

(2015) 01 KL CK 0017

In the High Court Of Kerala

Case No : Writ Petition(C). Nos. 26645 of 2011-E, 26698 of 2011-J and 27650 of 2011-E

Sophiya Beegam

APPELLANT

Vs

K. Bindulal

RESPONDENT

Date of Decision : 05-01-2015

Acts Referred:

Citation : (2015) 01 KL CK 0017

Hon'ble Judges : K. Vinod Chandran, J.

Bench : Single Bench

Advocate : P.N. Mohanan and I. Vinaya Kumari, for the Appellant; K.P. Satheesan, Senior Advocate, M.R. Jayaprasad, P. Mohandas (Ernakulam), Mathew Sunny and Anoop V. Nair, Advocates for the Respondent

Judgement

K. Vinod Chandran, J.—All the three writ petitions assail the order of the Co-operative Tribunal in Appeal No. 80 of 2010, which reversed the decision in ARC 30 of 2009. The petitioners in the writ petition stand to lose their seniority by the order of the Co-operative Tribunal, which held in favour of the party respondent herein, the appellant/plaintiff before the lower Courts.

2. The parties are ideally to be referred from their status in the Arbitration Court. The plaintiff before the Arbitration Court is the party respondent in all these cases, who seeks to sustain the order of the Tribunal. The ARC itself was initiated, challenging the promotions of defendants 2 to 9, who, except the 5th defendant, are the petitioners in the above writ petitions. The Tribunal did not upset the seniority of the 5th defendant vis-?-vis the plaintiff. Defendants 6 and 7 are the petitioners in W.P.(C). No. 26645 of 2011, defendants 8 and 9 are the petitioners in W.P.(C). No. 27650 of 2011 and defendants 2 to 4 are the petitioners in W.P.(C). No. 26698 of 2011. The initial entry into service of the defendants and the inter se seniority with the plaintiff were the issues agitated before the Courts below.

3. Defendants 8 and 9 [petitioners in W.P.(C). No. 27650 of 2011] were

appointed on 08.02.2002 pursuant to the directions issued by a Division Bench in a common judgment [Exhibit P3], in which the defendants 2 to 4 were also parties. The brief background facts are that a notification was issued on 18.06.1989 by the Kollam District Co-operative Bank, calling for selection to the post of Clerk/Cashier, wherein the employees of the member societies were granted relaxation as to the eligibility conditions of age and qualification. The defendants 8 and 9 were placed at 12th and 18th rank in the list published pursuant to the selection of 18.06.1989. The defendants 2 to 4 were at ranks 22, 36 and 38 respectively. They were ranked in the selection as against the 50% of vacancies reserved for employees of the Member Societies. In the midst of the selection, the Registrar of Co-operative Societies came out with a Circular, stipulating communal rotation in making appointments as per the rank list published by the Bank. One of the persons who was in the rank list, who is not concerned with the present dispute, had challenged the rotation as stipulated by the Registrar. An interim order was obtained insofar as the said person, who filed O.P. No. 10095 of 1992. The petitioner therein was given appointment in accordance with his position in the rank list.

4. Defendants 2, 3, 4, 8 and 9 approached this Court, belatedly, with writ petitions, which were disposed of by Exhibit P3 judgment, produced in W.P.(C). No. 27650 of 2011. The claim of the petitioners in Exhibit P3, that O.P. No. 10095 of 1992 was a representative action, was declined. The rank list prepared was found to have expired on 13.03.1991. The Circular issued for communal rotation was found to be not legally sustainable; even going by the statement filed by the official respondent. However, on grounds of delay, the petitioners were declined relief. Noticing the hardship caused to the petitioners by reason of the Circular, which eventually was found to be illegal by the Department itself; this Court directed the petitioners' case to be considered sympathetically, by Exhibit P3.

5. It was pursuant to such direction issued that the defendants 8 and 9 were appointed on 08.02.2002 by virtue of the resolution produced as Exhibit P4 in their writ petition. Exhibit P5 produced therein was their appointment order, on which date they joined the service of the respondent-Bank. Exhibit P6 produced in their writ petition is the seniority list of employees as on 28.02.2002, which indicates defendants 8 and 9, against serial Nos. 230 and 231. Defendants 6 and 7 are indicated at serial Nos. 228 and 229. Defendants 6 and 7 were initially appointed in another District Co-operative Bank, respectively in the year 1995 and 1996; and joined the respondent-Bank on 08.02.2002, on inter-Bank transfer. Their transfer from one District Co-operative Bank to another, admittedly, was on the agreement that they would be placed as the junior-most, in the clerical cadre, as on that date. The defendants 2 to 4 do not at all figure in Exhibit P6 seniority list of employees as on 28.02.2002; naturally, since the said defendants were appointed only by Exhibit P3 dated 27.04.2002, produced in W.P. (C). No. 26698 of 2011. The plaintiff figured at Sl. No. 280 in the seniority list as on 28.02.2002, having been appointed on 14.2.2002.

6. The respondent-Bank effected promotions and the defendants 6 to 9 and the plaintiff were promoted from the post of Clerk/Cashier to the post of Junior Accountant/Inspector, by Exhibit P7 dated 07.03.2005 in W.P.(C). No. 27650 of 2011. The defendants 6 and 7 were at serial Nos. 4 and 5 and defendants 8 and 9 at serial Nos. 6 and 7 in Exhibit P7. Again defendants 2 to 4 did not figure in such promotion and the plaintiff was placed at serial No. 55 in Exhibit P7. A further seniority list was published as on 31.03.2005 [Exhibit P8 in W.P.(C). No. 27650 of 2011], wherein again the defendants 6 to 9 were placed at Sl. Nos. 181, 182, 183 and 184 and the plaintiff at serial No. 231. A subsequent promotion granted by Exhibit P10 dated 12.02.2009 [in W.P.(C). No. 27650 of 2011] found defendants 6 to 9 placed at serial Nos. 6 to 9 and the plaintiff not figuring at all in such promotion from the post of Junior Accountant/Inspector to Senior Accountant/Inspector.

7. It was in the said promotion order that for the first time defendants 2 to 4 came to be placed at serial Nos. 10 to 12 immediately after the 9th defendant. Exhibit P10 of 2009 gave rise to the Arbitration Case filed by the plaintiff. ARC.30 of 2009 was taken into the files of the Arbitration Court and eventually the same was rejected by Exhibit P15. The order of the Arbitration Court was overturned by the Co-operative Tribunal by Exhibit P17, directing the plaintiff to be placed above the defendants 2 to 4 and 6 to 9 and to promote the plaintiff prior to the promotion of defendants 2 to 4 and 6 to 9.

8. The Arbitration Court found that the defendants 8, 9 and 2 to 4 were appointed from a rank list of 13.03.1991 and hence they were senior to the plaintiff. The defendants 6 and 7 were borne in the rolls of the Bank before the plaintiff and hence their seniority was also held unassailable. The Tribunal found that the Arbitration Court adopted different yardsticks for fixing the seniority. While the defendants 8, 9 and 2 to 4 were given the seniority based on their rank list of 1991, the plaintiff and defendants 6 and 7 were given the seniority only from their date of appointment, was the finding. The principle embodied in Rule 27(c) of the KS and SSR was adopted following the Division Bench decision in *Ambikakutty Vs. Kerala Co-operative Tribunal*, . The date of advice was held to be relevant for fixing the inter se seniority. The plaintiff was granted seniority as on 31.12.2001, the date of advice of PSC, the defendants 8 and 9 the date of their appointment order, i.e., the decision dated 07.02.2002 [Exhibit P5 in W.P.(C), No. 27650 of 2011], the defendants 2 to 4, the date of their appointment order 27.04.2002 [Exhibit P3 in W.P.(C). No. 26698 of 2011]. The defendants 6 and 7 also were placed below the plaintiff for reason of the undertaking to be accommodated as the junior-most on their date of appointment, i.e., 08.02.2002; long after the plaintiff's advice of 31.12.2001. The claim of the plaintiff against the 5th defendant was declined by both the Courts below and the same is not an issue herein.

9. The petitioners in W.P.(C). No. 27650 of 2011 [defendants 8 and 9] contend that the claim of the plaintiff was only with respect to his advice from the Kerala

Public Service Commission [for brevity "PSC"], which is said to be prior to the appointment of defendants 8 and 9, i.e., on 31.12.2001. Admittedly the plaintiff was issued with an appointment letter only on 08.02.2002 and joined the respondent-Bank on 14.02.2002, after the defendants 8 and 9 joined service. The contention advanced by the plaintiff was to the effect that Rule 27(c) of the Kerala State and Subordinate Services Rules, 1958 [for brevity "KS and SSR"] has to be applied or at least on the principle embodied therein, the date of advice would have to be taken into account to determine the seniority. The learned counsel appearing for the defendants 8 and 9 would contend that the said contention based on *Ambikakutty (supra)* is distinguishable; insofar as the plaintiff and defendants 8 and 9 not being advised for appointment in a common selection procedure.

10. The defendants 8 and 9 also rely on a Full Bench decision of this Court in *Sajeeve, N.J. Vs. Union of India (UOI) and Others*, to contend that the plaintiff could not have, in the year 2009, successfully raised an issue with respect to the seniority which had been settled for long and is evident from the seniority lists published intermittently as also the promotions granted. The defendants 8 and 9 would also place reliance on the decision of this Court in *Sharafudeen Kunju, S. and Others Vs. Manoharan Pillai and Others*, . In that case, on the basis of the Circular regarding communal reservation; reserved category candidates were granted appointment prior to those in the rank list; who figured higher in merit. This Court resolved the issue by the aforesaid decision, granting seniority as per the rank list. Going by the said proposition, the defendants 8 and 9 would have to be placed far higher, is the contention, which, however, the learned counsel fairly does not urge, in the teeth of the dismissal of their earlier writ petition and their appointments having been effected only by way of an equitable relief.

11. The defendants 6 and 7, who are the petitioners in W.P.(C). No. 26645 of 2011, would contend that they have been unnecessarily dragged into the litigation. There can be no dispute with respect to their seniority, since they had joined the Bank by inter-Bank transfer and the date of advice or the date of appointment of the direct recruits would not be relevant in considering their seniority. Admittedly they were appointed prior to the appointment of all the other defendants as also the plaintiff.

12. The petitioner in W.P.(C). No. 26698 of 2014 [defendants 2 to 4] would contend that, going by the specific contention raised by the plaintiff for seniority in accordance with the advice, the defendants 2 to 4 should be granted seniority over the plaintiff, since the defendants 2 to 4 were appointed in pursuance of a seniority list prepared in 1989, long prior to the list in which the plaintiff was included. The learned counsel would also place reliance on two decisions of the Hon"ble Supreme Court to buttress his contention, being *S.R. Bhagwat and others, Vs. State of Mysore*, and *Union of India (UOI) Vs. Madras Telephone SC and ST Social Welfare Association*, .

13. The learned Senior Counsel appearing for the plaintiff, however, would assert

the plaintiff's claim to be related to the date of advice as on 31.12.2001. The PSC had taken over the appointments to the District Co-operative Banks as on 1996 and in fact no appointments could have been made to the District Co-operative Banks after the said date. The defendants 6 to 9 were appointed only by virtue of an indulgence shown by a Division Bench of this Court while dismissing their case. The recipients of such benevolence, could not assert any right, with respect to seniority, especially as against a candidate who had been appointed as per the accepted procedure through the PSC, on merit, and whose seniority would have to be related back to the date of advice, is the contention.

14. The learned Senior Counsel appearing for the plaintiff would take this Court to Exhibit R2(i), to contend that the PSC was conferred with the power to make appointments in Co-operative Societies specified in the schedule in the year 1996. Admittedly the respondent-Bank is included in the schedule. It is as per the selection conducted by the PSC in accordance with the aforesaid statute that the plaintiff has been appointed. The learned Senior Counsel would contend that a perusal of the records on the background of the aforesaid Act, would reveal the fraud committed by the Bank in collusion with the defendants. The plaintiff's contention is that, in pursuance of Exhibit P3 the defendants 8 and 9 were appointed by virtue of Exhibit P4. The defendants 8 and 9 were having rank Nos. 12 and 18 as per the rank list prepared pursuant to Exhibit P1 notification of 1989. In fact, only 18 vacancies could be filled up from the rank list in which defendants 8, 9 and 2 to 4 were included. Exhibit P4 specifically indicated that no further grievances would be entertained from the other petitioners whose rank numbers are not above 18. It is in derogation of such specific decision that the defendants 2 to 4 were appointed. Further it is contended that the seniority list at Exhibit P8 and P7 do not have the trappings of a seniority list; one for reason of the same being not in pursuance of a proceeding and next for reason of no objections having been called for. The said contention is urged specifically to refute the "sit-back" theory pleaded by the defendants. The plaintiff was not aware of such seniority being fixed and for the first time a proper seniority list was published only as per Exhibit P9, the full extract of which is said to be produced as Exhibit R2(j). None of the defendants, hence, can claim seniority over the plaintiff, even going by the decision in Sharafudeen Kunju (supra), argues the plaintiff.

15. At the outset, it has to be emphasised that the inter se seniority dispute between the parties cannot be decided on the basis of the principles stated in Ambikakutty (supra). The said decision; though held that the seniority has to be fixed normally on the basis of the rank assigned and not on the basis of the date of appointment; was specifically dealing with a common selection procedure based on merit. The 1st rank holder in the rank list therein, joined duty, just after one day of the 2nd rank holder. This Court found that in such circumstance the ranking on merit would have to have precedence over the date of joining, since joining would depend on fortuitous circumstances inter alia of a lesser rank holder getting a favourable posting nearer to his/her home, which alone cannot

upset the merit.

16. The Division Bench specifically noticed two decisions of the Hon^{ble} Supreme Court in *A. Janardhana Vs. Union of India (UOI) and Others*, and *Ram Janam Singh Vs. State of Uttar Pradesh* and another, as also a decision of this Court in *Dr. A.K. Chirappanath v. Dr. M.A. Ittyachan* [1992 (1) KLT 406] and distinguished the same, pointing out the crucial difference; being that "both incumbents were selected as per a common selection procedure". Hence, despite Rule 27(c) of the KS and SSR being declared to be a salutary principle of fairness and equity, which could be imported to appointments, even when selections are not regulated by KS and SSR; the inter se seniority dispute herein cannot be resolved on that alone for reason of the parties being appointed from various sources. The defendants 6 and 7 were appointed on transfer from another society and joined the Bank on 08.02.2002. The defendants 8 and 9, the immediate juniors, also joined on 08.02.2002. The plaintiff joined on 14.02.2002 and the defendants 2 to 4 still later, on 27.04.2002. While the defendants 6 and 7 were appointed to the respondent-Bank on transfer, the defendants 8 and 9 as also defendants 2 to 4 were appointed from the rank list prepared as per Exhibit P1 notification, in pursuance of the directions in Exhibit P3 judgment. The plaintiff was appointed as per a valid selection conducted by the PSC. There could be no relative merit assessed between the plaintiff and the defendants since they were obviously not from a common selection procedure.

17. The allegation of fraud employed, cannot be looked into at this stage, especially since the plaintiff is not challenging the appointment as such of defendants 2 to 4 or defendants 8 and 9. These defendants [defendants 2 to 4 and 8 and 9] definitely obtained appointment only by reason of the observations made by the Division Bench of this Court, in Exhibit P3, to consider their case sympathetically. The question whether the defendants 8 and 9 and 2 to 4 would have normally got an appointment need not detain this Court. The sustainability of their appointment is no more alive for consideration, since that is not under challenge. No examination of any fraud alleged regarding the appointment, need be looked into by this Court; to resolve the instant dispute of inter se seniority. The contentions on that aspect are rejected.

18. The Tribunal committed a grave error in finding that the Arbitration Court adopted different yardsticks in the case of defendants 8, 9 and 2 to 4 and in the case of the plaintiff and defendants 6 and 7. The Tribunal noticed in para 10 that the issue to be decided was the "seniority of the employees in the very same cadre appointed by different modes is to be fixed" (sic). Nevertheless, *Ambikakutty* (supra) was applied with respect to the employees appointed from different sources and when no question arose of relative merit between such persons having been assessed, in a common selection procedure.

19. The defendants 6 and 7 were appointed on transfer. They had been continuing in another District Co-operative Bank and had been appointed on inter-Bank transfer to the respondent-Bank. Their appointment was on 08.02.2002,

prior to the appointment of the plaintiff. The seniority assigned to them could, not at all be upset. The plaintiff cannot claim seniority over the said defendants for reason only of his advice prior to that of the said defendants, since they were not appointed as per a common selection procedure. The undertaking of the defendants 6 and 7, were only to the effect that they would be junior-most in the cadre, as on the date of their appointment; with reference only to those already borne in the rolls of the respondent-Bank.

20. The reasoning that Ambikakutty (*supra*) does not apply is relevant, in the case of others too, since they too came from different source. The defendants 8 and 9 were selected pursuant to a notification issued by the Bank itself in the year 1989. They had figured in the rank list sufficiently high and would have normally got an appointment if the Circular of the Registrar stipulating communal rotation had not intervened. The Circular was found to be illegal and despite the writ petition filed by defendants 8 and 9 not having concluded with a positive direction, by virtue of the direction for equitable consideration made by the Division Bench, the defendants 8 and 9 were granted appointment. In the intervening period, the PSC had taken over the selection process and the plaintiff was advised from that selection.

21. Defendants 2 to 4 or defendants 8 and 9 definitely cannot claim seniority as conferred on the other appointees, pursuant to Exhibit P1 selection. Despite the said defendants having figured in the rank list pursuant to Exhibit P1, admittedly they were not granted an appointment. Their claim of illegal denial of appointment was rejected on the ground of delay. No seniority could be claimed on such illegality having visited on them, since the grounds raised on illegality were refused to be considered. However, they were granted appointment pursuant to directions issued in Exhibit P3. Their seniority has to be fixed from the date of their appointment. Defendants 8 and 9 admittedly joined before the plaintiff and the advice to the plaintiff is of no consequence, for the reasons stated above.

22. The reliance placed by the defendants 2 to 4 on S.R. Bhagwat (*supra*) and Madras Telephone SC and ST Social Welfare Assn. (*supra*) are of no consequence. S.R. Bhagwat (*supra*) considered the efficacy of a legislation which sought, in effect to overrule a judgment of the High Court. Madras Telephone SC and ST Social Welfare Assn. (*supra*) considered the conflict between two decisions of the Hon"ble Supreme Court regarding the basis on which seniority had to be decided. Both have no bearing on the issue herein.

23. The defendants 2 to 4 cannot claim any right flowing from Exhibit P1 on the basis of Exhibit P3, since their claims were rejected on the ground of delay. The benefit accrued to them, by virtue of their inclusion in the list prepared, pursuant to Exhibit P1, was only due to the indulgence shown in Exhibit P3, on equitable principles. Equity is not a one-way street and has to be employed without prejudice to others who have acquired some right over a period of time. The rights, if any, conferred on the defendants 2 to 4 stood crystallized only with

their appointment on 27.04.2002. They cannot claim any precedence or seniority over the plaintiff, who was appointed prior to them.

24. This Court would have normally concluded with the aforesaid findings; but much has been argued, by all parties, on the principles of "sit-back". The said principles too have an amount of relevance in deciding the dispute. The plaintiff's contention that Exhibits P6 and P7 are not "seniority list", as they are normally understood, cannot be countenanced. Exhibits P6 and P7, similar to Exhibit R2(j), ranked the employees in a common seniority list; definitely, in the chronology of hierarchy of designations.

25. Further, the plaintiff cannot feign ignorance of the placement of defendants 6 to 9 above him, since Exhibit P7 promotion order definitely included the plaintiff and defendants 6 to 9. Exhibit P7 was a composite promotion order, which promoted inter alia defendants 6 to 9 and the plaintiff from the post of Clerk-Cashier to that of Junior Accountant/Inspector. Exhibit P7 specifically indicated that "the employees, in the ranking below, are promoted to their existing cadre to the respective cadre as follows". At least as on 07.03.2005, the plaintiff was aware of his position with respect to the seniority with reference to defendants 6 to 9. The "sit-back" theory as propounded in *Sajeeve N.J. (supra)* would squarely apply insofar as the plaintiff's seniority claim as against the defendants 6 to 9 are concerned. This Court, as already held, is also convinced that any departure from the settled principle that seniority has to be normally determined as on the date of entry into service, is not warranted [*Ram Janam Singh and Dr. A.K. Chirappanath (both supra)*].

26. However, the defendants 2 to 4 did not figure in Exhibit P6 seniority list or in Exhibit P7 promotions. It is not disputed that they were promoted to the post of Junior Accountant/Inspector only on 11.02.2009 and by virtue of Exhibit P10, which was just two days later, on 12.02.2009, promoted to the post of Senior Account/Inspector. Hence, the defendants 2 to 4 having not figured anywhere above the plaintiff, either in the seniority lists or in the promotions made prior to Exhibit P10, were suddenly featured; as just junior to the defendants 8 and 9. The claim of the defendants 2 to 4 that they acquired a right relating back to the list prepared as per Exhibit P1 has already been negated; even in the case of defendants 8 and 9. Neither defendants 8 and 9, and surely not at all, the defendants 2 to 4 could claim such a right. The benevolence shown by the respondent-Bank, prompted by the equitable consideration directed by this Court in Exhibit P3, crystallised into a right only on the date of their respective appointments.

27. Defendants 2 to 4 cannot place any reliance on the "sit-back" theory. Their rapid rise, in the seniority, with the Sun, by Exhibit P10 dated 12.02.2009 was without any rhyme or reason and without notice to the adversely affected persons and definitely visited the plaintiff with immense prejudice. The defendants 2 to 4 would not have been placed above the plaintiff in the seniority, for reason of their appointment being after the plaintiff joined duty.

28. Resultantly, the order of the Tribunal, reversing the award of the Arbitration Court, would stand modified to the extent that the respective parties ought to be assigned seniority as on their date of joining duty. The defendants 6 to 9 would retain their seniority above the plaintiff as on their date of joining. The defendants 2 to 4 would also have to contend with the seniority as on their date of joining. Necessary revision shall be made in the seniority list in accordance with the directions herein above. The promotions too have to concede to the revision of seniority.

W.P.(C). No. 26645 of 2011 and 27650 of 2011 would stand allowed. W.P.(C). No. 26698 of 2011 would stand dismissed. Parties are left to suffer their respective costs.