

(1987) 11 KL CK 0034

In the High Court Of Kerala

Case No : O.P. No's. 6891 of 1981, 3284 and 4665 of 1984, etc.

P. Bhaskaran and Others

APPELLANT

Vs

Additional Secretary, Agricultural (Co-operation) Department,
Trivandrum and Others

RESPONDENT

Date of Decision : 06-11-1987

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : AIR 1988 Ker 75 : (1989) 58 FLR 78 : (1988) 1 ILR (Ker) 217 :
(1988) 2 LLJ 307

Hon'ble Judges : V.S. Malimath, C.J.;V. Bhaskaran Nambiar, J;P.C. Balakrishna Menon, J

Bench : Full Bench

Advocate : M.K. Damodaran, P.V. Mohanan, V.N. Achutha Kurup, C.K.S. Panicker, S.A. Nagendran, R. Ravindran, V. Rajendran, Thampan Thomas and P.V. Baby, for the Appellant; G. Mohan, Govt. Pleader, P.V. Appa Nair, P.K. Suresh Kumar, K.J. Joseph, Mathews P. Mathew and K. Raveendran, for the Respondent

Judgement

Bhaskaran Nambiar, J.—Inter pretation of Rule 200 of the Kerala Cooperative Societies Rules arises for consideration in all these matters, referred to a Full Bench, by different Benches which noticed an "apparent conflict" between two Division Bench rulings of this Court in Narayanan Nair v. Kottayam Dist. Co-op. Bank, 1984 Ker LT 248 and Krishnankutty Nair v. Joint Registrar, 1984 Ker LT 788. A proper understanding of the content of Rule 200 disposes of all these matters and we shall, therefore, first confine our attention to this question of law and then dispose of the matter on the facts in each case.

2. The Kerala Co-operative Societies Act ("The Act") meant to "consolidate, amend and unify the laws relating to Co-operative Societies in the State of Kerala" came into force on 12th May, 1969. Section 80 of the Act provided for classification of the Societies and for making rules "regulating the qualification, remuneration, allowances and other conditions of service of the officers and servants of the different classes of societies." Rules were not framed for this

purpose for a long time till Chapter XV, with Rules 182 to 200, came into force with effect from 1st January, 1974. On that date, it is said there were 4502 Co-operative Societies and thousands of employees in service in these societies. While the new rules classified the societies and prescribed the qualifications for appointment to several categories of service in the Societies, a saving clause was inserted in Rule 200 as follows :--

"Nothing in these Rules or any rules made thereunder shall operate to debar from enjoyment of any person or employee of any right or privilege of emoluments to which he is entitled by the term of any" contract or agreement or conditions of service subsisting between such person and a Co-operative Society on the date on which these Rules shall come into force. Nothing in these Rules shall be interpreted as disqualification for promotion to a higher post and benefits conferred by these rules to the existing employees of any Co-operative Society."

3. It is contended on one side that this rule saved all rights which accrued to all the employees before 1st January, 1974 and protected their right to earn promotion to any higher grade or higher post on the basis of the old bye-laws and rules, without reference to the qualifications and prescription laid down by the new rules from 1974. This claim is resisted by contending that only the "right or privilege of emoluments" earned before 1st January, 1974 alone is saved.

4. In the matters now before us, the necessity to interpret Rule 200 has arisen because some of the petitioners, the existing employees of the societies in service prior to 1-1-1974, contend that they are entitled to continue in service till they attain the superannuation age of 60 years, as provided in the bye-law and that they are not liable to retire on attaining the age of 58 years as provided under the new rules which came into force in 1974, Similarly where qualifications were prescribed, or where no qualifications were insisted for promotion to higher posts, under the bye-law or service rules in force prior to 1-1-1974, and when new qualifications are prescribed for promotion under the 1974 rules, it is contended that the employees appointed prior to 1-1-1974 are entitled to promotion to all higher posts without reference to these new qualifications under the present rules. Even when the bye-laws prescribed qualifications for promotion prior to 1-1-1974, those bye-laws also provided for relaxation of the qualifications. In several cases, relaxation was not granted by the Society. But it is contended that they are still entitled to relaxation and therefore should be deemed to be qualified under the old rules. Relying on Rule 200, they too claim promotion notwithstanding the prescription of qualification for promotion under the new rules.

5. Rule 200 in express terms saves any "right or privilege of emoluments" to which any person or employee was entitled prior to 1-1-1974. It also directs that these rules which came into force on 1-1-1974 should not be interpreted "as a disqualification to the existing employees in any society for any promotion to higher posts or benefits conferred by these rules."

6. Two single Judges in two separate judgments interpreting Rule 200 concluded thus, without giving any reasons : --

"A close reading of Rule 200 makes it clear that what is reserved by this rule is the emoluments and other benefits which the employees enjoyed under the provision in the bye-law during the tenure of office."

(O.P. No. 1684 of 1975)

"What is saved is only the right or privilege of emoluments. Other conditions of service are not protected. Any other interpretation of Rule 200 will render otiose the other rules."

(O.P. No. 549 of 1975)

7. In yet another decision by another learned single Judge in Sankara Wariyar v. North Malabar, Dist. 1982 Ker LJ 124 : (1982 Lab IC 863), interpreting Rule 200 to retirement cases, it was held thus : --

"The learned counsel for the petitioner contended that the expression "privilege of emoluments" is wrong and the correct expression is "privilege or emoluments". If that be so, the right or privilege mentioned in the rule is not restricted to emoluments and could take in other rights and privileges also. Various publications of the Rules give conflicting versions. Some publications refer to "Privilege of emoluments," while some other publications refer to "privilege or emoluments". The rules have been published in the official gazette and the gazette copy mentions "Privilege of emoluments." The court can go only by the version given in the official gazette and not in any private publications. Certain emoluments may be drawn as of right and certain others may be drawn by way of privilege. What is saved is only the right or privilege of emoluments and nothing else."

8. Expressing dissent, Justice Kochu Thommen referred the matter to a Division Bench and subsequently in the decision reported in Narayanan Nair v, Kottayam Dist Co-op. Bank, (1984 Ker LT 248) a Division Bench consisting of T. Kochu Thommen J. and K, Sukumaran J. held thus : --

"Rule 200 in our view therefore assumes a significance other than that of protecting the then existing emoluments of the incumbents already, in office. If what was intended was only the protection of emoluments of those permitted to continue in the posts, that had been already done by Rule 185 itself. Rule 200 therefore was intended to operate in a different area. The rule making authority presumably wanted to safeguard other rights, privileges or emoluments than what have been already provided for under Rule 185. Such rights would take in a right to be promoted under the pre-existing service conditions in the society. It is difficult to understand the words, "rights or privileges", qualifying the word "emoluments", if all that had been intended was to safeguard the emoluments of the incumbents in office, A sentence reading "Nothing in these Rules or any rules made thereunder shall operate to debar from enjoyment of any person or

employee of any emoluments to which he is entitled....." would have been sufficient. Be that as it may, the second sentence in that rule removes any possible doubt on the intention of the rule making authority. The right to further promotion on the basis of pre-existing conditions of service is effectively, specifically and fully protected by that provision. The significance of this provision apparently had not been brought to the notice of our learned brother Justice Chandrasekhara Menon, J., when the learned Judge rendered his decision. In a sense, the learned Judge was not directly concerned with that provision, as the issue therein was one of the age of superannuation. M.P. Menon J. saw force and relevance in that provision but chose not to pronounce upon the combined effect of the two portions of the Rule, as it was unnecessary having regard to the limited issue on which the judgment was ultimately rested. The effect of the provision had not been fully noticed or had not been brought to the attention of our learned brothers, Khalid, J., and Bhat, J., when they dealt with the issues before them. Unlike in the present case the question of promotion to higher post did not directly arise in those cases. On a combined reading of Rules, 185, 186, and 200, it -has to be held that the right to promotion to the higher posts of those already in service but not possessing the higher qualifications introduced under the Rules, is preserved and protected; the protection is not confined to the emoluments of the posts they held at the time or the coming into force of the Rules. We do, not find any reason to restrict the right of such promotion to the immediately higher posts. The safeguard intended was for the incumbents in office and in respect of promotions. A liberal inter- pretation is warranted having regard to trie wording of the Rule and the object underlying it."

9. All these confusions and complications could have been easily avoided if only the rule making authority had bestowed a little more attention to the drafting of the rules with greater precision and clarity, to convey without any doubt the intent and define without any uncertainty the content of the saving provisions. We may, therefore, at the outset point out that we are not at all satisfied with the clumsy frame of Rule 200. When the legal drafting department had before it the "saving" provisions included in almost all consolidating or amending statutes, making similar provisions with minor alterations in the Co-operative Societies Rule was a comparatively easy task.

10. Rule 200 provided for "right or privilege of emoluments". At one time there was even doubt whether the word "of was only a printing mistake for the word "or" and a reference had to be made to the gazette publication to ascertain that the correct word was "or" and not "of. One learned Judge was inclined to read "or" as "for". We shall read the rule as it stands" and do not propose to substitute the word "of with "or" in the present circumstances.

11. Rule 200 preserves rights; saves privileges. Does the word "emolument" qualify only "privilege" or qualify both the words "right" and "privilege"? It is, therefore, necessary to understand the true scope of the expression "privilege" occurring in Rule 200.

12. "Privilege" is not an expression of modern coinage inserted in the repeal and savings provision of any enactment. In the English Interpretation Act, 1889, dealing with effect of repeal in future Acts, Section 38 provided that the repeal shall not, unless the contrary intention appears, "affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed". The same words have been borrowed in S. 6(c) of the General Clauses Act of 1897 and incorporated in the Kerala General Clauses Act as well. What then is the privilege that is protected? Privilege is not statutorily defined and we have necessarily therefore to ascertain the legal content of that expression and take note of its meaning as it is understood in the general or ordinary sense. In Webster's Third New International Dictionary, privilege is "a right or immunity granted as a peculiar benefit, advantage or favour; a special enjoyment of a good or exemption from an evil or burden; a peculiar or personal advantage or right esp, when enjoyed in derogation of common right". In Black's Law Dictionary, privilege is "a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. An exceptional or extraordinary power of exemption. A right, power, franchise, or immunity held by a person or class, against or beyond the course of the law."

13. In *Corpus Juris Secundum*, Vol. 72 it is stated as follows : --

"PRIVILEGE. The word "privilege" has a variety of meanings, according to the connection or context in which it is used; but inherent in the term is the idea of something apart and distinct from a common right which pertains to all citizens or exists in all subjects, and the word connotes some sort of a special grant from the sovereignty, some type of necessary special permission or consent which the sovereign in its discretion might have withheld, or failed to provide, such as the right to do business as a corporation or the right to record a mortgage. Standing alone the word "privilege" carries the idea of permission, a permissive use, and, While it is frequently defined in terms of a right or immunity granted, it is often said that a person takes privileges to which he may not be entitled.

The word "privilege", as used in its broad and comprehensive sense, means an advantage; a peculiar advantage; a peculiar benefit, favour, or advantage; a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantage of other citizens; a favour granted, an option."

Salmond on Jurisprudence, 12th Edition, treats privileges as licences or legal liberties derived from the, absence of legal duties.

"If a landowner gives me a licence to go upon his land, I have a right to do so, in the sense in which a right means a liberty; but I have no right to do so, in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his land, he has an equal right or liberty to prevent me."

"The correlative of A's liberty to do a thing is B's no-right that it shall not be

done, and the correlative of A's liberty not to do a thing is B's no-right that it shall be done. "No-right" is a manufactured word indicating the absence of right against another in some particular respect. To say that B has a no-right against A is simply another way of saying that B has not a right against A, just as to say that A has a privilege against B is simply another way of saying that A is not under a duty towards B. Thus a trespasser has a no-right not to be forcibly ejected (i.e. has not a right not to be forcibly ejected), corresponding to the occupier's liberty to eject him. Again, the owner of a building generally has a no-right not to have his windows darkened or his foundations weakened by the buildings or excavations of his neighbours. In short, all cases of *damnum sine injuria* (o) are cases of no-right."

In the Text Book of Jurisprudence (Fourth Edition) by G. W. Paton, at page 292, it is stated thus : --

"The usual distinction is that liberty covers those acts that are primarily lawful for all, whereas privilege covers those that are *prima facie* unlawful but allowable in certain circumstances to all, or else to a limited" number of persons. The Restatement of the Law of Property defines a privilege as a legal freedom on the part of one person as against another to do a given act or a legal freedom, not to do a certain act."

Dias Jurisprudence, Fifth Edition, at page 23 summarises Jural Relations thus : --

"Claims, liberties, powers and immunities are subsumed under the term "rights" in ordinary speech, but for the sake of clarity and precision it is essential to appreciate that this word has undergone four shifts in meaning. They connote four different ideas concerning the activity, or potential activity, of one person with reference to another.

- (1) Y's duty with regard to X would be expressed by X as "you ought (must)" : (X is then said to have a claim or right, *stricto sensu*).
- (2) X's freedom to do something in relation to Y would be expressed by X as "I may" : (X has a liberty or privilege).
- (3) X's ability to alter Y's legal position would be expressed by X as "I can" : (X has a power).
- (4) Y's inability to alter X's legal position would be expressed by X as "you cannot": (X has an immunity).

The use of homonym "right" to denote these separate ideas obscures the distinctions and leads to confusion sooner or later. It would be helpful, therefore, to make the distinctions as obvious as possible by allotting to each a term of its own." He also refers to Hohfeld's rearrangement of the Salmonds Scheme in 1913 and says that Hohfeld "worked out a table of juralrelations with incisive logic".

14. Hohfeld set out his table of Jural relations as follows :

Jural Correlatives Right Privilege Power Immunity

duty No-right Liability Disability

Jural Opposites Right Privilege Power Immunity

No-right Duty Disability Liability"

Dias states thus : --

"The owners of an oyster fishery had, since the days of Queen Elizabeth I, granted licences to fish to persons who satisfied certain conditions. The plaintiff, who satisfied them but was refused a licence, brought an action alleging a customary claim correlative to a duty in the defendants to grant him one. The court held otherwise on the basis that the defendants had always exercised a discretion in the matter. This implied not only a liberty to grant licenses, but also a liberty not to grant licences, which implied the absence of a duty to do so. If, then, they were under no duty to grant licences, the plaintiff could have no claim".

Dias proceeded to state :--

"It has been shown that liberty begins where duty ends."

"Some liberties are recognised by the law generally e.g. liberty to follow a lawful calling. So too, are "Parliamentary privilege" in debate and "judicial privilege", which are liberties in the Hohfeldian sense in that both connote the absence of a duty not to utter defamatory statements. An infant's position (sometimes called in non-Hohfeldian language an immunity) in contracts for things other than necessities is more complicated. In some cases it amounts to a power to repudiate the contract; in others it is not clear whether an infant has a liberty not to perform the contract, i.e. no primary duty to perform, or whether there is a sanctionless duty, i.e. a primary duty which he ought to fulfil, but no sanctioning duty to pay damages and instead an immunity from the power of judgment.

Other liberties are recognised by law on special occasions, that is to say the normal" duty not to do something is replaced in the circumstances by the liberty to do it, e.g. self-help, self-defence, the defences of fair comment and qualified privilege. Lastly, liberty may be created by the parties themselves, e.g. consent, or *volenti non fit injuria*, one effect of which is that it absolves a defendant from his duty."

In the Fifth Edition of Lloyd's Introduction to Jurisprudence, at page 434, the learned author states thus : -- .

"Rights.....are not mere gifts or favours..... for which gratitude is the sole fitting response. A right is something which a man can stand on, something that can be demanded or insisted upon without embarrassment or shame..... A world with claim-rights is one in which all persons, as actual or potential claimants, are

dignified objects of respect.....No amount of love or compassion, or obedience to higher authority, or noblesse oblige, can substitute for those values."

Referring to Hohfeld's analysis of Rights, the learned Author states :--

"Hohfeld was not the first jurist to note the ambiguity with which sentences using the concept of rights was fraught. But Hohfeld's account was (then in 1919) the most rigorous and remains today, despite its faults, the source to which most (and not just jurists) return."

and then proceeds thus :--

"Privilege" confers a special position and accurately captures some "privileges", for example the rule that a judge does no legal wrong in speaking slander in his judicial capacity. However, exceptions on account of status are only one type of privilege; we can do whatever the law allows us translates into Hohfeldian terminology into a privilege to do whatever is not a breach of duty."

Francis Lieber states:

"There is no right without a parallel duty, no liberty without the supremacy of the law, no high destiny without earnest perseverance, no greatness without self-denial."

15. The decision of the Supreme Court in *Isha Valimohamed and Another Vs. Haji Gulam Mohamad and Haji Dada Trust*, is very relevant on this issue. Justice Mathew speaking for the Court interpreting Section 51 of the Saurashtra Rent Control Act, held thus :--

"We think that the respondent-landlord had the legal freedom as against the appellants to terminate the tenancy or not. The appellants had no right or claim that the respondent should not terminate the tenancy and the respondents had, therefore, the privilege of terminating it on the ground that appellants had sublet the premises. This privilege would survive the repeal. But the problem would still remain whether the respondent had an accrued right or privilege to recover possession of the premises u/s 13(1) of the Saurashtra Act on the ground of the sub-letting before the repeal of that Act. The fact that the privilege to terminate the tenancy on the ground of sub-setting survived the repeal does not mean that the landlord had an accrued right or privilege to recover possession u/s 13(1) of that Act as that right or privilege could arise only if the tenancy had been validly terminated before the repeal of the Saurashtra Act."

16. When the General Clauses Act preserved and saved rights, privileges, liabilities and obligations, an occasion rarely arose for any intelligible interpretation of the expression "privilege" separately. The width of the saving clause, in the circumstances, did not admit of any elaborate judicial examination either. That probably explains the paucity of judicial decisions interpreting the word "privilege" occurring in saving clauses. However, we are not in that "privileged" position for the reason that Rule 200 requires a judicial

determination of the content of "privilege" to understand the extent of the statutory protection granted to existing staff of co-operative societies.

17. Where there is a right, there is a duty. Where it is only a privilege, it is only liberty without any corresponding duty. Privilege provides an opportunity to choose among alternatives. Privilege can be the dispensation of a bounty, a conferment of a personal benefit or advantage, a sanction of immunity or the grant of an exemption. Privilege is thus essentially discretionary. It may or may not be granted. Privilege has thus no compulsive element and is thus not judicially enforceable. When there is no duty to enforce a privilege, there can be no sanction for its breach. Privilege cannot be equated with right, and failure to grant a privilege does not attract any sanction. Privilege is essentially personal while right is generally universal. Privilege is permissive, right is prerogative. Right has a larger content. Privilege is in a narrow compass. But both right and privilege can be regulated by statute and are subject to constitutional limitations. When once a privilege is granted, it ripens into a right. The Government have thus the privilege of granting permission to conduct trade in liquor, for, none has a fundamental right to carry on such trade. The grant of privilege is itself subject to the Abkari laws. Privilege may extend to several aspects and embrace several fields. When thus the distinction between the two jural concepts of "privilege" and "right" is borne in mind, interpretation of Rule 200 does not pose serious complications. Moreover, the saving clause is intended to extend the advantage and benefits conferred on existing employees and not to carry forward the harmful hostile effects of the pre-existing period. It, therefore, seems to us to be clear that Rule 200 intended to preserve all the rights which the existing employees were entitled to before 1-1-1974 and also to the privilege of emoluments which they were so entitled to under the earlier bye-laws or rules. The extent of the right preserved cannot be affected by limiting its application to emoluments and the contention that right to emoluments alone was saved under this rule cannot be accepted.

18. The second limb of the interpretative problem posed for consideration relates to the last sentence in R. 200 regarding the right of promotion. A right, to promotion earned already before 1-1-1974 is protected under this rule. A chance of promotion has no such protection. Thus where qualifications have been prescribed by the old bye-laws or service rules for promotion, persons fulfilling those qualifications are entitled to promotion even after the new rules, notwithstanding the fact, a different or a higher qualification is insisted under the new rules. Lack of qualifications prescribed under the old rules, however, cannot be a passport for promotion unless specifically warranted or intended by R. 200. The qualifications acquired under the old bye-laws can enable the existing employee to earn promotion to one higher post and not to all the vacancies in the higher posts which arise after 1-1-1974. The quality of service cannot be perilously dangerous to the efficient functioning of the societies. Qualifications prescribed under the new rules for promotion should invariably be the rule and not the exception. In this view, we have no hesitation to hold that Rule 200

saves , the existing employees to earn promotion on the basis of the earlier qualification only to one higher post. The rule advisedly uses the expression "a higher post" and its context does not import the principle "words in the singular shall include the plural."

19. Where no qualifications were prescribed under the old bye-laws, there was no question of preserving any right to promotion and therefore the existing employees in those cases will have to satisfy the requirements and qualification prescribed by the new rule to obtain promotion. Relaxation is a privilege which ripens into a right when it is granted. On our reasoning that a right to promotion alone is saved, it follows that where qualifications prescribed under the old bye-law, were not relaxed as provided therein before the new rules were framed, those employees did not acquire any right to be promoted and Rule 200 did not come to their rescue. Relaxation of the essential qualifications under the old rule or bye-law cannot be exercised after the new rules have come into force. The qualifications for promotion prescribed prior to 1-1-1974 ceased to exist from that date with the promulgation of the new rules and no question of any relaxation under the protection of the saving provision in Rule 200 therefore arises.

20. It is only necessary for us to consider the Division Bench rulings of this Court, referred to earlier, which have given rise to this reference to the Full Bench. In *Narayanan Nair v. Kottayam Dist. Co.-op. Bank* 1984 Ker LT 248, Justice Sukumaran speaking for the Bench stated thus :--

"On a combined reading of Rules 185, 186, and 200, it has to be held that the right to promotion to the higher posts of those already in service but not possessing the higher qualifications introduced under the Rules, is preserved and protected; the protection is not confined to the emoluments of the posts they held at the time of the coining into force of the Rules".

We agree with this conclusion for reasons which we have already stated. But the further dictum laid down in the judgment reads .

"We do not find any reason to restrict the right of such promotion to the immediately higher posts. The safeguard intended was for the incumbents in office and in respect of promotions. A liberal interpretation is warranted having regard to the wording of the Rule and the object underlying it."

We are not in agreement with this reasoning or conclusion and for reasons stated earlier and to this extent that decision is overruled.

21. The other decision. *Krishnakutty (sic) v. Joint Registrar* 1984 Ker LT. 788. on our understanding reading is not in conflict with the decision in 1984 Ker LT 248. In this decision Chief Justice Bhaskaran speaking for the Bench stated thus : --

"We also notice that what the framers of the rules had in mind was the protection of the rights of all those who were holding a particular post before the rule came into force, by allowing them to hold the post without being reverted on account

of the fact that they did not possess the qualification as prescribed by the rule."

It is also stated thus :--

"As a matter of fact, there was no rule that was in force, before the coming into force of Rule 186, which inter alia provided that a person in the position of the appellant-petitioner would be entitled to further promotions without acquiring any of the qualifications whatsoever in that behalf. Had there been any. such rule, it would have been a good defence against the order in the nature of Ext. P3. The appellant-petitioner has no such case that the rule or contract of appointment earlier provided for promotion without acquiring qualifications".

22. We see no conflict between this judgment and the one reported in 1984 Ker LT 248, In the view, therefore, we have taken the decisions which held that the right to emoluments alone is saved under R: 200 cannot be accepted as correct and therefore, the judgments in O.Ps. Nos. 1684 and 549 of 1975 are overruled. So also, the decision in Sankra Wariyar v. North Malabar Dist. 1982 Ker U 124 : (1982 Lab IC 863), taking the same view cannot also stand and it is also overruled to this extent

23. We shall, therefore, summarise our conclusion on the interpretation and application of Rule 200 of the Kerata Cooperative Societies Rules, bearing in mind that the employees of the Co-operative Societies in service on 1-1-1974, "the existing employees" are the beneficiaries under the provision;

(1) That all rights which the existing employees were entitled on or before 1-1-1974 are preserved.

(2) As for privileges pre-existing privileges of emoluments alone are saved under the rule.

(3) The existing employees are entitled to promotion to one higher post without reference to the qualification prescribed by the new rules, provided they were qualified under the old rules or bye-laws.

(4) If no qualification was fixed prior to 1-1-1974, promotion can be effected only in accordance with the qualification and condition provided under the new rules, after 1-1-1974 and

(5) A plea for relaxation is only a claim of privilege and this privilege is not protected under Rule 200. This privilege ripens into a right only when it is granted As this right is protected, relaxation granted before 1-1-1974 can be pressed into service relying on this rule. Relaxation of the qualification prescribed under the old bye-law thus cannot be made after the new rule has come into force."

24. We shall now proceed to consider the petitions and appeal separately.

O.P. Nos. 3284 of 1984, 4665 of 1984, 5301 of 1984, 5364 of 1984 5662 of 1984 and 1427 of 1986.

25. In all these cases, the short question is whether the petitioners are entitled to continue till they attain the age of 60 years as provided in the bye-laws prior to 1-1-1974, or only till they attain the age of 58 years as provided in the new rules. What the petitioners seek is to quash a circular issued by the Registrar under the Act, directing that the employees of all Co-operative Societies shall retire on attaining the age of 58 years as provided in Rule 183(2) of the Co-operative Societies Rules, 1969. When the old bye-laws or service rules provide that the employees can continue in service till they attain the age of 60 years, this right is preserved and protected under Rule 200. The rules that came into force on 1-1-1974 reducing the age of superannuation to 58 cannot, therefore, apply to the existing employees who were appointed prior to 1-1-1974 and were still in service on the date of coming into force of the new rules. The circulars issued by the Registrar as defined under the Act, compelling the existing employees appointed before 1-1-1974 to retire on attaining the age of 58 years is in conflict with the protection afforded under Rule 200 and hence they cannot stand and be enforced. We however, make it clear that when the bye-laws or rules of any society did not fix the retirement age, the employees of those societies will have to retire on attaining the age of 58 years as prescribed under the present rules.

26. Some of the petitioners have sought for a declaration that they are entitled to continue in service till they attain the age of 60 years as provided under the bye-laws and prayed for appropriate writ to be issued against the concerned societies. This Court has consistently held that no writ will lie against a co-operative society. We have no hesitation in reiterating this position.

27. The distinguishing features to identify an authority as a State within the meaning of Article 12 of the Constitution are now well settled with the pronouncement of the Supreme Court in the Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others, ; Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, and the Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and the later decisions. The decision of this Court in *Sofhi v. F.A.C.T.* 1984 Ker LT 32 : (1984 Lab IC NOC 110) also succinctly summarises the principles deducible from the decisions of the Supreme Court. There is, we think, no necessity thus to restate the same principles.

28. On the question whether Co-operative Society is a State, the decisions of the Supreme Court in *Sabhajit Tewary Vs. Union of India (UOI) and Others*, , *Kumari Regina Vs. St. Aloysius Higher Elementary School and Another*, and *Vaish Degree College v. Lakshmi Narain*, AIR 1976 SC 888 are very apposite.

29. The Co-operative Societies are not created by the Co-operative Societies Act and they are not statutory bodies. They are only functioning in accordance with the provisions of the Act. These institutions would have legal existence even if the

Co-operative Societies Act was not in force. Moreover, the Government have no shares in the Cooperative Societies. There is no deep and pervasive State control. The management of the societies does not vest in the Government or in the representatives of the Government. The management is under the effective control of a committee elected by the members of the societies. The statutory regulation or restriction in the functioning of the societies is not "an imprint of State under Article 12."

30. We, therefore, hold that no writ will lie against a Co-operative Society governed by the Kerala Co-operative Societies Act and these writ petitions will have to be dismissed on that score.

31. The counsel appearing for the societies have however, assured that they will mould relief to the petitioners and persons similarly situated in their respective societies in accordance with the principles settled by this Court in this decision on the interpretation of Rule 200. In view of the fact that the circular already issued by the Registrar and impugned in these writ petitions are quashed, the Registrar will issue fresh circulars incorporating the principles stated in this judgment and communicate the same to all societies. These Original Petitions are disposed of accordingly.

O.P. No. 6891 of 1981.

32. The petitioner is a Junior Clerk in the Taliparamba Service Co-operative Bank appointed on 15-12-1975, after the new rules came into force. He has passed S.S.L.C. examination and obtained the Junior Diploma in Co-operation. Respondents 4 and 5 are seniors to him and the complaint is that they have been appointed to higher posts even though they did not have the qualification prescribed under the rules that came into force on 1-1-1974. The right of promotion available to respondents 4 and 5 will depend on the extent of applicability of Rule 200 as interpreted by us.

33.. The Deputy Registrar of Co-operative Societies, Cannanore, by his order dated 13-1-1981 held that the appointments of respondents 4 and 5 were irregular. But the Government have as per order dated 5-10-1981 (Ext. P4) set aside this order and upheld the claim of the contesting respondents. The petitioner, therefore, seeks to quash Ext. P4 and for incidental reliefs.

34. The Deputy Registrar, Cannanore, in the first instance, and the government, if moved later will have to consider the entire matter afresh on the basis of our interpretation of Rule 200. Facts have to be ascertained and the relevant provisions of the bye-law and service rules and also the new rules have to be looked into before any decision is rendered. It is not proper to go into all these facts now in this proceedings. The order of the Deputy Registrar dated 13-1-1981 and that of the Government dated 5-10-1981 (Ext. P4) are both quashed as the claims have not been considered under Rule 200 as interpreted by us. The Deputy Registrar will therefore, consider the matter afresh in the light of all relevant facts giving an opportunity to the petitioner and respondents 4 and

5 to file fresh representations. The Original Petition is allowed to the above extent. Parties shall bear costs.

W.A. No, 277 of 1984.

35- The 2nd respondent, an Accountant in the Nediirippu Service Co-operative Bank, was reverted by the Bank as per proceedings dated 20-10-1982 (Ext. P2). Claiming relief under Rule 200, he filed O.P. No. 9744 of 192 challenging this order. A learned Judge allowed the writ petition holding that persons who had commenced service prior to 1-1-1974 could be promoted right up to the highest post in a Co-operative Socety without insisting on the qualification introduced by Rule 186 and quashed Ext. P2 and declared that the writ petitioner "will be entitled to continue as an Accountant in the services of the Bank, notwithstanding the deficiency in training qualification." It is against this judgment that the Bank has filed this appeal.

36. The reasoning of the learned Judge cannot be sustained in view of our decision that the protection for promotion under Rule 200 is only to one higher post after 1-1-1974 and not to all the higher posts "right up to the highest post". Moreover the writ petitioner has challenged the decision of a co-operative society in proceedings under Article 226 of the Constitution. No writ will lie against a Co-operative Society and the writ petition should have been dismissed on that short ground. For both the reasons, the appeal has to be allowed.

37. The counsel for the appellant, however, submitted that the appellant-Bank will consider the matter afresh in accordance with our decision on the scope and content of R, 200. For this purpose, the 2nd respondent can make a representation before the appellant within one month from today and the Bank has undertaken to pass fresh orders and not to revert the 2nd respondent till such decision is rendered

In the result, the appeal is allowed, the judgment of the learned single Judge is set aside, the Original Petition is dismissed subject to the above observations. Parties will bear the costs.