

(2010) 08 KL CK 0258

In the High Court Of Kerala

Case No : Writ Petition (C) No. 22352 of 2010 (T)

Mohandas M.K.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 16-08-2010

Acts Referred:

Kerala Co-operative Societies Act, 1969 — Section 80(3)
Kerala Co-operative Societies Rules, 1969 — Rule 185

Citation : (2010) 3 KLJ 627

Hon'ble Judges : K. Surendra Mohan, J

Bench : Single Bench

Advocate : P. Ramakrishnan, for the Appellant; K.C. Santhosh Kumar (G.P.), T.A. Shaji (SC), Jobi A. Thampi, Aysha Youseff (SC), P.V. Asha and Vineetha B, for the Respondent

Final Decision : Dismissed

Judgement

K. Surendra Mohan

1. Are mutual transfers permissible between two different District Co-operative Banks? This is the question that arises for determination in these writ petitions. Both these writ petitions challenge the transfer granted mutually to an employee of the Kottayam District Co-operative Bank Ltd and an employee of the Kollam District Co-operative Bank Ltd. The proceedings are attacked as unsustainable in law and liable to be set aside. The service regulations that permit such transfer are also assailed as being violative of the provisions of the Kerala Co-operative Societies Act, 1969 ("the Act" for short) and the Rules thereunder. Since the issues that arise for consideration are common, these writ petitions are considered and disposed of by this common judgment. The short facts necessary for the purpose are summarised hereunder.

2. The petitioner in WP(C) No. 22352 of 2010 is working as a Junior Accountant in the third respondent Bank, viz, the Kottayam District Co-operative Bank Ltd. He joined service as a Clerk/Cashier on 14.7.1995. He was sanctioned the grade

of a Junior Accountant on 17.4.2005 and was promoted to the post on 22.12.2007.

3. The fourth respondent Sri Joy Joseph, had joined service as a Clerk/Cashier in the Kollam District Co-operative Bank only on 21.2.2001 that is, six years after the appointment of the petitioner. However, he was promoted as a Junior Accountant on 7.3.2005 and as a Senior Accountant on 12.2.2009.

4. While so, the 6th respondent, Smt. Tensy Scaria and Sri Joy Joseph submitted a joint application for mutual transfer among themselves. The request was considered by the Board of Directors of the Kottayam District Co-operative Bank and a resolution was passed to the effect that the Bank does not have any objection to the mutual transfer and also resolved to post the 4th respondent, Sri Joy Joseph as the junior-most Senior Accountant in the Bank. Since the transfer and posting could be permitted only with the consent of the Registrar of Co-operative Societies, such consent was also sought for. The Board of Directors of the Kollam District Co-operative Bank also resolved to permit the transfer that was sought for. In the above circumstances, the petitioner in WP(C) No. 22352 of 2010 filed WP(C) No. 16741 of 2010, challenging the resolution of the Kottayam District Co-operative Bank. The writ petition was disposed of by this court as per judgment dated 1.6.2010, Ext. P10 in WP(C) No. 22352 of 2010, directing the Registrar of Co-operative Societies to consider the grievance of the petitioner also while passing orders in the matter. Pursuant to Ext. P10 judgment, the matter was considered by the Registrar and Ext. P12 order has been passed, which is the order under challenge in both these writ petitions. A copy of the said order has been produced in WP(C) No. 22888 of 2010 also, marked as Ext. P1. Pursuant to the impugned order, Smt. Tensy Scaria and Sri Joy Joseph have been relieved, but they have not been able to join duty in the respective posts to which they have been transferred, because an interim order of "status quo" issued by this Court is in force. Therefore, it is submitted that a break in service would be the consequence, unless appropriate orders regarding the manner in which their period of absence is to be treated, are issued in these proceedings.

5. The petitioners in WP(C) No. 22888 of 2010 are also persons who are working as Junior Accountants in the Kottayam District Co operative Bank Ltd. They too claim to be persons who were recruited along with Smt. Tensy Scaria and Sri Joy Joseph. However, the said persons have been promoted over them. In the above writ petition also", identical contentions as in the other writ petition are raised. For the sake of convenience, the documents are referred to hereinafter, in the order in which they are marked as exhibits in WP(C) No. 22352 of 2010, unless specifically referred to otherwise.

6. Separate counter affidavits have been filed by respondents 4, 5 and 6, opposing the prayers in the writ petition. According to the respondents, the petitioners are not at all persons who come within the scope of the expression, "persons aggrieved" so as to entitle them to challenge Ext. P12 proceedings. It is pointed out that the petitioners in both these cases are only Junior Accountants

whereas the mutual transfer is effected to the higher post of Senior Accountant. Therefore, they have not suffered any injury by virtue of such transfer. Further, it is pointed out that since the Rules permit mutual transfer, the same is not liable to be interfered with. No chances of promotion of the petitioners would be affected for the reason that the person who has been transferred to Kollam, viz Tensy Scaria, is younger than Sri Joy Joseph. Therefore, since Joy Joseph would retire on a date earlier to that of Smt Tensy Scaria, it is pointed out that no prejudice is caused to the petitioners. On the contrary, the retirement of Sri. Joy Joseph on an earlier date would provide more opportunities for promotion to the juniors. In view of the fact that Ext. P12 has been issued in due compliance with all the procedural requirements that are stipulated by the service regulations, it is submitted that, Ext. P12 suffers from no infirmity whatsoever.

7. According to Sri. P. Ramakrishnan, counsel for the petitioner in WP(C) No. 22352 of 2010, Section 80(3) of the Kerala Co-operative Societies Act ("the Act" for short), provides that the service conditions of the employees of the third respondent Bank are to be governed by the Rules made in consultation with the State Co-operative Union. However, no rules have been so framed. Instead, the Government have issued Ext. P1 Service Regulations. Ext. P1 has been amended by Ext. P2 dated 18.12.1989, incorporating Clause 11 B(2)(c) providing that inter bank transfer of employees of the same category of posts may be made if mutually agreed upon by the Board of Directors of the respective Banks. Later on, sub-section 3 A to Section 80 of the Act was introduced by which, it is provided that all appointments of officers to the District Co-operative Banks for which direct recruitment is resorted to, is to be made from a select list to be furnished by the Kerala Public Service Commission (KPSC). Pursuant to the above, the KPSC initiated steps for conducting selection to the post of Clerk/Cashier in various District Co-operative Banks. In order to facilitate such selection, model regulations were framed by the KPSC, which is Ext. P3. In the meanwhile, the Government issued an order dated 26.2.2008 amending clause 11 B(2)(c) of Ext. P1 providing for inter bank transfer where the same is mutually agreed upon by the Board of Directors of the respective Banks, provided that the person so transferred would be the junior most in the category in which he/she joins, and that the basic pay drawn by the said employee in the Bank shall be protected by the Bank to which he/she is transferred. It is also provided that the transfer should be in consultation with the KPSC and that the Bank from which such transfer is made should report the resultant vacancy to the KPSC for fresh advice.

8. On the basis of the above directions, it is contended that there is no provision for a mutual transfer, since the provisions referred to above speak only of transfer of an individual employee and for reporting of the resultant vacancy to the KPSC. When a mutual transfer is granted there cannot be any resultant vacancy, and therefore it is contended that such a mode of transfer is not envisaged by the Rules. It is also contended that since the mode of recruitment to the post of Senior Accountant is by promotion, by permitting mutual transfer,

a mode of appointment not contemplated by the Rules is being resorted to, without any statutory authorisation. For the above reason, it is contended that Ext. P12 is liable to be set aside. It is further pointed out that the person who has been transferred to the Kottayam District Co-operative Bank, being a person who has become senior to the petitioners taking advantage of the better promotional avenues available in his parent Bank, would now be placed above the petitioners resulting in loss of avenues of promotion to them. Yet another contention raised on behalf of the petitioners is that since what is contemplated is that the person who gets the benefit of the transfer should be permitted to join duty only as the junior most in the category in which he/she joins, the fourth respondent should be permitted to join only as the junior most in the category of Accountants and not as the junior most Senior Accountant. Reliance is also placed on Ext. P8 communication issued by the Joint Registrar of Co-operative Societies to the effect that the question of finalising the norms regarding the Service Regulations permitting inter district transfers of employees was only under consideration. Since Ext. P8 is issued after the issue of Ext. P4 Government order, it is contended that the issue is still alive and pending consideration of the authorities. It is also contended that Ext. P12 is not permissible in law for the reason that no provision of law enables the issue of such an order.

9. Mr. Ashok Shenoy, who appears for the petitioner in WP(C) No. 22888 of 2010, raises an additional contention to the effect that the amendments to the Service Regulations themselves are ultra vires the Act and the Rules. According to the counsel, Section 80(3) of the Act confers power on the Government to make Rules in consultation with the State Co-operative Union, regulating the qualification, remuneration, allowances and other conditions of service of the officers and servants of the different classes of societies. Section 109 confers a general power on the Government to make Rules for carrying out the purposes of the Act. In exercise of the above powers, the Kerala Co-operative Service Rules have been framed. Particular reliance is placed on Rule 182(3) which provides that the Committee shall appoint employees from the select list of candidates furnished by the KPSC. As per Sub rule 5 of the said rule, with respect to societies and posts not governed by Section 80(3A) and Section 80 B of the Act, appointments shall be made by the Committee after conducting a written test and interview as per the guidelines issued by the Registrar. As per Rule 185(1), appointments to the categories of posts in a society other than those mentioned in sub rules 2, 3 and 4 thereof shall be made by promotion on the basis of seniority in the feeder category. The posts mentioned in sub rules 2, 3 and 4 are supervisory posts made mention of in the said provision. The post of a Senior Accountant is not enumerated in any one of the said provisions. Therefore, the appointments to the post of Senior Accountant has to be made by promotion from the feeder category. Rule 185 A provides for appointment by way of deputation or on contract basis for a specified period not exceeding five years. According to the counsel for the petitioners, the above being the only provisions

that provide for appointment to the various posts, any mode of appointment not stipulated by one of the above provisions is impermissible. Appointment by transfer from one district to another or by mutual transfer is not stipulated by any provision of the Act or the Rules. Therefore, it is contended that the mutual transfer that has been granted is liable to be set aside. The counsel also places reliance on the Recruitment Rules for District Co-operative Banks, 1998, which are Model Rules adopted by the third respondent Bank. The Rules are produced as Ext. P5 in WP(C) No. 22888 of 2010 and have been adopted by the 3rd respondent as per Ext. P6. It is pointed out that Rule 3 of Ext. P5 does not contemplate an appointment by transfer. Therefore, it is contended that by permitting the mutual transfer, the above provisions are violated.

10. Adv. Moly Jacob, who appears for the Kollam District Co-operative Bank points out that the Service Regulations have been in existence from the year, 1986 onwards with a provision for inter bank transfer and that the amendment that permits inter district transfer was introduced in 1989 by Ext. P2 in WP(C) No. 22352 of 2010. Subsequently, the provision was amended as per Ext. P4 dated 26.2.2008, providing for a consultation with the KPSC as an additional condition for such transfer. However, the provisions were not challenged by anyone though they have been on the statute book for the past two decades. It is further pointed out that the employee who is transferred would join only as the junior most in the category to which he is transferred and therefore, no prejudice whatsoever is caused to the other employees of the Bank.

11. Adv. T.A. Shaji, who appears for the Kottayam District Co-operative Bank relies on Section 101 of the Act to submit that the Government has the power to exempt societies from any of the provisions of the Act and is therefore, sufficiently empowered to permit transfers as in the present case by the grant of such exemption. It is further submitted that Rule 185 of the Rules is not violated for the reason that in the present case, there is neither an appointment nor promotion, there is only a transfer. It is also submitted that the KPSC was consulted in the present case as required by the Rules.

12. Adv. P.V. Asha who appears for the 6th respondent, Tensy Scaria also supports the contentions of the other counsel and submits that in the present case, there is no appointment but only a transfer. Adv. Joby Thamby who appears for the fourth respondent also supports the contentions of the other counsel. It is submitted that he was relieved from the parent society on 16.7.2010 and that he has not been able to join duty in the service of the society to which he has been transferred for the reason that the interim order of this court has prohibited him from doing so. It is submitted by the fourth and sixth respondents that the impugned order does not cause any prejudice to the petitioners since the sixth respondent who is younger in age has been transferred out and an older person has taken her place. It is pointed out that the petitioners are in fact benefited by the transfer.

13. I have heard the counsel for the respective parties in detail. I have also

considered the rival contentions anxiously.

14. On facts, it is worth noticing that the sixth respondent Smt. Tensy Scaria is a person who was admittedly recruited into service along with the petitioners in 1995 to the post of Junior Clerk/Cashier. They also become Junior Accountants at about the same time. However, Smt. Tensy Scaria was promoted as a Senior Accountant and is admittedly working in the said post. The petitioners have not challenged her promotion. Nor do they have any grievance against the same. Smt. Tensy Scaria has been transferred to Kollam District Co-operative Bank and Sri Joy Joseph has been transferred to her place in the Kottayam District Co-operative Bank by Ext. P12 proceedings. Sri Joy Joseph being a person older to Smt. Tensy Scaria would retire earlier and therefore no prejudice is caused to the petitioners by his transfer to the Kottayam District Co-operative Bank. In fact, as rightly contended by the counsel for the respondents, such transfer would only enure to the benefit of the petitioners by providing them with better prospects for promotion. Since the position of Smt. Tensy Scaria above the petitioners is not being disputed or questioned, the transfer of Sri Joy Joseph to her position cannot cause any prejudice or detriment to the petitioners as contended. Further, in the present case, Sri Joy Joseph is to join as the junior most Senior Accountant in the Kottayam District Co-operative Bank. Even if it is assumed that there are no Senior Accountants in the bank who are junior to Smt. Tensy Scaria, the petitioners cannot be said to have suffered any prejudice by the transfer of Sri Joy Joseph to her place. Therefore, technically, the petitioners are not aggrieved by Ext. P12 proceedings.

15. The next contention of the petitioners is that there is no provision either in the Act or the Rules enabling the respondents to permit a mutual transfer as authorized in Ext. P12. However, it is admitted by the petitioners that the Service Regulations adopted by both the banks permit transfer of employees from one bank to another as well as from one district to another. If transfer of an employee from one bank to another is permissible, a mutual transfer among two employees is also equally permissible. This is for the reason that instead of transferring one person from one bank to the other, and vice versa, a mutual transfer only combines together two individual transfers. The same is resorted to only by consent. Therefore, I do not find any force in the objections against the same.

16. Reference is made to the Service Regulations to contend that the impugned transfer amounts to appointment, which is not permissible by adopting the device of transfer. It is to be noted that the Service Regulations clearly permit transfer of an employee from one bank to the other. When such inter bank transfers are permitted, it cannot be said that such transfers amount to appointment that is not permissible. If a posting by transfer does not amount to appointment when it is a one way transfer, it cannot become anything more, when it is a mutual transfer. This is for the reason that in the case of a mutual transfer the persons transferred occupy respectively, the very same post that

was earlier occupied by the other.

17. The further contention of the petitioners that inter bank transfers are not supported by the provisions of the Act or Rules also lacks substance for the reason that neither the Act nor the Rules contain any prohibition against such transfer. Since power has been granted to the Government to frame rules and regulations regarding service conditions, by Section 80(3) of the Act, the Government has the necessary powers to frame rules permitting transfer of employees. It is also worth noticing from the provision for transfer in the Service Regulations that transfer is permissible only in cases where the respective Board of Directors of the transferor as well as the transferee bank resolves to permit the same. Further, the person who gets the benefit of the transfer joins the service of the transferee bank only as the junior most in the category to which he/she is transferred. Thereby, the interests of the persons who are already in the service of the bank are also protected.

18. The next contention of the petitioners is that the methods of appointment contemplated by Rule 182, 185 and 185A are only direct recruitment, promotion and deputation. Therefore, an appointment by transfer is violative of the Rules. The contention cannot be accepted for the reason already stated above that transfer is not a mode of appointment but only a mode of regulating the posting of employees. Since the KPSC was also consulted before the impugned proceedings were issued, I do not find any grounds to interfere with the same. For the foregoing reasons, the writ petitions fail and they are therefore dismissed. Since it is pointed out that Smt. Tensy Scaria and Sri Joy Joseph who were relieved on 16.7.2010, have been out of service, they shall be permitted to join duty pursuant to the impugned proceedings without any break in service. No costs.