

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

WP(C).No. 26684 of 2013 (I)

PETITIONER:

RAJENDRAN M.,
DOOR NO.12/646, RAJ BHAVAN, JAWAHAR ROAD,
COCHIN - 682 002.

BY ADV. SRI.P.P.JACOB

RESPONDENTS:

1. THE MATTANCHERRY MAHAJANIK CO-OPERATIVE
URBAN BANK LTD. NO.665,
PALLIARAKKAVU ROAD, KOCHI - 682 002
REPRESENTED BY ITS GENERAL MANAGER.
2. THE BOARD OF DIRECTORS OF THE MATTANCHERRY MAHAJANIK
CO-OPERATIVE URBAN BANK LTD.NO.665, PALLIARAKAVU ROAD,
KOCHI - 682 002, REPRESENTED BY ITS CHAIRMAN.
3. THE CO-OPERATIVE SERVICE EXAMINATION BOARD,
THIRUVANANTHAPURAM PIN - 695 001, REPRESENTED
BY ITS SECRETARY.
4. THE JOINT REGISTRAR OF CO-OPERATIVE SOCIETIES (G),
ERNAKULAM, CIVIL STATION, B-2 BLOCK,
5TH FLOOR, KAKKANADU, KOCHI - 682 030.
5. STATE OF KERALA,
REPRESENTED BY SECRETARY TO GOVERNMENT,
CO-OPERATION (C) DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM - 695 001.

R3 BY ADV. SRI.ANIL THOMAS, SC
R3 BY ADV. SMT.RASHMI. K.V., SC
R1 & R2 BY ADV. SRI.GEORGE POONTHOTTAM
R BY GOVERNMENT PLEADER
R BY SMT.RASHMI. K.V., SC, CO.OP. SERVICE EXAMINATION

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
26-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :

EXT.P-1: TRUE PHOTOCOPY OF THE NOTIFICATION PUBLISHED IN
MATHRUBHUMI DAILY DATED 30.9.2013 VIDE SL.NO.3.

EXT.P-2: TRUE PHOTOCOPY OF THE FEEDER CATEGORY RULE APPLICABLE TO
FIRST RESPONDENT.

EXT.P-2(A): TRUE PHOTOCOPY OF THE AMENDED FEEDER CATEGORY RULE
WITH ORDER OF THE JOINT REGISTRAR DATED 16.8.2012.

EXT.P-3: TRUE PHOTOCOPY OF THE STATEMENT SHOWING THE SALARY OF
THE GENERAL MANAGER.

EXT.P4: TRUE PHOTOCOPY OF THE LETTER FOR INTERVIEW ISSUED BY FIRST
RESPONDENT DATED 21.11.2013.

RESPONDENTS' EXHIBITS: NIL

/True Copy/

P.A to Judge.

DAMA SESHADRI NAIDU, J.

W.P. (C) No. 26684 of 2013

Dated this the 26th day of October, 2015.

JUDGMENT

A member of a Society, incidentally its former employee, questions in this Writ Petition the mode of recruitment sought to be adopted by the Society after amending its Feeder Category sub-Rules. This amendment, too, is called in question. On the other hand, the Society has a countervailing question as regards the petitioner's standing in filing the writ petition.

2. The petitioner, who was earlier an employee of the first respondent Bank, is now its member holding shares. He has filed the writ petition questioning the amendment effected to Ext.P2(a) Feeder Category Rules providing for direct recruitment, apart from appointment by promotion, as a source of recruitment to the post of General Manager. He has further assailed Ext.P1 notification issued by the third respondent pursuant to Ext.P2 (a) amended Feeder Category Rules, seeking to fill up the post of General Manager

through direct recruitment.

3. In the above factual backdrop, the learned counsel for the petitioner has submitted that in terms of Section 13A of the Kerala Co-operative Societies Act ('the Act'), the bye-laws, including the Recruitment Rules, shall be in consonance with the statutory provisions either as per the principal enactment or the Rules made thereunder.

4. The learned counsel has laid specific emphasis on Rule 185 of the Kerala Co-Operative Societies Rules ('the Rules') to contend that, to the post of General Manager in the first respondent Bank, the only mode of appointment is by way of promotion. According to him, Ext.P2 (a) cannot be sustained in the face of the statutory mandate under Rule 185 (2) (iv).

5. In elaboration of his submissions, the learned counsel would contend that earlier Rule 185 was to the effect that 'ordinarily' filling up the post of General Manager should be by way of promotion. Subsequently, through an amendment dated 28.04.1999, the word 'ordinarily' has been removed. The amendment deleting the expression 'ordinarily', according to the learned counsel, leaves no room for

ambiguity that appointment by promotion is the only acceptable mode of recruitment to the post of General Manager.

6. The learned counsel has also submitted that the first respondent Bank has not been financially performing well. According to him, it was surviving with meager profits. At this juncture, appointing a person as General Manager through the process of direct recruitment, according to the learned counsel, is imprudent. In support of his submissions, the learned counsel has placed reliance on **Mohanan and others v. State of Kerala and others**¹.

7. On the converse, the learned counsel for respondents 1 and 2, on the contrary, has submitted, to begin with, that the ratio of the decision in **Mohanan** (supra) has no application to the case at hand. He has submitted that in **Mohanan**, the issue was whether it was advisable to have recruitment when the Bank was sustaining losses. The learned counsel in that regard has submitted that the petitioner has never questioned the filling up of the post; at best, he has only questioned the mode of filling up of the post. In elaboration, the learned counsel has submitted that either by way of promotion or by

¹ 2010(3)KHC 634

way of direct recruitment, once a post is filled, the financial impact on the respondent Bank is one and the same. As such, the petitioner cannot be allowed to blow hot and cold.

8. The learned counsel has laid specific emphasis on the standing of the petitioner in filing the writ petition. He has specifically contended that the petitioner, in fact, has been espousing the cause of one of the employees who may stand to gain as a result of the present litigation. In other words, the petitioner lacks bona fides, and this Court cannot entertain the writ petition.

9. As regards Ext.P2 (a) amended Feeder Category Rules, the learned counsel has submitted that initially by way of resolution, the Managing Committee proposed the amendment and later had it approved by a statutory authority, the Joint Registrar. He has further submitted that Rule 185 of the Rules has not specifically barred the respondent Bank from taking recourse to any other mode of recruitment than promotion to fill up the post of General Manager. Summing up his submissions, the learned counsel for respondents 1 and 2, apart from contending that the petitioner lacks the necessary

locus, has submitted that the petitioner has also got an alternative remedy for ventilating his grievance concerning either the amendment in Ext.P2(a) or Ext.P1 Recruitment Notification.

10. The learned Standing Counsel for the third respondent, on her part, has submitted that the Board has received the request to initiate the process of direct recruitment for the post of General Manager. She has further submitted that the respondent Board, acting on the 2nd respondent's resolution, dt.25.08.2012, issued Ext.P1 notification and conducted the written examination on 12.05.2013. According to her, after shortlisting the successful candidates on 21.08.2013, the Board forwarded the list of candidates to be interviewed. But, it has so far not heard anything from respondents 1 and 2.

11. In reply, the learned counsel for the petitioner has submitted that the petitioner has the necessary locus. Drawing my attention to paragraph 6 of the writ petition, he has contended that the averments therein have not been rebutted by respondents 1 and 2. In support of his contention that once a plea has not been traversed, it is deemed to

have been admitted, the learned counsel has placed reliance on **Venkitaramanan Potti v. Travancore Devaswom Board**².

12. As regards the appointments disregarding the financial position of the Bank, the learned counsel has further placed reliance on **Subha B. Nair v. State of Kerala**³.

13. On the issue whether the petitioner can approach this Court invoking Article 226 of the Constitution of India in the face of an alternative remedy, the learned counsel has placed reliance on **Mannady Service Co-op. Bank Ltd. v. Krishna Kumar and another**⁴.

14. Heard the learned counsel for the petitioner, the learned counsel for respondents 1 and 2 and the learned Standing Counsel for the third respondent, apart from perusing the record.

15. The issues to be addressed in the present writ petition are as follows:

1. Whether the petitioner has the necessary locus to file the present writ petition?
2. Whether the petitioner has an efficacious alternative remedy

² 1993(2) KLT 374

³ 2008(2) KLT 929(SC)

⁴ 2011(2) KHC 361 (DB)

under any provision of law?

3. Whether Ext.P2(a) can be sustained in the face of the statutory mandate in Rule 185 of the Rules and consequently whether Ext.P1 can be sustained?

Issue No.1:

16. To begin with, I may address the issue of the petitioner's standing to file the present writ petition. Indeed, it is not in dispute that the petitioner is a member of the first respondent Bank holding shares. It is further not to be forgotten that a society caters to the needs of its members, and thus it is a homogeneous entity having identifiable constituents, the members. Every member has a stake in the growth of the institution, and he or she needs to be vigilant as to the affairs of the said institution.

17. Further, the decision makers, the Managing Committee, are also drawn from among the members of the society. It would be preposterous to hold that members of the Managing Committee can decide the society's fate just because they have been elected and that the members at the grass roots cannot question their activities.

18. This Court in an unreported judgment, dt.31.10.2014, in W.P.

(C) No.27162 of 2014, has held that in public law remedy, the controversy surrounding the issue of *locus standi* refuses to die down. At the outset, it is to be observed that a constitutional remedy under Article 226 is less adversarial than the statutory remedies essentially falling under Section 9 of the Code of Civil Procedure (CPC). Most of the times, save issues *pro bono publico*, though individual rights are agitated, they invariably have a public law element ingrained in them.

19. In the light of the above discussion, in my considered view, every member has the necessary standing to monitor the affairs of the society and, indeed, question the affairs of the Society before an appropriate forum. The questioning can on the ground of, inter alia, maladministration or statutory infraction by the persons at the helm of the affairs. I, therefore, hold issue No.1 in favour of the petitioner.

Issue No.2:

20. The learned counsel for respondents 1 and 2 has submitted that initially the Managing Committee has proposed the amendment and placed it before the Joint Registrar, an executive of the State, for approval. According to him, once it has been approved, the petitioner,

if aggrieved, has an efficacious alternative remedy under Section 83(i) (j) of the Act. According to the learned counsel for respondents 1 and 2, any order passed by a competent authority is subjected to the appellate remedy under Section 83 (i) (j) of the Act. On the converse, the learned counsel for the petitioner has contended that only if an amendment is refused, an aggrieved person can invoke Section 83 (i) (j) of the Act.

21. Be that as it may, this Court in **Manady Service Co-op. Bank** (supra) has observed that if the action taken by the society is in violation of the statutory provision and against the binding orders issued by the Registrar of Co-operative Societies, the parties can always have their grievance redressed by approaching this Court.

22. In the present instance, the fact remains that the amendment is not of the bye-law, but of the Recruitment Rules brought about by the Management Committee. The process of an amendment does not involve the General Body, the members as a whole. As such, it cannot be said that the petitioner has directly participated in the process, or even had express knowledge about the

amendment. That the Recruitment Rules had been amended might have come to the petitioner's knowledge once the Society issued the recruitment notification.

23. Indeed, the amendment has been registered by the Joint Registrar; it does not, however, mean that he has provided any judicial imprimatur to the legality of the amendment acting in a quasi-judicial capacity. Subject to the statutory parameters, the registration of the bye-laws, Recruitment Rules, Feeder Category Rules, etc., is a ministerial or purely administrative act on the part of the Registrar or the Joint Registrar, as the case may be. Further, the principal issue that is required to be considered is whether the amendment is in consonance with the statutory mandate as has been incorporated in Rule 185 of the Rules.

24. In the light of the subsequent developments, especially the issuance of Ext.P1 notification by the third respondent, I am of the considered opinion that the issue of alternative remedy has rendered itself academic, for the petitioner has laid a comprehensive challenge not only against the amendment but also against Ext.P1 notification.

The matter, to be further observed, has been pending since 2013: for more than two years. As such, at this juncture, it may be inadvisable and iniquitous to non-suit the petitioner on the ground of alternative remedy, if any.

Issue No.3:

25. Rule 185 of the Rules suffered an amendment through SRO 159/98 dated 11.02.1998. Earlier, it originally read to the effect that appointments to higher categories of service in a society shall 'ordinarily' be made by promotion from among the members eligible for appointment to such category in accordance with those rules on the basis of seniority in the feeder category.

26. As is evident, through the amendment, among other things, the expression 'ordinarily' has been removed. Resultantly, it is not difficult to comprehend the legislative intent in the removal of the expression 'ordinarily.' Put it differently, the legislature, though delegated, has consciously decided to remove the qualifying expression 'ordinarily,' lest it should lead to ambiguity; namely, that though ordinarily it should be by way of promotion, it could even be

otherwise.

27. Now, in the absence of the said expression, especially based on a specific exclusion, the inevitable conclusion is that the recruitment to the posts, which have not been otherwise specifically mentioned, shall be only through promotion and promotion alone. In the light of the above ineluctable conclusion, I am afraid, the contention of the learned counsel for respondents 1 and 2 that Rule 185 of the Rules does not expressly prohibit any other mode of recruitment cannot be countenanced. It is an oft-repeated judicial dictum of vintage value that an executive has to discharge its functions strictly in terms of the statutory mandate and in no other manner.

28. From Section 13A of the Act it is evident that every Co-operative Society shall make its bye-laws consistent with the provisions of the Act and the Rules made thereunder. Ipso facto, no provision in the bye-laws of the Society shall be contrary to the provisions of the Act and Rules. It is true of all other regulations, such as feeder category rules, governing the Society.

29. In the present instance, we may examine Rule 185 of the Rules, which reads to the extent relevant as follows:

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

X X X X X

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

- (i) Accounts Officer in the Kerala State Co-operative Bank Ltd.;
- (ii) Branch Manager and equivalent posts in the District Co-operative Banks;
- (III) Deputy Manager in the Kerala State Co-operative Agricultural and Rural Development Bank;
- (iv) Assistant Secretary/Manager and equivalent posts in Primary Co-operative Societies and Urban Banks having a deposit of more than 10 crores;

X X X X X

30. Sub-rule (1) of the said Rule is to the effect that for posts other than those mentioned in sub-Rules (2), (3) and (4), the mode of appointment shall be by promotion. Clause (iv) of sub-Rule (2) of Rule 185 contains the posts of Assistant Secretary/Manager and equivalent

posts, which are, in fact, the feeder category to the post of the General Manager/Secretary. The posts in the feeder category shall be filled up by promotion and by direct recruitment in the ratio of 3:1. The Rule does not speak about the post of General Manager/Secretary, thereby implying that sub-rule (1) applies: the appointment is by way of promotion.

31. Accordingly, it needs no further cogitation to hold that Ext.P2 (a) falls foul of Rule 185(2)(iv) of the Rules. And to the extent of its permitting the recruitment by promotion to the post of General Manager/Secretary, it needs to be set aside. Consequently, Ext.P1 is also required to be set aside.

32. Though the learned counsel for the petitioner has advanced arguments on the issue of the financial position of the respondent Bank, in my considered view, it may not be germane to the determination of the issues in the present instance. In that regard, there is sufficient force in the contention of the learned counsel for respondents 1 and 2 that whether be the mode of recruitment—be it by promotion or direct channel—the financial burden on the Society is

one and the same. At any rate, the learned counsel for respondents 1 and 2 has also submitted that no further steps have been taken subsequent to Ext.P1.

33. I do not, therefore, intend to pronounce definitively whether the respondent Bank could go for recruitment on account of its having what is said to be meager income.

34. In the facts and circumstances, the Court hereby declares that Ext.P2(a) to the extent of permitting the recruitment by promotion to the post of General Manager/Secretary is unsustainable and is set aside. Consequently, Ext.P1 is also set aside.

Accordingly, this writ petition is allowed. No order as to costs.

DAMA SESHADRI NAIDU, JUDGE.

