting respondents. The petitioner never challenged that final seniority list. Unless that final seniority list is interfered with, no relief could be granted to the petitioner in this Writ Petition, he further submits. On considering the matter, the submissions so made by the learned counsel for the first respondent cannot be ignored. *Unless, the petitioner could successfully challenge the final seniority list, no relief can be granted to the petitioner. In that view of the matter, without prejudice to the right, if any, of the petitioner to challenge the final seniority list in respect of the Junior Clerks in the Bank, this writ petition is closed.*"

(emphasis added)

17. On a perusal of the above pronouncement of this Court in W.P. (C) No. 24043/2010, it is every evident that the learned single Judge has made it abundantly clear that the petitioner could as well challenge the final seniority list, only if

any of the petitioner's rights survives in that regard. In Exhibit P3, it has also been abundantly made clear that the final seniority list comes in the way of the petitioner's asserting his right to promotion, and until and unless it is properly challenged and eventually set aside, his right, if any, could not prevail.

18. I am afraid, on a plain reading of Exhibit P3 judgment, I do not find any express or implied liberty having been granted to the petitioner to directly challenge before this Court Exhibit P4 final seniority list, more particularly bypassing the statutory rigour under Section 69 (2) (d) of the Act.

In re, issue No:1

19. It is pertinent to examine Section 69 (2) (d) of the Act to appreciate whether the petitioner is entitled to file the writ petition to take recourse to Article 226 of Constitution, without initially approaching the Arbitrator raising the dispute of seniority. Section 69 to the extent relevant reads as follows:

"69 (2) (d) : any dispute arising in connection with employment of officers and servants of the different classes of society specified in sub-section (1) of Section 80 *including their promotion and inter se*

seniority."

(emphasis added)

20. It is not in dispute that the respondent Bank is a Society specified in Sub-Section 1 of Section 80. Clause (d) of Sub-Section 2 of Section 69 specifically mandates that any issue concerning promotion and *inter se* seniority is required to be agitated before the Co-operative Arbitration Court and Registrar. In the first place, as has been rightly contended by the learned counsel for the contesting respondents, as well as the learned Standing Counsel for the respondent Bank, by the time the petitioner initiated the arbitration proceedings, Exhibit P4 final seniority list was prepared and published. I do not see any disabling factor against the petitioner in his not challenging Exhibit P4 at the earliest point of time. It is equally important to appreciate the factor that the very issue of seniority has engaged the minds of the Arbitrator and also the learned Tribunal in appeal, as could be seen from the observations of the learned Tribunal in its Exhibit P2 judgment. At least, at that stage of appeal when there was a specific contention on the part of the respondent Bank concerning Exhibit P4 seniority list, the petitioner ought to have taken remedial steps to

properly challenge it. He has, regrettably, bypassed the said necessity wishfully. As such, in the light of the statutory mandate under Section 69 (2) (d) of the Act, I do not see any justifiable grounds for the petitioner to have taken recourse to Article 226 of the Constitution, without reference to an efficacious alternative statutory remedy. Thus is answered the second issue as well against the petitioner.

In re, issue No:3

21. The learned Senior Counsel has drawn my attention to paragraph 4 of Appendix XII A of Kerala Service Rules to contend that the petitioner has already completed his probation in his entry cadre and as such his subsequent probation in promotional cadre could not prevent him from taking benefit of paragraph 4. In fact, she has placed a heavy reliance on the dictum of the Honourable Supreme Court in **Mohammed Abdulla** (*supra*). To appreciate the ratio of the Honourable Supreme Court in the said judgment, it is profitable to extract both paragraphs 4 and 5 of Appendix XII A of Kerala Service Rules, which read as follows:

“4. Permanent Officers and non-permanent Officers who have completed probation in their entry cadre in the regular service of Government may be

granted leave without allowances under these rules. In such cases, for, and during the currency of, the period of leave, the officers shall lose all service benefits such as the earning of leave including half pay leave, pension, gratuity, increment, etc., and also promotion chances as may arise with reference to their seniority in the posts from which they proceeded on leave. They shall also lose seniority in the higher grade/grades with reference to their juniors who might get promoted to such grade/grades before they rejoin duty.

5. In the case of non-permanent Officers in regular service who have not completed probation in the entry grade, leave without allowances may be granted subject to the condition that they will have to start afresh and complete their probation on return from the leave without allowances. In other words, the Officers will forfeit the service benefits that had accrued to them prior to their proceeding on leave and they will be deemed as new entrants to Government service on return from leave. What is protected is only their right to rejoin Government service in the same entry grade as if they were new entrants."

22. The contention of the learned Senior Counsel is that paragraph 4, rather than paragraph 5, applies to the case of the petitioner, because the petitioner has already completed his probation in the entry cadre. In **Mohammed Abdulla** (supra), the petitioner therein prior to his going on leave had already entered the cadre of Grade II Auditor and completed the period of probation. At the time he actually went on leave, he was working as an Audit Officer on probation; later, when

he resumed his service after leave period, he rejoined as an Audit Officer. In that context, the learned Senior Counsel seems to have contended that the petitioner, too, ought to have been readmitted as a probationary Junior Clerk. What cannot be lost sight of, in my view, is that the petitioner's initial promotion, if it can be called one, is not against a substantive vacancy, but only against a leave vacancy. In other words, if we employ a legal fiction and assume that the petitioner continued as probationary Junior Clerk without going on leave, he could have been, anyway, relegated to his entry cadre, i.e. Peon, once the person who went on leave and in whose absence the petitioner was promoted resumed service. In that context, the petitioner could not hope for a better right than what he could have been entitled to had he continued in service without going on leave.

23. Under those circumstances, I do find a clear distinction between the ratio laid down in **Mohammed Abdulla** (*supra*) and the facts of the present case. Thus, I am afraid, the petitioner cannot take advantage of the ratio laid down in **Mohammed Abdulla** (*supra*).

In re, issue No:4

24. It is axiomatic to observe that an employee does not have any fundamental right to promotion, but only a right to be considered for promotion. Time and again, the Courts have consistently reiterated the said principle as the Apex Court has concluded in **State of Haryana and others v. Rameshwar Das** [(2009) 7 SCC 400] and **Jaswant Singh Lamba v. Haryana Agricultural University and others**, [(2008) 5 SCC 656]. It cannot as well be contradicted that a person who has been promoted in a leave vacancy only functions in an officiating capacity until the incumbent resumes duty, and it can be described as the promotee keeping the seat warm until the incumbent returns. In this context, this Court in **Deepamol v. State of Kerala**, [2007 (4) KLT 173], has held thus:

“15. The quality of appointment of the petitioner as per Ext.P1 is only of an appointment against a temporary vacancy which occurred on account of a teacher proceeding on leave to acquire B.Ed, qualification. Such an appointment is one which may entitle the petitioner to make a further claim under Rule 51A of Chapter XIV-A Kerala Education Rules, if a vacancy of the same category arises in that school at a later point of time. Barring that preference, the quality of the appointment as per Ext.P1, as rightly pointed out by the learned Counsel for the 4th respondent, is to warm up that

seat and to vacate when the period of appointment ends or on return of the teacher who has proceeded on leave, and nothing more. The 4th respondent is, therefore, right in contending that the petitioner could not have been treated as a person 'in service'..."

25. Indeed, there is any amount of justification on the part of the respondents in contending that the seniority list, which was published way back on 16.08.2006, could not be disturbed after eight years. The Hon'ble Supreme Court in **Malcom Lawrence Cecil D'souza v. Union of India** [(1976) 1 SCC 599], has observed thus:

"9... by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

26. The same principle was reiterated in **Y. Rammohan and others v. Government of India and Others**, [(2001) 10 SCC 537] and **S. Sumnyan and others v. Limi Niri and**

Others, [(2010) 6 SCC 791]. In fact, having referred to **State of Orissa v. Pyarimohan Samantaray and Ors.**, AIR 1976 SC 2617, **State of M.P. and Ors. v. Nandlal Jaiswal and Ors.**, [1987] 1 SCR 1, **Ramanna Dayaram Shetty v. International Airport Authority of India**, (1979) II LLJ 217 SC, **Ashok Kumar v. Collector, Raipur**, [1980] 1 SCR 491, **K. R. Mudgal V. R.P. Singh**, (1987) I LLJ 214 SC and **R.S. Makashi and Ors. v. I.M. Menon and Ors.**, 1980 (1) SCC 370, where relief was refused on the ground of laches in moving the Court for redress of the grievances after lapse of a period of years after the cause of action arose, the Hon'ble Supreme Court in **G.C. Gupta v. N.K. Pandey**, (1988) 1 SCC 316, has reiterated its earlier observations in **Rabindra Nath Bose v. Union of India**, [(1970) 1 SCC 84], that each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years.

27. In fact, this Court has also reiterated the same judicial dictum in **Prakasini v. Joint Registrar** [2006 (1) KLT 199 and **Raveendran v. State of Kerala** [2007 (3) KLT 558].

28. Thus, in the light of the binding ratio referred to above, I am of the considered opinion that the petitioner's laying challenge against Exhibit P4 final seniority list at this point of time cannot be sustained.

In the facts and circumstances, the writ petition is dismissed. No order as to costs.

DAMA SESHADRI NAIDU
JUDGE

DMR/-