

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

WP(C).No. 11420 of 2015 (B)

PETITIONER:

DELSON DAVIS P., SECRETARY (UNDER ORDER
OF SUSPENSION) THRISSUR DISTRICT CO-OPERATIVE
HOSPITAL LTD.NO.R 306, SHORANUR ROAD,
THRISSUR-680001, RESIDING AT PELLISSERY HOUSE,
ST.FRANCIS CONVENT ROAD, EAST FORT P.O.,
THRISSUR-680 005.

BY ADVS.SRI.M.SASINDRAN
SRI.V.VENUGOPAL

RESPONDENTS:

1. THE JOINT REGISTRAR OF CO-OPERATIVE SOCIETIES
(GENERAL), THRISSUR-680 001.
2. THE REGISTRAR OF CO-OPERATIVE SOCIETIES (GENERAL),
THIRUVANANTHAPURAM-695 001.
3. THE THRISSUR DISTRICT CO-OPERATIVE HOSPITAL
LTD.R 306, SHORANUR ROAD, THRISSUR-680001 -
REPRESENTED BY ITS SECRETARY.
4. THE CONVENER, DISCIPLINARY ACTION,
THRISSUR DISTRICT CO-OPERATIVE HOSPITAL LTD.R 306,
SHORANUR ROAD, THRISSUR-680001.
5. T.K.PORINCHU, PRESIDENT
THRISSUR DISTRICT CO-OPERATIVE HOSPITAL LTD.R 306,
SHORANUR ROAD, THRISSUR-680001.
6. P.M.SURENDRAN, SECRETARY,
THRISSUR DISTRICT CO-OPERATIVE HOSPITAL LTD.R 306,
SHORANUR ROAD, THRISSUR-680001.

R3 TO R6 BY ADV. SRI.GEORGE POONTHOTTAM
R1 & R2 BY SPL. GOVT. PLEADER SRI.D.SOMASUNDARAM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
13-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 11420 of 2015 (B)

PETITIONER'S EXHIBITS:

EXT. P1: A TRUE COPY OF THE NOTE SUBMITTED BY THE PETITIONER BEFORE THE COMMITTEE.

EXT. P2: A TRUE COPY OF THE ORDER DATED 29.9.2014 SUSPENDING THE PETITIONER FROM SERVICE.

EXT. P3: A TRUE COPY OF THE CHARGE MEMO DATED 5.11.2014 ISSUED BY THE DISCIPLINARY ACTION COMMITTEE CHAIRMAN.

EXT. P4: A TRUE COPY OF THE REPLY DATED 7.11.2014 SUBMITTED BY THE PETITIONER BEFORE THE CHAIRMAN DISCIPLINARY ACTION COMMITTEE.

EXT. P5: A TRUE COPY OF THE COMPLAINT SUBMITTED BEFORE THE REGISTRAR, ABOUT THE ILLEGALITIES AND IRREGULARITIES COMMITTED BY THE 5TH RESPONDENT.

EXT. P6: A TRUE COPY OF THE ORDER DATED 3.12.2014 ISSUED BY THE REGISTRAR.

EXT. P7: A TRUE COPY OF THE STATEMENT DATED 19.3.2011 SUBMITTED BY BINCY THALAKKAD.

EXT. P8: A TRUE COPY OF THE STATEMENT GIVEN BY THE 6TH RESPONDENT BEFORE THE ADMINISTRATOR.

EXT. P9: A TRUE COPY OF THE PROCEEDINGS DATED 21.3.2015 EXTENDING THE PERIOD OF SUSPENSION OF THE PETITIONER.

EXT. P10: A TRUE COPY OF THE CIRCULAR NO.20/87 DATED 13.5.1987

EXT. P10(a): A TRUE COPY OF THE ENGLISH TRANSLATION OF EXT. P10

EXT. P11: A TRUE COPY OF THE ENGLISH TRNSLATION OF EXT. P6

EXT. P12: A TRUE COPY OF THE CERTIFICATE OF MBA DEGREE OF THE PETITIONER

RESPONDENT'S EXHIBITS:

EXT. R3(a) TRUE COPY OF THE EXISTING STAFF PATTERN AND FEEDER CATEGORY RULES

EXT. R3(b) TRUE COPY OF THE PROPOSAL FOR STAFF PATTERN REVISION SUBMITTED TO THE JOINT REGISTRAR

EXT. R3(c) TRUE COPY OF THE AGREEMENT ENTERED INTO BETWEEN THE SOCIETY AND M/S.GLOBE ELEVATORS ON 10.7.2014

EXT. R3(d) TRUE COPY OF THE CERTIFICATE ISSUED BY THE LEKSHMI COLLEGE OF SCIENCE, TECHNOLOGY AND MANAGEMENT, PALACE ROAD, SOUTH CHALAKKUDY, KERALA-680 307

EXT. R3(e) TRUE COPY OF THE RESOLUTION OF THE MANAGING COMMITTEE OF THE SOCIETY DATED 18.10.2014 AND ITS TRUE ENGLISH TRANSLATION

EXT. R3(f) TRUE COPY OF THE RESOLUTION OF THE MANAGING COMMITTEE OF THE SOCIETY DATED 13.11.2014 AND ITS TRUE ENGLISH TRANSLATION

EXT. R3(g) TRUE COPY OF THE RESOLUTION OF THE MANAGING COMMITTEE OF THE SOCIETY DATED 12.12.2014 AND ITS ENGLISH TRANSLATION

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.11420 of 2015 B

Dated this the 13th day of November, 2015

JUDGMENT

The petitioner, the erstwhile Secretary of the third respondent Society, now under suspension from 29.09.2014, has approached this Court ventilating his grievance, inter alia, that the sixth respondent, an alleged henchman of the fifth respondent, the President of the Society, has been appointed as the Secretary illegally, though he does not possess the necessary qualification.

2. Since there is much opposition from the respondent Society concerning the locus of the petitioner to file the present writ petition, it is essential to begin the narration of facts with the service particulars of the petitioner rather than the sixth respondent, whose appointment is in question.

3. Briefly stated, the petitioner, who had been working as the Secretary of the third respondent Society, was placed under suspension with effect from 29.09.2014 through Exhibit P2 order. In response to Exhibit P3 charge memo issued by the Management, the petitioner is said to have submitted Exhibit P4 explanation.

4. The petitioner would have us believe that the disciplinary proceedings initiated against him are vindictive. The *raison d'être* for the proceedings, according to the petitioner, are as follows: That the fifth respondent, the President of the Society, had been indulging in large scale manipulations and irregularities affecting the Society; that the petitioner reported to the authorities, including the Registrar of the Societies, concerning the conduct of the fifth respondent; that in view of the petitioner's whistle blowing attitude, the fifth respondent bore grudge against him and subjected him to disciplinary proceedings, apart from ensuring his suspension.

5. The petitioner further pleads that the sixth respondent, on an earlier occasion—when the petitioner had been suspended in 2009—was made the in-charge Secretary overlooking the claim of four seniors. Later, when the sixth respondent retired from service on 30.11.2014, taking advantage of the petitioner's suspension, once again, the fifth respondent influenced the second respondent to ensure the sixth respondent's appointment, initially, as the in-charge Secretary; later, as the permanent Secretary despite his lacking the necessary qualification.

6. Apart from questioning the legality of Exhibit P6 order of the second respondent appointing the sixth respondent as the Secretary, the petitioner also complains that he is grossly aggrieved by the appointment in question, because the sixth respondent now as the Secretary is also the Presenting Officer in the disciplinary proceedings initiated against the petitioner. According to him, since the sixth respondent acts at the behest of the fifth respondent,

the petitioner would not get any fair departmental enquiry. Under these circumstances, seeking the invalidation of Exhibits P2, P6 and P9 orders of the authorities, apart from an order of restraint against the sixth respondent from his functioning as the Secretary of the Society, the petitioner has filed the present writ petition.

Summary of Submissions:

Petitioner's:

7. The learned counsel for the petitioner has submitted that the sixth respondent retired from service on 30.11.2014 as Attendar, four grades below the position of Secretary. According to him, in terms of Rule 185A of the Kerala Co-operative Societies Rules, 1969 ('the Rules' for brevity) the sixth respondent lacks the basic qualification. Drawing my attention to Exhibit P6 order of appointment, the learned counsel would contend that under the statutory scheme of appointment, it is the Managing Committee that can appoint the staff in the Society. But, in the present

instance, the second respondent himself, contends the learned counsel, appointed the sixth respondent as the Secretary. In this regard, the learned counsel has also drawn my attention to Rules 182(2) and 186 of the Rules.

8. One of the specific contentions of the learned counsel for the petitioner is that the experience cannot be a substitute to basic qualification. In other words, experience is in addition to but not in lieu of the basic qualification a candidate is required to possess. In support of his submissions, the learned counsel has placed reliance on **Basheer.A. (Dr.) v. Dr.Saiful Islam.A and Others**¹, and **Janardhanan v. Joint Registrar**².

9. The learned counsel, when confronted with the question of the petitioner's locus, has submitted that the sixth respondent is the Presenting Officer and the petitioner's exoneration in future may have the impact of displacing the sixth respondent. As such, he cannot,

¹ 2014 (4) KHC 379 (FB)

² 1990 (1) KLT 530

according to the learned counsel, be impartial while he is acting as the Presenting Officer. Thus, submits the learned counsel that the petitioner is affected and he has the necessary locus to question the appointment of the sixth respondent. In this regard, the learned counsel places reliance on **Mohanan v. Joshwa**³. The learned counsel has further contended that the petitioner, as an employee, has every right to question any illegality in the organisation.

10. Finally, the learned counsel has drawn my attention to Exhibit P8 statement made by the sixth respondent in some other disciplinary proceedings involving the fifth respondent, the President of the Society. According to the learned counsel, the sixth respondent has emphatically gone on record saying that he has committed illegalities at the behest of the fifth respondent, only with whose patronage he proclaims himself to be surviving.

³ 2006 (3) KLT 301

11. Per contra, Mr. George Poonthottam, the learned counsel for the third respondent has strenuously contended that the writ petition is in the nature of a public interest litigation. According to him, there shall be no pro bono publico litigation in service matters. Succinctly stated, the petitioner lacks the necessary locus standi to file the writ petition questioning the sixth respondent's appointment.

12. The learned counsel has also contended that what has been urged by the petitioner in the writ petition is essentially a service dispute for the resolution of which the petitioner has an efficacious alternative remedy as well as a proper forum.

13. The learned counsel has elaborately submitted on the antecedents of the petitioner. According to him, the petitioner has been facing charges of grave irregularities. He has also emphasised the fact that after issuing the initial charge memo, the respondent Society issued additional charges based on which an Enquiry Officer has already

conducted an enquiry.

14. The learned counsel has submitted that but for the submission of the report, the entire enquiry is complete. And at this stage, this Court ought not to invoke its jurisdiction under Article 226 of the Constitution at the behest of the petitioner, whose conduct does not inspire any confidence. In sum and substance, the learned counsel would contend that the petitioner has filed the present writ petition with a collateral objective of obstructing the Managing Committee from taking any drastic disciplinary action against him.

15. The learned counsel has also submitted that to redress the petitioner's grievance, if any, there is an efficacious statutory mechanism; it has been conveniently bye-passed by the petitioner. Drawing my attention to Section 83(1)(j) of the Kerala Co-operative Societies Act, 1969 ('the Act' for brevity), the learned counsel has contended that there is no legal justification, not even a

whisper, in the writ petition why the petitioner could not take recourse to the appellate remedy if he is aggrieved in any manner.

16. The learned counsel has also submitted that in terms of Rule 185A of the Rules, a person having sufficient experience—thus professionally qualified—can be appointed to any post despite the fact that he has no basic academic qualification. The learned counsel has reminded the Court that Rule 185A begins with a non obstante clause. According to him, the post of Secretary is a technical post and that the sixth respondent has already acquired sufficient expertise having worked as the in-charge Secretary on earlier occasions.

17. Trying to refute the contention of the learned counsel for the petitioner that Exhibit P6 is, in fact, an order of appointment rather than an order of approval under Rule 185A, the learned counsel would contend that ex facie Exhibit P6 would read as if it were an order of appointment;

but, for all practical purposes, asserts the learned counsel, it is only an order of approval. In elaboration, the learned counsel has submitted that, before inviting Exhibit P6 order from the second respondent, the Managing Committee of the third respondent Society passed a resolution considering all aspects such as experience and expertise of the sixth respondent and accordingly forwarded the resolution to the second respondent for his approval.

18. At this juncture of the arguments, this Court pointed out that neither in the counter affidavit nor in any of the exhibits filed before this Court has the respondent Society spelt out even remotely that the Managing Committee has considered the sixth respondent's appointment only on the basis of his expertise. The Court has further pointed out that the impugned order, too, does not suggest that the second respondent has been persuaded by the Managing Committee on the basis of the sixth respondent's putative expertise.

A Word of Appreciation: An Aside:

19. In response to the above query of the Court, the learned counsel for the respondent Society has undertaken to file the necessary material before this Court to establish that the Managing Committee had applied its mind and sought the approval of the second respondent to appoint the sixth respondent as the Secretary only on the basis of his expertise. The Court has, however, responded by saying that, with the arguments half-way through, it may not be proper to have any additional material on record. The evening session having come to an end, the Court adjourned the matter.

20. A couple of days later the hearing resumed. The learned counsel for the respondent has brought to my notice that, in the interregnum, he has filed certain additional documents along with a petition for their acceptance. Initially, I refused to entertain them. In turn, the learned counsel has responded by saying that he filed

the documents only with a view to assisting the Court and nothing else. If the Court does not want to look into them, neither can he insist on their acceptance, nor does he have any grievance in that regard.

21. Persuaded by the disarming response of the learned counsel, I have, on second thought, asked the learned counsel for the petitioner whether he has any objection if the Court receives the documents. The learned counsel has submitted—despite the fact that the documents may prove to be adverse to his cause—that he does not want to take advantage of any technicality and that they may be accepted subject to his objections as to their veracity.

22. When the learned counsel for the petitioner thus—passingly though—doubted the authenticity of the documents, the learned counsel for the respondent readily undertook to produce the entire original records. When the Court has dissuaded him, the learned counsel for the

respondent has, however, submitted that any scintilla of doubt on the genuineness of the documents will also cast a shadow on his integrity, as well. Accordingly, having taken an adjournment, he did produce all the records in the original.

23. As the records are in the vernacular (only the translated versions being before the Court), I asked the learned the counsel for the petitioner to check the records and satisfy himself as regards their genuineness. The learned counsel, having checked, expressed no further apprehension on the issue.

24. I have narrated the incident—at some length, in fact—only to place on record a word of appreciation at the sense of fairness and the spirit of accommodation displayed by both the learned counsel. It is heartening to note. Indeed, such exemplary conduct on the part of the senior members of the Bar sets a fine example for the young members and makes them emulate the seniors. Already

enjoying a very fine reputation with its professionalism and discipline, the Bar of this Court only further enhances its reputation with such commendable candour in conducting the cases. Litigation is not a war to be won at any cost, but adjudication with fairness as its foundation.

25. Heard the learned counsel for the petitioner and the learned counsel for the third respondent, as well as the learned Government Pleader, apart from perusing the record.

Issues:

- I.** Whether the petitioner has the necessary locus standi to file the writ petition?
- II.** Whether the petitioner has an efficacious alternative remedy?
- III.** Whether the Registrar has the authority or jurisdiction to appoint an employee in a Co-operative Society in terms of Rule 185A of the Rules?
- IV.** Whether the sixth respondent has been qualified to be appointed as the Secretary of the respondent Society?

V. Whether Exhibit P6 order passed by the Registrar can be sustained?

VI. Whether Exhibits P2 to P9 can be sustained or are required to be set aside?

VII. Whether the petitioner is required to be re-instated after revoking his suspension?

VIII. Whether the sixth respondent can act as a Presenting Officer in the disciplinary proceedings initiated against the petitioner?

IX. Whether the petitioner has the necessary locus standi to file the writ petition?

Issue Nos.VI to IX:

26. In so far as issues VI to IX are concerned, they are related to the service disputes involving the petitioner. It is made clear that the respondent Society has duly initiated the disciplinary proceedings and in furtherance thereof appointed an Enquiry Officer to conduct the departmental enquiry. Unless the petitioner could establish before the Court that the authority who has initiated the disciplinary proceedings lacks the necessary jurisdiction or

that the very initiation of enquiry is vitiated on the grounds such as mala fides or abuse of process, this Court, it is trite to observe, is not inclined to interfere with the validly constituted disciplinary proceedings.

27. Further, the sixth respondent, the validity of whose appointment is to be examined, can only be discharging his functions ex officio as a Presenting Officer unless and until this Court interdicts his appointment. As such, the petitioner cannot question the role of the sixth respondent as the Presenting Officer. This Court, therefore, refuses to grant any relief to the petitioner in so far as the disciplinary proceedings initiated against him are concerned.

Issue No.I:

28. On the issue of locus or standing, I may observe that the very legal concept of standing stands considerably diluted. Unless the suitor is charged with mala fides or is termed a busybody out to settle personal scores or hog the

limelight, the Courts have always taken a lenient view.

29. There is, however, no gainsaying the fact that on the issue of standing, the service jurisprudence always stands on a different footing. More often than not, the Courts have frowned on the so called pro bono publico litigation in service matters. Here, the question is, has the petitioner engaged himself in any public interest litigation?

30. Indisputably, the petitioner is an employee of the very Organisation, the action of which he has questioned. There is no hiding the fact that in the writ petition he has espoused, inter alia, his own cause as well. It is, to me, incidental. The petitioner has questioned, as a substantial issue, the appointment of the sixth respondent as the Secretary by the second respondent on the grounds of ultra vires and also his lacking the necessary qualification.

31. The issue, therefore, is the illegality or maladministration on the part of the executive at the helm of the affairs. The petitioner's personal grievance against

the sixth respondent's appointment and the advantage he may gain, if the appointment is set aside, are incidental and do not, in my opinion, vitiate his approaching the Court. There is much argument on the past conduct—departmentally—of the petitioner.

32. Law does not compel a cause to be unalloyed, presented in its pristine glory before the Court; nor is it mandatory that the suitor should always present himself before the Court in a shining armour: with impeccable antecedents. In a civil litigation, the petitioner's antecedents hardly matter, unless the conduct is motivated by mala fides. Further, a cause may have many elements intertwined into one action for redressal; the Court is always at liberty to ignore the insignificant or unwanted element and focus on the core issue, lest it should amount to throwing the baby with the bathwater.

33. In **Vijay Shankar Pandey v. Union of India**⁴, a Civil Servant has been subjected to disciplinary proceedings on the ground that he is a signatory on the petition filed before the Supreme Court questioning what is said to be the maladministration in his own establishment. The petition has resulted in CBI probe; the rest is history. In that context, the Hon'ble Supreme Court has observed that the Court is at a loss to comprehend how the filing of the writ petition containing allegations that the Government of India is lax in discharging its constitutional obligations of establishing the rule of law can be said to amount to either failure to maintain absolute integrity and devotion to duty or of indulging in conduct unbecoming of a member of the Service. The Apex Court has tellingly observed thus:

“49. The Constitution declares that India is a sovereign democratic republic. The requirement of such democratic republic is that every action of the State is to be informed with reason. State is not a hierarchy of regressively genuflecting coterie of bureaucracy.

⁴ (2014) 10 SCC 589

50. The right to judicial remedies for the redressal of either personal or public grievances is a constitutional right of the subjects (both citizens and non-citizens) of this country. Employees of the State cannot become members of a different and inferior class to whom such right is not available. The respondents consider that a complaint to this Court of executive malfeasance causing debilitating economic and security concerns for the country amounts to inappropriate conduct for a civil servant is astounding.”

34. In any event, the concept of standing has been much watered down in Indian jurisprudence, more particularly in reference to a public law remedy involving the putative infraction of constitutional rights of a person. The Courts have always tried, justly so, to sustain a lis rather than throw it out, especially, in the absence of mala fides or ulterior motives on the part of the suitor. Indeed, a person may have an incidental benefit—thus may have been grinding his own axe; nevertheless, if the lis raises other substantial issues, the Court cannot be blind to the cause just because there is a lurking suspicion in the approach of the suitor.

35. In the present instance, the petitioner's cause is mixed: part personal, part institutional. So long as they are separable, the Court can always consider what is justiciable and reject what is objectionable. To sum up, in my considered view, the petitioner cannot be non-suited merely because he has, if at all, conflated his personal interest with that of the institution. All is said and done, the petitioner, too, is a stakeholder and the organisational well-being is his concern as well.

Issue No.II:

36. Indeed, in the face of an efficacious alternative remedy, when a person can invoke Article 226 of the Constitution has been well settled. To recap the oft-repeated judicial dictum in that regard, I may observe, first, that the rule of alternative remedy is not an absolute bar, but only a self-imposed limitation on the part of a Constitutional Court. Second, under—at least—three specific instances, the availability of an alternative remedy

does not bar a person from invoking the public law remedy of judicial review: (1) When the impugned action of the executive affects the fundamental rights of a person; (2) when the order impugned suffers on the ground of vires; and (3) when the principles of natural justice are violated.

37. In the present instance, the petitioner questions Exhibit P6 order appointment issued by the second respondent to be ultra vires. As such, the question of an efficacious alternative remedy does not deter the petitioner from approaching this Court.

Issue No.III:

Appointment – The Issue of Ultra Vires:

38. In the above factual backdrop, now I may address the principal issue whether the appointment of the sixth respondent can be sustained? This aspect is to be examined on twin grounds: whether the Registrar has got the necessary authority or jurisdiction under Rule 185A of the Rules to appoint the sixth respondent as the Secretary

and whether the sixth respondent fulfills the eligibility criterion as has been statutorily mandated. Thus issue Nos.I to III have been taken up together.

39. To begin with, it may be relevant to examine the scope and ambit of Rule 185A of the Rules, which reads as follows:

“185A. Notwithstanding anything contained in these rules the committee of a society may, with the prior approval of the Registrar, appoint persons who are technically or professionally qualified or persons with experience and expertise, by way of deputation or on a contract basis for a specified period not exceeding five years:]

[Provided that no such contract appointment shall be made to the posts mentioned in sub-rule(2),(3) and (4) of Rule 185 or to any other post in any Society, which is engaged in banking business.]

[Provided further that the Co-operative Medical College constituted by any duly registered Co-operative Institution may, with the prior approval of Registrar of Co-operative Societies, appoint Professors retired from Government Medical College as Professors on annual contract basis.”

40. It is beyond any cavil that it is the Managing Committee of the Society that is empowered to appoint any persons who are technically or professionally qualified or

persons with experience and expertise by way of deputation or on a contract basis for a specified period not exceeding five years. The said appointment of the person shall be with the prior approval of the Registrar. Without much cogitation, it can further be said that the power of prior approval is entirely different and distinct from that of the very appointment. In the present instance, Exhibit P6 is loud and clear. It is anything but a prior approval. In other words, Exhibit P6 is an order of appointment.

41. The learned counsel for the respondent Society has fairly submitted that Exhibit P11, which is the translation of Exhibit P6, truthfully reflects the contents in the vernacular. To be precise, the learned counsel has admitted that it is an order of appointment. Nevertheless, he has contended that it is only a wrong description of the process; for, according to him, it is the Managing Committee that has appointed the sixth respondent with the approval of the Registrar.

42. I wish that were the process adopted by both the respondent Society and the Registrar. No material has been placed on record to conclude that even if one were to treat Exhibit P6 as a prior approval, there was any appointment made by the Managing Committee on its own. Thus, I am constrained to conclude that Exhibit P6 cannot be sustained.

Issue No.IV:

43. Now, we may examine Rule 186 of the Rules. As can be seen, Rule 186(1)(i) provides that all posts other than those requiring technical qualifications, the starting pay of which is ₹ 250/- and above, shall be filled up with persons having a degree in Commerce or Master's degree in Arts of a recognised University, with Co-operation as a special subject. In the alternative, the prospective candidate may have any Bachelor's degree of a recognised University and a Higher Diploma in Co-operation or Higher Diploma in Co-operation and Business Management.

44. The fact, however, remains that under Rule 185A, which is the linchpin of the submissions made by the learned counsel for the respondent Society, for the appointment to a technical post no specific qualification has been prescribed. According to the learned counsel, the post of Secretary is either technical or professional. In elaboration, he has further submitted that the sixth respondent has earlier had sufficient experience and expertise having worked in the same post. Succinctly stated, the contra submissions of the learned counsel for the petitioner is that the sixth respondent worked as an Attendar, four ranks below that of the Secretary, for a period of twenty-one months when the petitioner was under suspension. Subsequently, on the petitioner's second suspension, the sixth respondent was in charge for less than a month. According to him, it can hardly be called any experience.

45. It is the singular contention of the learned counsel for the petitioner that experience or expertise shall be over and above the basic qualification. In this regard, we may examine the judicial dictum laid down in Basheer (supra). The issue before the learned Full Bench, on reference, is whether experience is subsequent to acquiring the requisite qualification or whether it could be acquired simultaneously while acquiring the qualification.

46. In the above case, a person to be appointed as Reader is required to have eight years' teaching experience, apart from having Ph.D. The candidate in question did not have eight years' experience after acquiring Ph.D. In that context, the learned Full Bench has held that the experience prescribed should be one acquired after acquisition of the basic educational qualifications.

47. Though the learned counsel for the petitioner has placed heavy reliance on the above judgment, I am afraid it has no relevance in the present factual matrix. In Basheer

(supra) the issue is with regard to experience in addition to the basic qualification; here experience is in lieu of qualification.

48. Indisputable is the fact that Rule 185A of the Rules begins with a non-obstante clause. In the present instance, the post is Secretary, a pivotal position in the organisation. A person to be appointed on deputation or on a contract basis for five years must be technically or professionally qualified. In the alternative, he must be a person with experience and expertise. We have adverted to the educational qualifications required to be possessed by a person to be appointed as Secretary.

49. In the present instance, the sixth respondent, indisputably, has possessed only SSLC. Thus, without much cogitation it can be held that he has not been academically qualified to hold the post. Whether Rule 185A of the Rules dispenses with this primary requirement?

50. If we examine the scheme of things, it is clear that Rule 185A contemplates an out of turn appointment for a limited period. Dispensing with the due process in appointments may arise in an exigency or when the employer intends to be benefited by the immense experience or expertise of a person. In **Sheshrao Jangluji Bagde v. Bhaiyya**⁵, the Hon'ble Supreme Court has held: "Normally when we talk of an experience, unless the context otherwise demands, it should be taken as experience after acquiring the minimum qualifications required and, therefore, necessarily will have to be posterior to the acquisition of the qualification. However, in the case of promotion the same interpretation may not be just or warranted. It would depend on the relevant provisions as also the particular type of experience which is required."

⁵ 1991 Supp (1) SCC 367

51. Expertise, according to Concise Oxford English Dictionary, is great skill or knowledge in a particular field. Experience is knowledge or skill gained over time, defines the same dictionary. But expertise, to my mind, is not something that is gained out of thin air; it is, in a measure, a skill gained out of experience or with repeated exposure to a particular activity.

52. Rule 185A is not a provision that annihilates the entire statutory scheme as regards the recruitment. Nor is a non-obstante provision a licence to take liberties with the essential requirements unless the substantial provision, regarding which an exception is carved out in the non-obstante clause, is entirely irreconcilable.

53. In **Dominion of India v. Shrinbai A. Irani**⁶, a Constitution Bench of the Hon'ble Supreme Court has held that although ordinarily there should be a close approximation between the non obstante clause and the

⁶ AIR 1954 SC 596

operative part of the section, the non obstante clause need not necessarily and always be co-extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof, a non obstante clause cannot cut down that construction and restrict the scope of its operation. In such cases the non obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment.

54. Going by the above proposition of law, I am of the opinion that Rule 185A of the Rules has never been meant to bye-pass the statutory requirement of possessing the basic qualification required to hold the post of a Secretary. Further, the Society runs a hospital as its principal activity;

the post of a Secretary is not a technical post, but an administrative one—a pivotal position. More pertinently, what is the expertise or experience the sixth respondent has? A couple of years of exposure in the said post as a stop gap arrangement, while he was working as an Attender—at least three ranks below. The sixth respondent's fortuitous stint as a Secretary can be called anything but experience, more particularly, worthy of conferring on the person expertise.

55. Of some significance is the fact that the sixth respondent has earlier faced disciplinary proceedings. True, facing the disciplinary proceedings is not a crucifying factor against an employee; it is, on most occasions, an unavoidable angst of an employee who may, in the end, come out unscathed. But, what is to be seen is Exhibit P8, the sixth respondent's explanation in those proceedings; to see is to believe!

56. The back ground to Exhibit P8 is that earlier, the sixth respondent had an occasion to serve as the Secretary on temporary basis, though. Indeed, it is alleged that the sixth respondent was made the Secretary, then working as a Peon, by ignoring the claim of four senior employees, who include the Assistant Secretary as well. It is, however, not relevant to consider the said aspect of ignoring the claim of the seniors. The fact, at any rate, remains that during the sixth respondent's tenure as in-charge Secretary, one employee, who had been irregularly appointed as a Staff Nurse, submitted a complaint before the Administrator that the sixth respondent accepted Rs.1 lakh as bribe for appointing her. In the enquiry that ensued, the sixth respondent submitted an explanation, which is Exhibit P8. The said explanation, a part of which is extracted below, is self-explanatory:

“Though a meeting is convened on 23.11.2010, the decisions of the meeting are return before the next meeting. After 23.11.2010 discussions were held with the

relatives of Smt.Bincy and Rehna and I understood that Rehna has agreed to give 1.5 lakhs and Rehna has decided to give Rs.1 lakh to the President. Accordingly the President directed me to accept Rs.1.5 lakhs from Rehna and Rs.1 lakh from Bincy and directed to keep it separately. The amount was entrusted by them with me on next day itself. The President confirmed the receipt of the amount from me by asking whether they have given the amount and thereafter an order was issued to them by the President directly, by considering their application dated 26.11.2010 and permitted them to enter service as permanent Staff Nurse from 01.12.2010. The President has collected the amount of Rs.2.50 lakhs, immediately after confirming the receipt of the same by me from Rehna and Bincy. It has been said that the amount was distributed among other directors and I was given food from Casino Hotel thereafter. This file was kept separately, since the President had directed by me to do so and directed that the file should not be anybody else. Mistake of my own part may be pardoned since I have done as directed by the President and I have done so due to the fear that if I failed to do according to their direction, I will lose my job and thereafter the mistake committed without any intention may be pardoned."

57. Pertinently, neither the counter affidavit nor the additional affidavit filed by the third respondent has even a remote reference to Exhibit P8. In other words, the document stands undisputed. It is too evident to be ignored that in Exhibit P8 the sixth respondent did admit accepting illegal gratification, albeit, at the behest of the President of

the Society. To a telling effect he confesses that he has committed the crime as directed by the President and that he had done so only because of the fear that any disobedience on his part would have cost him his job. That is why, though with some reservation, at the outset, I employed the expression 'henchmen'. To be fair to the third and sixth respondents, both the counter affidavit and the additional affidavit do contain elaborate pleadings, in the nature of counter allegations, against the petitioner. As has been adverted to at the beginning, this Court has not indulged in any adjudication concerning the service dispute involving the petitioner; on the contrary, this Court has focused on the legality of Exhibit P6.

58. It is sad to note that Exhibit P6 was passed by an official of the rank of Registrar. Without sounding harsh, I still have to voice my concern at the abdication of administrative responsibility on the part of the said official.

59. In the first place, the Registrar has never bothered to check whether he himself could appoint an employee rather than approve the appointment. Second, he seems to have simply signed on the dotted lines based on the recommendation, if any, on the part of the Managing Committee, especially its President, whose conduct stands exposed in Exhibit P8. An organisation running a hospital on co-operative principles, I am afraid, cannot deal with an issue such as the appointment of a Secretary in such a cavalier fashion.

60. Before parting with the matter, I may observe that I have not taken into consideration the records subsequently produced by the learned counsel for the respondent Society. In fact, those records, as has been admitted by the learned counsel for the petitioner, do contain certain material to show that the Managing Committee initially decided to recommend the case of the sixth respondent for a tenurial appointment on the basis of

his alleged experience. At any rate, since I have already held that the basic qualification is sine qua non for a candidate to be appointed as Secretary, the question of my considering those records has been obviated.

In the facts and circumstances, Exhibit P6 is set aside. Thus the writ petition is allowed to the extent indicate above. No order as to costs.

Dama Seshadri Naidu, Judge

tkv

'C.R.'