

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 22ND DAY OF JUNE 2015/1ST ASHADHA, 1937

WP(C).No. 18558 of 2015 (T)

PETITIONER:

THE PALAKKAD SERVICE CO-OPERATIVE BANK LTD
NO.1200, G.B.ROAD, PALAKKAD P.O.,
PALAKKAD DISTRICT, PIN 678 001
REPRESENTED BY ITS SECRETARY

BY ADVS.SRI.N.K.SUBRAMANIAN
SRI.S.ANANTHAKRISHNAN

RESPONDENTS:

- 1.STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
DEPARTMENT OF CO OPERATION, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM 695 001.
2. THE ASSISTANT DIRECTOR OF CO OPERATIVE SOCIETIES,
AUDIT/THE COCCURENT AUDITOR,
THE PALAKKAD SERVICE CO OPERATIVE BANK LTD. NO.1200,
GB.ROAD, PALAKKAD PO, PALAKKAD 678 001 .
(APPOINTMENT UNDER RULE 156 PART 1 OF THE KSR
BY THE DIRECTOR OF CO OPERATIVE (AUDIT)
THIRUVANATHAPURAM)
3. THE JOINT DIRECTOR OF CO OPERATIVE AUDIT,
CIVIL STATION, PALAKKAD POST, PALAKKAD 678 051.
4. THE DIRECTOR OF CO OPERATIVE AUDIT,
DIRECTORATE OF CO OPERATIVE AUDIT, P.M.G. JUNCTION,
VIKAS BHAVAN, C BLOCK, THIRUVANANTHAPURAM 695 033.

R BY SRI. K.C. VINCENT, GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
22-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :

P1:TRUE COPY OF THE AUDIT CERTIFICATE DATED 18.09.2013 ALONG WITH THE AUDIT MEMORANDUM WITH TRANSLATION IN ENGLISH.

P2:TRUE COPY OF THE AUDIT CERTIFICATES FOR THE YEARS 2013-14 AND 2012-13 WITH TRANSLATION IN ENGLISH.

P3:TRUE COPY OF THE APPEAL DATED 06.11.2014 ALONG WITH A PETITION FOR STAY WITH TRANSLATION FOR RELVANT PORTION IN ENGLISH.

P4:TRUE COPY OF THE ORDER DATED 09.12.2014.

P5:TRUE COPY OF THE PETITION DATED 23.12.2014 WITH TRANSLATION FOR RELEVANT PORTION IN ENGLISH.

P6:TRUE COPY OF THE ORDER DATED 28.02.2015 WITH TRANSLATION IN ENGLISH.

RESPONDENTS' EXHIBITS : NIL

/True Copy/

P.A to Judge.

'CR'

DAMA SESHADRI NAIDU, J.

W.P. (C) No. 18558 of 2015

Dated this the 22nd day of June, 2015.

JUDGMENT

The petitioner, a Co-Operative Bank, having been classified as class-I society, filed Ext.P3 appeal before the first respondent against the audit certificate issued by the 3rd respondent. In fact, the petitioner is aggrieved by certain directions in Ext.P1 audit certificate. The first respondent has, however, rejected the appeal through Ext.P4 order, holding that there is no provision in the Kerala Co-Operative Societies Act ('the Act' for brevity) to maintain an appeal against Ext.P1 audit certificate.

2. The petitioner, aggrieved by Ext.P4 order of rejection of the appeal at the threshold, filed what is said to be Ext.P5 revision, for which, even according to the learned counsel for the petitioner, there is no specific provision. Be that as it may, once again, the first respondent passed Ext.P6 order reiterating its earlier stand that in terms of Section 83 (1)(j), no appeal is maintainable. Aggrieved thereby, the petitioner has filed the present writ petition.

3. The learned counsel for the petitioner has strenuously contended that on neither of the occasions—while passing Ext.P4 order or while passing Ext.P6 order—has the petitioner been given an opportunity to put forth his contentions concerning the maintainability of the statutory appeal. Expressed differently, it is the contention of the learned counsel for the petitioner that both Exts.P4 and P6 suffer from the vice of non-compliance with the principles of natural justice.

4. Taking me through the statutory provisions, the learned counsel has submitted that Section 63(3)(6) and (7), read with Section 3 of the Act, amply provides for an appeal against audit certificate in terms of Section 83(1)(j) of the Act. In elaboration of his submissions, the learned counsel would contend that as per Section 83(1)(j), an appeal shall lie against any order made by any person exercising all or any of the powers of the Registrar. It is the singular contention of the learned counsel for the petitioner that the 3rd respondent has, in fact, exercised the powers of a Registrar while issuing Ext.P1 audit memorandum and certificate.

5. Thus, on the twin grounds that there has been violation of the observance of the principles of natural justice, and that the statutory appeal despite being eminently maintainable, the first respondent rejected

the same, the learned counsel for the petitioner has sought the intervention of this Court.

6. The learned Government Pleader, on the other hand, has submitted that the appeal is not an inherent power of any court or Tribunal, much less of a quasi-judicial authority. According to him, there ought to have been a specific provision to maintain an appeal against any order of a primary authority. According to him, the 4th respondent has issued Ext.P1 audit memorandum and certificate under Section 63 of the Act in his own right, but not as a delegate of the Registrar. The learned Government Pleader, drawing my attention to Section 63 (7) of the Act, contends that the 3rd respondent, while issuing Ext.P1 audit memorandum and certificate, may have been under the administrative control of the Registrar, but not acted as a delegate of the Registrar.

7. Heard the learned counsel for the petitioner and the learned Government Pleader, apart from perusing the record.

ISSUES:

- (1) Whether the 3rd respondent has issued Ext.P1 as a delegate of the 1st respondent?
- (2) Whether the Act or the Rules made thereunder provide for an

appeal against Ext.P1?

- (3) Whether the respondents have infringed the principles of natural justice in issuing Ext.P4 & P7; if so, what are the consequences?

In re: Issue No.1:

8. Since the learned counsel for the petitioner has laid much emphasis on Sections 3 and 63 (3) (6) and (7) of the Act, it is apposite to examine the same, which reads as under:

Section 3:

3. Registrar (1) The Government may appoint a person to be the Registrar of Co-operative Societies for the State. (2) *The Government may by general or special order confer on any person all or any of the powers of the Registrar under this Act.*

(emphasis added)

Section 63 of the Act, to the extent relevant, reads as follows:

" 63. xxx

(3) The Government may by general or special order, delegate all or any of the powers of the Director of Co-Operative Audit, in the Act to his subordinate officers or to the subordinate officers of the Registrar.

xxx

(6) Notwithstanding anything contained in any other law for the time being in force, the Audit certificate issued by the

Director of Co-Operative Audit, or by any officer authorized by him shall be valid for all purposes required to be filed before the State Government and non-Governmental authorities.

(7) The Director of Co-Operative Audit shall be under the control of the Registrar of Co-Operative Societies.
(emphasis added)

9. From Section 3 of the Act, it is manifest that the Government may by general or special order confer on any person all or any of the powers of the Registrar under this Act. There is no gainsaying the fact that the conferment must be the powers specifically conferred on the Registrar. The natural corollary to the above proposition is to see whether the power of audit is the Registrar's power delegated to the 3rd respondent. In this regard, we may examine Section 66 of the Act, especially sub-Sections (3) & (7) thereof. It is, however, evident that similar to Section 3 of the Act, Section 66 (3) empowers the Government to confer the powers of the Director of Co-Operative Audit on any other officer. In fact, without the involvement of the Government, the Director of Co-Operative Audit himself can delegate any of his powers to some other official. Without much cavil, it can further be stated that sub-section (7) of Section 66 only makes it clear that the Director of Co-Operative Audit is under the administrative control of the Registrar of Co-Operative Societies.

10. On the examination of the above statutory scheme, it is to be stated that there is any amount of difference between an official discharging duties on delegation of the powers of some other official and his discharging statutorily mandated duties under the administrative supervision of the said official.

11. Delegation has two facets: legislative delegation and administrative delegation. As we are, here, concerned with administrative delegation, it may be seen that this delegation is achieved by means of either a statutory devise or a constitutional devise. In **Mutual Film Corporation v. Industrial Commission**¹, the American Supreme Court has endeavoured to draw a line of distinction between administrative and legislative powers thus:

“[W]hile administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done, there would be infinite confusion in the laws, and, in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.”

¹ (1915) 236 U.S. 230

12. In India, the executive power, I may observe, is independent of and in addition to, the statutory sanctioning, as it is available by way of constitutional conferment. Articles 73 and 162 deal with the executive power of the Union and the State respectively. In terms of Article 162 of the Constitution, the executive power of a State shall, subject to the provisions of the Constitution, extend to the matters with respect to which the Legislature of the State has power to make laws. The exercise of the executive power shall be subject to the limitation that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof.

13. Having observed that administrative delegation can be achieved by exercising either the residual powers in terms of Article 162 of the Constitution or the statutorily conferred specific powers, we may further appreciate that there can be administrative sub-delegation. The obvious method of the sub-delegation is, of course, by means of statutory authorisation. Even when the statute is silent on the issue of sub-delegation of administrative power, this objective can be achieved without

offending the principle that *delegatus non potest delegare*. The Courts have found the devise of introducing the dichotomy of essential functions and ministerial functions. Though the authority to act or decide is not permitted to delegate his principal power, he can, nevertheless, delegate the non-essential powers, variably called the ministerial functions, to his subordinate so that he could be aided in the charge of his duties by some other person who can do everything short of actually taking the very decision, as is frequently seen in service jurisprudence—to be specific in disciplinary proceedings.

14. Wills, J. in his concurring judgment in **Huth v. Clarke**² has held thus:

The case really turns on the meaning of the word “delegate,” a word which has appeared on the statute-book for the last thirty years, occurring, as it does, at least as far back as 24 & 25 Vict. c. 133, sched., part 2 (6). *Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.* The best illustration of the use of the word is afforded by the maxim, *Delegatus non potest delegare*, as to the meaning of which it is significant that it is dealt with in Broom's Legal Maxims under the law of contracts: it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with

² (1890) 25 Q.B.D. 391

his power in such a manner as to denude himself of his rights. *If it is correct to use the word in the way in which it is used in the maxim, as generally understood, the word “delegate” means little more than an agent. . .*

(emphasis added)

15. Indeed, delegation is not synonymous with denudation; more particularly, when the essential functions have not been delegated. The fact, however, remains that where there is no delegation, either expressly or impliedly, it is axiomatic that the act is to be performed by the specified person. Even when the said person is required to act subject to the sanction of a superior authority, the act is required to be performed by him, but not by the said superior authority, for there is no delegation of any power from that superior authority to the authority who is required to act.

16. In **State of Assam v. Keshab Prasad Singh**³, the facts in brief are that a register of Fisheries had to be kept and the Deputy Commissioner was empowered, with the previous sanction of the Chief Commissioner (later Provincial Government), to declare any collection of water to be a fishery. Latching on to the expression “the previous sanction” in the relevant rules, the government has, with a view to

³ AIR 1953 SC 309

bypassing the appellate scrutiny by High Court, taken upon itself the task of settling the fishery rights, instead of sanctioning the action of the Deputy Commissioner. In that context, the Hon'ble Supreme Court has observed thus:

26. It seems to us that if the intention was to authorise the Government to lift the matter out of the Rules altogether and to proceed in an executive capacity, the word "sanction" would be out of place, for the Government would hardly require its own previous sanction to something which it is itself authorised to do. The sanction must therefore refer to something which some other person or body is authorised to do, and in the context we feel that it can only mean sanction to the Deputy Commissioner to proceed in a manner which is not [?] quite in accordance with the instructions contained in the rules.

...

34. When we say the Deputy Commissioner acted under the direction and orders of the State Government, we refer to the actual act of "settling" and not to his choice of a lessee. If this auction had proceeded in the normal way, the Deputy Commissioner would have directed the auction and would have made a selection and would then have sent his selection on to a higher authority, the Commissioner, for sanction. He would then have "settled" the fishery. In the present case, he carried out every one of those steps except that the higher authority here was the State the Government which had substituted itself under Rule 190-A in place of the Commissioner. It was his the Deputy Commissioner who made the initial choice. It was his choice which was "sanctioned" and it was he who in reality and in fact "settled" the fishery with the first respondent. The mere fact that the State the Government in addition to "sanctioning" his act also told him to "settle" the fishery could not alter or

divest him of his legal authority? This is not a case in which the Deputy Commissioner having been vested with a discretion failed to exercise it and acted as the mouthpiece of another. His discretion was to select a bidder and he did that without any outside pressure. Thereafter his authority was to “settle” the fishery with the selected bidder once his act was sanctioned and *the mere fact that he was directed by another to do that which he would have been bound to do under the law in any event cannot divest the settlement of its legal and binding character.*

(emphasis added)

17. In the light of above discussion, I am of the considered opinion that the 3rd respondent has acted on his own, but not as a delegate of the Registrar, so as to attract Section 83 of the Act, one of the appeal provisions, which we may examine now.

In re: Issue No.2:

18. The Act does provide for a mechanism for appealing against the orders passed under certain provisions of the Act. Section 82 of the Act provides for the appeals to Tribunal, whereas Section 83 provides for appeals to other authorities. It may be profitable to examine the contours of Section 83, which reads as follows:

83. Appeals to other authorities.- (1) An appeal shall lie under this section against-
(a) an order of the Registrar made under sub-section (2) of section 7 refusing to register a society; or

- (b) an order of the Registrar made under sub-sections (4) and (6) of section 12 refusing to register an amendment of the bye-laws of a society; or
- (c) a decision of a society refusing to admit any person as a member of the society or expelling any member of the society; or
- (d) an order made by the Registrar under section 67 apportioning the cost of inquiry held under section 65 or an inspection made under section 66; or
- (e) an order of surcharge made by the Registrar under section 68; or
- (f) an order made by the Registrar under section 71 directing the winding up of a society; or
- (g) any order made by the liquidator of a society in exercise of the powers conferred on him by section 73; or
- (h) any order made under section 76; or
- (i) an order for attachment of any property made by the Registrar under section 78; or
- (j) any order made by any person exercising all or any of the powers of the Registrar.*

(2) An appeal under sub-section (1) shall be made within sixty days from the date of the order or decision,-

- (a) If the order or decision was made by the Registrar, to the Government; and
- (b) in order cases, the Registrar, and the Government or the Registrar, as the case may be, may pass such order on the appeal as they or he may think fit.

(emphasis added)

19. The petitioner, as can be seen, has invoked Section 83 (1) (J) of the Act, which only says that any order made by any person exercising all or any of the powers of the Registrar can be appealed against. We have

already seen that the power exercised by the 3rd respondent is not the power delegated to him from the powers of the Registrar; on the contrary, the said authority has exercised his statutory power, albeit under the general supervision of the Registrar.

20. If we follow the precedential contours, we can see beginning from **Garikapati Veeraya v. N. Subbaiah Choudhry**⁴ to **Hindustan Petroleum Corpn. Ltd. v. Dilbahar Singh**⁵, the Courts have consistently held that an appeal is not a natural or inherent right; it cannot be assumed to exist unless expressly provided for by statute, and that being a creature of statute, remedy of appeal must be legitimately traceable to the statutory provisions. This right of appeal, once provided for, can always be taken away or curtailed subsequently. On the other hand, the right to appeal can be circumscribed by the legislature through imposition of preconditions, meeting of which is sine qua non for the maintainability of the appeal proceedings. I am, therefore, inclined to conclude that the scope and ambit of appeal provision is required to be gathered strictly from the statute only, without falling back on the putative residuary, or even inherent, powers of the Courts.

21. In **Shiv Shakti Coop. Housing Society v. Swaraj**

⁴ AIR 1957 SC 540

⁵ (2014) 9 SCC 78

Developers⁶, the Hon'ble Supreme Court has held as follows:

17. Right of appeal is statutory. Right of appeal inhered in no one. When conferred by statute it becomes a vested right. In this regard there is essential distinction between right of appeal and right of suit. Where there is inherent right in every person to file a suit and for its maintainability it requires no authority of law, appeal requires so. As was observed in *State of Kerala v. K.M. Charia Abdulla and Co.* (AIR 1965 SC 1585) the distinction between right of appeal and revision is based on differences implicit in the two expressions. An appeal is continuation of the proceedings; in effect the entire proceedings are before the Appellate Authority and it has the power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. It was noted by the four Judge Bench in *Hari Shankar v. Rao Girdhari Lal Chowdhury*, (AIR 1963 SC 698), that the distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way, as has been done in second appeals arising under the Code. The power of hearing revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Reference was made to Section 115 of the Code to hold that the High Court's powers under the said provision are limited to certain particular categories of cases. The right there is confined to jurisdiction and jurisdiction alone.

⁶ (2003) 6 SCC 659

22. Since the petitioner has invoked Section 83 (i) (j) of the Act, the appeal provision, it is required to be addressed in some detail. In fact, an appeal under the said provision shall lie to the Government against any order made by any person exercising all or any of the powers of the Registrar. It has already been held that 3rd respondent has not, indisputably, acted as or exercised the powers of a Registrar.

23. If we examine Section 63 of the Act, it elaborates on the manner of appointment of the Director of Co-Operative Audit and also the functions required to be performed. May be he is an official under the administrative control of the Registrar, but he cannot be termed as a delegate of the Registrar. At the cost of repetition, I may have to stress the fact that evidently as per Section 83(1)(j) of the Act that, an appeal shall lie against any order if the same is passed by an authority as a delegate of the Registrar, but not as his subordinate.

24. I, therefore, find sufficient force, for the reasons adumbrated above, in the contention of the learned Government Pleader that appellate jurisdiction under a statute, especially by a quasi-judicial authority, cannot be assumed; on the other hand, it ought have been specified, for the appellate power, being a substantive power, is to be traced to a statute.

In re: Issue No.3:

25. At any rate, it is required to address the contention of the learned counsel for the petitioner that both Exts.P4 and P6 orders have been passed without affording an opportunity to the petitioner to put forth its contentions that the appeal is maintainable. Indisputably, both the orders have been passed by the authority without putting the petitioner on notice. To the said extent, I am inclined to hold in favour of the petitioner that the first respondent ought to have provided the petitioner a fair opportunity, for he has come before a quasi-judicial authority with a particular grievance. It is, nevertheless, further required to be observed that the observance of the principles of natural justice, inviolable as they are, is neither invariable nor ineluctable under all circumstances.

26. The judicial precedents are a legion to state that the principles of natural justice have attained the status of fundamental rights and have to be invariably read into every statute, unless there is a specific exclusion of their application. Nevertheless, in course of time, the rigidity of the principle has become stifling, forcing a shift—ever so subtle—in the judicial thinking. The Courts have introduced a dichotomy into their application: whether the compliance is mandatory or directory? In other words,

whether any prejudice has been caused to a person on account of non-observance of the principles of natural justice; say, by not giving prior notice. The burden, it is to be observed, is placed on the person who complains of violation of the principles of natural justice. Initially hesitantly, but later with some amount of certainty, the theory of useless formality has come to govern certain infractions of the principle, especially concerning the aspect of fair hearing.

27. In **M.C. Mehta v. Union of India**⁷, M. Jagannatha Rao, J., speaking for a Division Bench of the Supreme Court, in his Lordship's characteristic erudition, after surveying the theory of 'useless formality' in its entire gamut, has held thus:

“21. It is, therefore, clear that if on the *admitted* or *indisputable* factual position, only one conclusion is possible and permissible, the Court need not issue a writ merely because there is violation of the principles of natural justice.

22. Before we go into the final aspects of this contention, we would like to state that cases relating to breach of natural justice, do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of “real substance” or that there is no substantial possibility of his success or that the result will not be different, even if

⁷ (1999) 6 SCC 237

natural justice is followed...Thus, in relation to cases other than those relating to admitted or indisputable facts, there is considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a “real likelihood” of success or if he is entitled to relief even if there is some remote chance of success. *We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is considerable unanimity that the courts can, in exercise of their “discretion”, refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed.* We may also state that there is yet another line of cases as in *State Bank of Patiala v.S.K. Sharma*, (1996) II LLJ 296 SC, *Rajendra Singh v. State of M.P.*, AIR 1996 SC 2736, that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it can be waived.”
(emphasis added)

28. I am of the considered opinion that the petitioner has not been put to any particular prejudice in having not been afforded an opportunity concerning the maintainability of the statutory appeal. At any rate, the petitioner, having advanced his contentions before this Court, I presently find its contentions, essentially on a pure question of law, to be without merit. Thus, the last contention of the learned counsel for the petitioner as to the infraction of the principles of natural justice cannot, I must note,

merit the attention of the Court to nullify Exts.P4 and P6.

29. It is made clear that the dismissal of the writ petition shall not affect the merits of the petitioner's contentions insofar as the directions contained in Ext.P1 audit memorandum and certificate are concerned. It is left open for the petitioner, if he chooses, to assail the same before an appropriate forum.

Subject to the above observation, this writ petition stands dismissed.

No order as to costs.

sd/- DAMA SESHADRI NAIDU, JUDGE.

rv

