
(2002) 12 KL CK 0009
In the High Court Of Kerala
Case No : W.A. No's. 2086 and 2757 of 2002

Ambikakutty

APPELLANT

Vs

Kerala Co-operative Tribunal

RESPONDENT

Date of Decision : 19-12-2002

Acts Referred:

Kerala State and Subordinate Services Rules, 1958 — Rule 27

Citation : (2003) 1 ILR (Ker) 391 : (2003) 1 KLT 153

Hon'ble Judges : Jawahar Lal Gupta, C.J.; R. Basant, J

Bench : Division Bench

Advocate : M.V. Bose, for the Appellant; T.R. Ramachandran Nair and V.N. Achutha Kurup and C. Vathsalan, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

R. Basant, J.—How is inter se seniority to be determined between two employees of a Cooperative Society when there is no rule or term of employment specifically covering the situation? This is a question that falls for determination in these appeals.

2. W.A. No. 2086/1982 arises from the judgment in O.P. No. 11330/1995. The learned single Judge found that in the absence of any or term of employment, the date of actual commencement of service alone has to be reckoned as the crucial input. The Original Petition filed by the appellant challenging the decision of the Co-operative Tribunal was dismissed.

3. By the impugned common judgment, O.P. No. 14396 of 1995 was also disposed of by the learned single Judge. In the said Original Petition, the 6th respondent in this appeal had challenged the finding in the judgment of the Co-operative Tribunal in so far as it was against her. The Co-operative Tribunal had held that in the absence of rules, regulations, bye-laws etc. it is the rank on merits assigned to the candidates appointed by a common order that has to be reckoned as the relevant input for ascertaining inter se seniority.

4. The disputes raised in these appeals have had a chequered career. Both the appellant and the contesting 6th respondent were appointed as Junior Clerks as per a common selection procedure. The appellant was ranked No. 1 and the contesting respondent was ranked No. 2. As per order dated 12.10.1981 both were appointed as Junior Clerks and were directed to join duty on or before 19.10.1981. While the contesting respondent joined duty on 16.10.1981, the appellant could join duty only on 17.10.1981. They were duly confirmed on 16.1.1983 and 17.1.1983 respectively. They were both promoted as Senior Clerks on 1.7.1988. No seniority list was prepared for a long time in the establishment. It would appear that the increments of the contesting respondent always became due and were granted one day prior to the date on which the increment of the appellant became due. All other incidents of one day's extra prior service were also granted to the contesting respondent by the employer. It is submitted that while allocating custody/charge in the absence of the Assistant Secretary, custody/charge was given on some occasions to the contesting respondent - probably taking into account the fact that she had joined service one day earlier.

5. Be that as it may, the seniority list was published for the first time in April 1990 as per Ext. P2 marked in O.P. No. 11330/1995. In that the appellant was assigned position above the contesting respondent recognising her superior ranking in the merit list for appointment. Evidently the contesting respondent raised objections and on 23.6.1990 final seniority list was published. Therein the contesting respondent was shown as senior to the appellant. The final seniority list clearly shows that the appellant though ranked list in the advice list based on merit had joined service on 17.10.1981 whereas the contesting respondent though ranked second after the appellant had joined service on 16.10.1981. Objections were raised by the appellant before the Managing Committee. The Managing Committee did not accept her request. It is in these circumstances that the appellant preferred A.R.C. No. 1066/1991 before the Arbitrator u/s 69 or the Co-operative Societies Act. The Arbitrator as per his award dated 29.9.1993 upheld the claim of the appellant. The same was challenged before the Cooperative Tribunal and the Co-operative Tribunal as per judgment dated 28.6.1995 in A.P. No. 119/1993 upheld the view of the Arbitrator and held that the appellant is senior to the contesting respondent. However, the learned Co-operative Tribunal, after recording that finding on merit, proceeded further to consider whether the arbitration proceedings was legally maintainable. Following the dictum in *Balachandran v. Dy. Registrar 1978 KLT 249* it was held that the Arbitration Proceedings are not maintainable. Accordingly the contesting respondent's appeal was allowed.

6. Against that award, the appellant preferred O.P. No. 11330/1995 whereas the contesting respondent preferred O.P. No. 14396/1995. During the pendency of the Writ Petitions, the 4th respondent Bank promoted the 6th respondent as Managing Director and the Joint Registrar of Co-operative Societies, by Ext. P14 proceedings marked in O.P. No. 14396/1995 rescinded that resolution of the

Board of Management. O.P. No. 14396/1995 was accordingly amended to challenge Ext. P14 also.

7. The learned single Judge took note of the fact that Rule 27(c) of the Kerala State and Subordinate Service Rules is not applicable to the parties. Rule 27(c) of the K.S. & S.S.R. embodies the principle that when more than one person is appointed on the basis of the common advice given by the Public Service Commission their inter se seniority will be decided on the basis of their ranking in such advice.

8. It is common case now before us that Rule 27(c) is not applicable. There is also no contention that there is any other rule, regulation, bye-law or term of service which governs the field. The learned single Judge took the view, following the decisions reported in A. Janardhana Vs. Union of India (UOI) and Others, and Ram Janam Singh Vs. State of Uttar Pradesh and another, that in such circumstances it is only that date of commencement of actual service which can be taken into account. It is accordingly that O.P. No. 11330/1994 was dismissed and O.P. No. 14396/1995 was allowed.

9. In the absence of specific rules, there can be no dispute that the respondents have to act fairly, justly and reasonably. That is the Constitutional mandate under Article 14. Perversity and arbitrariness, if any, would certainly vitiate their action in assigning positions for the employees in the seniority list. Admittedly Section 80 of the Kerala Cooperative Societies Act and Chapter XV of the Rules govern the term of employment of the appellant and the contesting respondent.

10. We are in agreement with the learned counsel for the appellant that determination of seniority, ignoring the ranking in the merit list, merely on the basis of the date of actual joining service, would be unreasonable, perverse and unfair. Rule 27(c) only incorporates a salutary principle of fairness and equity. Where two persons are selected by a common selection procedure and are selected/advised for appointment as per the same order, their seniority has got to be decided normally on the basis of the rank assigned for them in the common selection procedure based on merit etc. For no fault of such person ranked higher, he should not be compelled to lose his seniority, Even if Rule 27(c) is not strictly applicable, the principle embodied therein must certainly be followed by all persons acting fairly and reasonably. Accepting the contra position would result in unreasonable and perverse results. It would facilitate actions with oblique motives. If 2 persons ranked on merit were appointed by the same order and the more meritorious were posted to a farther and more distant place, the less meritorious would steal a march over his colleague by joining duty at a nearer place. Managements will thus be able to tinker with the merit ranking by manipulating the place of initial posting. Such an approach would be unjust, irrational and perverse. That would lead to injustice and inequity.

11. In the instant case admittedly the appellant was ranked higher in the common selection procedure. She was higher in rank on merits in the advice

(merit list) for appointment. Both of them were appointed on the same day. The appointment orders admittedly directed the incumbents to join duty on or before a particular date. Both had joined service in compliance with the said direction before that date. In these circumstances to deny seniority to the appellant merely because the contesting respondent actually joined the establishment a day earlier would certainly be perverse. It is illogical. It is irrational. It offends one's sense of justice and fair play. In the absence of any rule, certainly the appellant must be ranked higher in the seniority list. We have no hesitation to agree with the findings of the Arbitrator, Co-operative Tribunal and the Joint Registrar of Co-operative Societies on this aspect. We are unable to agree with the conclusion of the learned single Judge.

12. We must alertly note that the decisions reported in *A. Janardhana Vs. Union of India (UOI) and Others*, *Ram Janam Singh Vs. State of Uttar Pradesh* and another, and in *Dr. A.K. Chirappanath v. Dr. M.A. Ittyachan* 1992 (1) KLT 406 which were cited before us were not dealing with an identical situation at all. The crucial difference in this case is that both incumbents were selected as per a common selection procedure. The appellant was admittedly ranked higher. She had admittedly joined duty within the time granted by the appointing authority. In these circumstances, we are of the opinion that the appellant is entitled for a higher position in the seniority list and no decision referred above can lead us to any contra conclusion.

13. It is then contended that the appellant had acquiesced to the existing situation. She had joined service in 1981. Till 1995, she had not raised any dispute. The contesting respondent was confirmed earlier, was granted increment earlier and was given charge on some occasions when the superiors were on leave. In spite of all these, the appellant had not raised her little finger. In these circumstances the extra ordinary discretionary jurisdiction under Article 226 may not be invoked, it is urged.

14. We find no merit in this contention also. Since the contesting respondent had actually joined one day earlier, she may be entitled for some other service benefits. One day's extra salary must certainly have been paid to her. Considering the earlier date of joining, her increments must have fallen due one day earlier. All these cannot be reckoned as sufficient to deny her, the right to be assigned position in the seniority list. It is crucial to note that even in the provisional list, the management themselves had accepted that the appellant was senior to the contesting respondent. There can be no question of acquiescence prior to that. It is in the final seniority list that we find her position in the seniority list being disturbed for the first time. Prior to 23.6.1990, the appellant therefore, had no necessity or obligation to raise any objections. After publication on Ext. P3 she has been moving heaven and earth to change the same. In these circumstances we are of the opinion that the contention that the appellant had acquiesced without raising any objection to the superior position of the contesting respondent in the seniority list cannot be accepted. Immediately after Ext. P3

she had raised objections before the Board and the Authorities under the Co-operative Societies Act. She had promptly approached the Arbitrator under the Co-operative Societies Act and the Arbitrator had upheld her objections. She had defended her case before the Co-operative Tribunal also. When she lost her cause before the Co-operative Tribunal, she had rushed to this Court also in defence of her claim for higher position in the seniority list. So the contention that the appellant had acquiesced must in these circumstances necessarily fail.

15. It follows from the above discussions that the impugned common judgment warrants interference. The same deserves to be set aside. The appellant's claim for higher position above the contesting 6th respondent in the seniority list deserves to be declared. O.P. No. 11330/1995 deserves to be allowed and O.P. No. 14396/1995 deserves to be dismissed. The 4th respondent bank must accept the seniority of the appellant over the contesting 6th respondent and must consider her claim for promotion as Managing Director.

16. In the result

- (a) these appeals are allowed,
- (b) the impugned common judgment is set aside,
- (c) O.P.No. 11330/1995 is allowed and O.P. No. 14396/1995 is dismissed,
- (d) the appellant is held to be senior to the contesting 6th respondent and the 4th respondent is directed to recognise such seniority wherever it counts.
- (e) The parties are directed to suffer their respective cost throughout.