A SUBHA B. NAIR & ORS.

v.

STATE OF KERALA & ORS.

(Civil Appeal No. 4176 of 2008)

MAY 27, 2008

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[S.B. SINHA AND LOKESHWAR SINGH PANTA, JJ.]

Service law – Cadre strength – Determination of – Requisition by bank to fill up 214 posts of clerk/cashier in Co-operative Bank – Approval of 208 posts by Registrar – Only 201 vacancies filled up – Challenge to – Order of High Court that seven more vacancies to be filled up, one vacancy having arisen due to non-joining of duty – Justification of – Held: Order of High Court sustainable – Approval of Registrar is necessary – It is within the domain of employer to fill up existing vacancies or not – Bank had taken a policy decision not to fill up any other or further post – More so, rank list expired and thereafter, the vacancies could not be directed to be filled up – Cadre strength of Co-operative Society would depend upon its classification – Statement for classifying the branches were not prepared scientifically – Further, there has been computerization of branches in the Bank – Kerala Cooperative Societies Rules, 1969.

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Respondent-Cooperative Bank made a requisition to respondent no. 4-State Public Service Commission for appointment of 214 clerk/cashier in the Bank. The respondent No.2-registrar approved only 208 posts. 201 vacancies were filled up. Appellant filed writ petition on the ground that the respondent-Bank could fill 16 more vacancies. The Single Judge of the High Court held that having regard to the approved vacancy position, six more vacancies could be filled up and one vacancy having arisen due to non-joining of the candidate could also be filled up. It issued direction to fill up seven more vacan-

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cies. In appeal, order of High Court was upheld. Hence, the present appeal.

Appellants contended that the High Court committed a serious error as the approval of Registrar in such matters was not necessary; and that in any event profitability or otherwise of the Cooperative Bank was not a relevant factor for determining the cadre strength.

Respondent-Cooperative Bank, Kerala Public Service Commission and the State of Kerala contended that the rank list having expired on 31.12.2004, the High Court could not have issued any writ on the petition filed by the appellants as the Bank had taken a policy decision not to fill up any other or further post; and that under Rule 182 of the Kerala Cooperative Societies Rules, 1969, the approval of the Registrar is imperative.

Dismissing the appeals, the Court

HELD: 1.1 After the processes were gone into for appointment of Clerk-cum-cashier in the Bank, rank list was prepared on or about 18.09.2001. Its validity expired on or about 31.12.2004. Some persons did not join the posts. The vacancies remained unfilled. Another requisition for filling up of the vacancies position was notified again on or about 10.05.2005 by which date the validity of the earlier rank list expired. Pursuant or in furtherance thereof the Commission already conducted an examination on 10.05.2008, and in terms thereof a fresh rank list would be prepared. [Para 6] [1064-B,C & D]

1.2 A decision on the part of an employer whether to fill up the existing vacancies or not is within its domain. On this limited ground in absence of discrimination or arbitrariness, a writ court ordinarily would not interfere in such matters. [Para 7] [1064-D & E]

Deepa Keyes v. Kerala State Electricity Board (2007) 6 SCC 194; *K. Thulaseedharan v. Kerala State Public Service*

A *Commission, Trivandrum and Others* (2007) 6 SCC 190 – relied on.

1.3 Recruitment to a post having regard to the provisions contained in Article 320 of the Constitution of India must be made by the Committee in terms of the Statutory B Rules. Kerala Cooperative Societies Rules, 1969 has undergone a change in 2004 by way of Kerala Cooperative Societies (Amendment) Rules, 2004. Thus, it may not be entirely correct that the Registrar will have no say in the matter. [Paras 9, 11 and 12] [1064-G; 1065-E,F & G]

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1.4 Financial heath of a bank is a relevant factor. In the instant case, from the profit and loss account it appeared that the statement for classifying the branches were not prepared scientifically and hence a true picture D of the financial position was not reflected therein. The Registrar has the responsibility to see that the Cooperative Societies function effectively and efficiently. A Cooperative Bank according to the guidelines issued by NABARD, should be in a position to maintain the cost of management to working fund at the optimum level of 2%. The cost E of management, however, of the Cooperative Bank was found to be 8%, which according to the registrar, was at an alarming level as has been observed by the Auditor. [Paras 12 and 13] [1065-G,H; 1066-A & B]

F 1.5 The cadre strength of Cooperative Society would depend upon its classification thus, although the Registrar may not have anything to do therewith directly, but the same would follow as a necessary corollary. The classification norms which were prescribed by the Govern- G ment long time back may not be valid in the present day situation having regard to the computerization programme resorted to by the Bank. [Paras 14 and 15] [1066-B,C & D]

1.6 In the absence of any material it is difficult for a court to arrive at a firm conclusion that having regard to H the fact that over a period of time the Cooperative Bank

had opened many more new branches or the volume of its operation had increased requiring appointments of more persons. What would be the effect of computerisation is also not known. Only because the Bank has sent a requisition or had been making recruitments in other categories of staff by itself may not be a ground for issuance of a writ of or in the nature of mandamus, although the Co-operative Bank had adopted a policy decision not to fill up more than 201 vacancies which stands filled up to 208 vacancies in terms of the judgment of High Court. [Para 16] [1066-H; 1067-A,B & C]

Shankarsan Dash v. Union of India (1991) 3 SCC 47; *Jitendra Kumar & Ors. v. State of Haryana & Anr.* 2008(2) SCC 161 - referred to.

1.7 The question as to whether there existed 7 vacancies or 16 vacancies in the aforementioned situation loses all significance. It is assumed that as per the requisition, 9 more vacancies could be filled up but it is trite that if the employer takes a policy decision not to fill up any existing vacancy, only because a person's name is found in the select list, the same by itself would be a ground to compel the bank to fill them up. [Para 18] [1068-A & B]

1.8 After the expiry of rank list, vacancies should not be directed to be filled up. The direction cannot be issued only on sentiment/sympathy. Thus, no relief can be granted to the appellants. [Paras 19, 20 and 21] [1068-C & D]

CIVIL APPELLATE JURISDICTION : Civil Appeal NO. 4176 of 2008

From the final Judgment dated 18/7/2006 of the High Court of Kerala at Ernakulam in W.A. Nos. 2275, 2527 and 2622 of 2005

WITH

C.A. Nos. 4177 and 4178 of 2008

A C.N. Sree Kumar, P.R. Nayak, Thomas Joseph A., D. Parashar and Malini Poduval for the Appellant.

Vipin Nair, S. Balaji, P.B. Suresh, Vivek Sharma (for M/s. Temple Law Firm), Roy Abraham, Seema Jain, Himinder Lal, P.V. Dinesh and Sindhu T.P. for the Respondents.

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The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Appellants are before us aggrieved by and dissatisfied C with a judgment and order dated 18.07.2006 passed by the Kerala High Court in Writ Appeal Nos.2275, 2527 and 2622 of 2005 affirming the judgment and order dated 7.9.2005 passed by a learned single judge of the said Court.

3. Recruitment to the posts is made by the respondent D No. 4 – Commission. A requisition was made for filing up of 214 posts. Allegedly, the respondent No.2 approved only 208 posts. 201 vacancies were filled up. Contending inter alia that the Respondent - Cooperative Bank could fill 16 more vacancies, a writ petition was filed. A learned single judge of the High E Court opined that having regard to the approved vacancy position, six more vacancies could be filled up and one vacancy having arisen due to non-joining of the same could also be filled up. A direction was, therefore, issued to fill up seven more vacancies. An intra-court appeal was preferred thereagainst, which F by reason of the impugned judgment has been dismissed opining:

> "The vacancies already stand reported to the Public Service Commission in implementation of the interim order passed on 10.12.2004 and this report shall be deemed to G have been in respect of the vacancies occurred before the expiry of the list, limited to the vacancies available. There cannot have any dispute on that. In Ext.P10, the Registrar had approved the staff strength sanctioning only 208 posts of clerk/cashier. Out of that, only 201 are in H position. Therefore, there are remaining 7 vacancies.

These 7 vacancies shall be taken as, as mentioned above, reported before 31.12.2004 and the candidates shall be advised as if the report had been received before the expiry of the said date, following the appropriate ratio and communal rotation as applicable to the post. As the Public Service Commission had received the report regarding the Non Joining Duty vacancy only on 10.5.2005, they need consider it as one in respect of the vacancies that had arisen after the expiry of the list. When the Registrar had sanctioned only 208 posts, whatever be the resolution in Ext.R4(g) or the contentions raised in the counter affidavit, the bank is disabled from appointing persons any more than what is contained in the order of the Registrar. Moreover, because of the computerization of the branches and other modern facilities introduced in the banking business, necessarily there may be reduction in the number of vacancies. Therefore, the view taken by the learned Single Judge to direct 7 vacancies to be advised, cannot be said to be unjustified to invite interference in these appeals."

4. Mr. Sree Kumar, learned counsel appearing on behalf of the appellants submits that the High Court committed a serious error in so far it failed to take into consideration that having regard to the decision of the said Court in *Elampal Service Coop. Bank Ltd. v. Government of Kerala,* [2000 (3) KLT 389], approval of Registrar in such matters was not necessary and in any event profitability or otherwise of the Cooperative Bank being not a relevant factor for determining the cadre strength and, thus, the impugned judgment cannot be sustained.

5. Mr. Roy Abhraham; Mr. P.V. Dinesh and Mr. Vipin Nair, lerned counsel appearing on behalf of the Respondent – Co-operative Bank, Kerala Public Service Commission and the State of Kerala, on the other hand, submit that the ranked list having expired on 31st December, 2004 the High Court could not have issued any writ on the petition filed by the appellants herein, particularly in view of the fact that the Bank had taken a

A policy decision not to fill up any other or further post. It was furthermore submitted that in terms of Rule 182 of the Kerala Co-operative Societies Rules, 1969, the approval of the Registrar is imperative.

6. Indisputably requisition was made by the respondent-
B Bank to the Commission for appointment of 220 clerk-cum-cashier in the Bank. After the processes were gone into ranked list was prepared on or about 18th September, 2001. Its validity expired on or about 31st December, 2004. Some persons did not join the posts. The vacancies remained unfilled.

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Another requisition for filling up of the vacancies position was notified again on or about 10th May, 2005 by which date the validity of the earlier ranked list expired. It is now accepted at the Bar that pursuant or in furtherance thereof the Commis-
D sion has already conducted an examination on 10th May, 2008, and in terms thereof a fresh rank list would be prepared.

7. A decision on the part of an employer whether to fill up the existing vacancies or not is within its domain. On this limited ground in absence of discrimination or arbitrariness, a writ
E court ordinarily would not interfere in such matters. This has been so held by this Court in *Deepa Keyes v. Kerala State Electricity Board,* [(2007) 6 SCC 194] observing that the rank list having expired and the validity having not been extended, no relief could be granted to the appellants therein.

F 8. Similar view has also been expressed by this Court in *K. Thulaseedharan v. Kerala State Public Service Commission, Trivandrum and others,* [(2007) 6 SCC 190]

9. Recruitment to a post having regard to the provisions
G contained in Article 320 of the Constitution of India must be made by the Committee in terms of the Statutory Rules.

Rule 188 of the 1969 Rules provides for a staff pattern in the following terms :-

H "188. Staff Pattern. – Every society shall adopt the staff

pattern indicated in Appendix III to these rules, according to the type and class to which it belongs :

Provided that where any society cannot adopt such staff pattern due to its financial position, the members of the committee may work; in an honorary capacity in lieu of appointing any paid employee :

Provided further that where any society is in need of any change in the pattern of staff including the scale of pay under special circumstances the same may be made by the society with the prior approval of the Registrar of Co-operative Societies."

10. A Division Bench of the Kerala High Court in *Elampal Service Cooperative Bank Ltd.* (supra) opined that the power of the Registrar either to rescind a resolution or reclassification made by the Cooperative Society can be exercised so as to enable him to set them aside, stating:-

"If reclassification made by the petitioner Bank is incorrect, the Registrar is not helpless in setting aside the resolution passed."

11. Rules appear to have undergone a change in 2004 by way of Kerala Cooperative Societies (Amendment) Rules, 2004. Note 4 Appended to Appendix II under Serial No.2m under Class IV of the 1969 Rules reads as under :-

"Note 4 :- Classification made by the Societies should be got certified and approved by the registrar of Co-operative Societies before being implemented."

12. Thus, it may not be entirely correct that the Registrar will have no say in the matter. Financial heath of a bank is a relevant factor.

13. In this case from the profit and loss account it appeared that the statement for classifying the branches were not prepared scientifically and hence a true picture of the financial position was not reflected therein. The Registrar has the respon-

A sibility to see that the Cooperative Societies function effectively and efficiently. A Cooperative Bank, according to the guidelines issued by NABARD, should be in a position to maintain the cost of management to working fund at the optimum level of 2 %. The cost of management, however, of the Cooperative B Bank in question was found to be 8 %, which according to the Registrar, was at an alarming level as has been observed by the Auditor.

14. The cadre strength of a Cooperative Society would depend upon its classification thus, although the Registrar may C not have anything to do therewith directly, but the same would follow as a necessary corollary.

15. It furthermore appeared that the classification norms which were prescribed by the Government long time back may D not be valid in the present day situation having regard to the computerization programme resorted to by the Bank.

In its counter-affidavit the State of Kerala averred:-

"The Central Banks Conference, which is the forum constituted to take stock of the progress and to review the E problem faced by the credit structure in the state consisting the representatives of District Co-operative Banks, Kerala State Co-operative Bank, Government, Registrar of Co-operative Societies, has of the view that the present classification norms needs changes in par with the present F credit scenario and slow growth of the movement, threat posed by the new generation banks in the wake globalization and liberalization, a committee has been constituted to study the aspect and the committee recommended to change the classifications of District Co-G operative Bank urgently, lest the very existence of the banks will be in peril. The proposal is under active consideration of the Government, and it is expected that the classification norms will be revised soon."

16. In the absence of any material it is difficult for a court H

to arrive at a firm conclusion that having regard to the fact that over a period of time the Cooperative Bank had opened many more new branches or the volume of its operation had increased requiring appointments of more persons. What would be the effect of computerisation is also not known. Only because the Bank has sent a requisition or had been making recruitments in other categories of staff by itself may not be a ground for issuance of a writ of or in the nature of mandamus, although the Cooperative Bank had adopted a policy decision not to fill up more than 201 vacancies which stands filled up to 208 vacancies in terms of the judgment of the learned Single Judge of the High Court.

17. In *Shankarsan Dash v. Union of India* [(1991) 3 SCC 47], this Court held:

> "7 . It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. *However, it does not mean that the State has the licence of acting in an arbitrary manner.* The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab."

A [See also *Jitendra Kumar & Ors. v. State of Haryana & Anr.*, [2008 (2) SCC 161].

18. The question as to whether there existed 7 vacancies or 16 vacancies in the aforementioned situation looses all significance. We would assume that as per the requisition, 9 more
B vacancies could be filled up but it is trite that if the employer takes a policy decision not to fill up any existing vacancy, only because a person's name is found in the select list, the same by itself would be a ground to compel the bank to fill them up.

C 19. Rules of the Cooperative Societies as has been interpreted by this Court in *Deepa Keyes* (supra) and *K. Thulaseedharan* (supra) clearly show that after the expiry of rank list, vacancies should not be directed to be filled up.

20. This Court furthermore cannot issue a direction only
D on sentiment/sympathy.

21. For the reasons aforementioned no relief can be granted to the appellants. The appeals fail and are dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

N.J. Appeals dismissed.