

(2020) 12 KL CK 0061

In the High Court Of Kerala

Case No : Writ Petition (Civil) Nos. 25824, 26032, 26040, 26260, 26277 Of 2020

A. Mahendran And Ors

APPELLANT

Vs

State Co Operative Election Commission Represented By
Election Commissioner And Ors

RESPONDENT

Date of Decision : 03-12-2020

Acts Referred:

Kerala Co-Operative Societies Act, 1969 — Section 16(2), 28A
Kerala Co-Operative Societies Rules, 1969 — Rule 35A, 35A(1), 35A(1)(3), 35A(1)(4),
35A(3), 35A(4), 35A(6)(d)
Constitution Of India, 1950 — Article 226

Citation : (2020) 12 KL CK 0061

Hon'ble Judges : Raja Vijayaraghavan V, J

Bench : Single Bench

Advocate : P.N. Mohanan, R. Lakshmi Narayan, George Poonthottam, Nisha George, V. Satheesh, Arun Chandran, Kp Harish, C.P. Sabari, Amrutha Suresh, Bimal K. Nath

Final Decision : Allowed

Judgement

1. The Moolathara Service Co-operative Bank Ltd. No. P-518, is a Primary Co-operative Credit Society registered and functioning under the

provisions of the Kerala Co-operative Societies Act, 1969 (hereinafter referred to as 'the Act') and the rules framed thereunder. The election

to the Managing Committee of the said Society is scheduled to be held on 13.12.2020.

2. W.P.(C) No.25824 of 2020 has been filed challenging the election notification on the ground that the Electoral Officer, in brazen violation of the

statutory provisions, has tinkered with the election schedule fixed by the State Co-operative Election Commission and undermined the election process.

In the said writ petition, several infractions to Rule 35A of the Kerala Co-

operative Societies Rules, (â??the Rulesâ?? for short) is highlighted and the prayer sought for is to quash the election notification; for a declaration that the election cannot be conducted on the basis of Ext.P1 notification as the Electoral Officer has changed the schedule for election without any powers; and for incidental reliefs.

3. W.P.(C) No.26277 of 2020 is filed by the Managing Committee being aggrieved by the acts of the Electoral Officer in removing 1480 members

who were included in the preliminary voters list from the final voters list and also for directions that the persons who are removed from the voters list

are also entitled to be included in the final voters list to enable them to participate in the election process and to exercise their franchise.

4. W.P.(C) Nos.26260, 26032 & 26040 of 2020 are filed by certain persons who claim that they are also entitled to get membership of the society and

that though their applications were submitted well within time as provided under Section 16(2) of the Act, they were kept out from the preliminary

voters list. Their prayer is for a direction to the respondents 1 and 2 to issue membership to the petitioners within 60 days of receipt of the application

and for a further direction to include them in the voters list.

5. The undisputed facts are that the Managing Committee of the Moolathara Society assumed charge on 26.7.2015 and the original term of 5 years

expired on 25.7.2020. Due to the lockdown imposed by the Central Government, the election was deferred and the term of the Managing Committee

was extended by various orders and Circulars. It is stated that as the extended term is coming to an end, the Managing Committee decided to conduct

the election to the Board of Directors on 13.12.2020 and a resolution was forwarded to the State Co-operative Election Commission under Rule

35A(1) of the Kerala Co-operative Societies Rules. The Election Commission issued a notification on 28.10.2020 to conduct elections to be held on

13.12.2020.

6. As per the schedule fixed by the Election Commission, the preliminary voters list was to be published on 11.11.2020 and objections to the

preliminary voters list were allowed to be filed from 11.11.2020 to 19.11.2020. The consideration of the objections to the preliminary voters list were to

be carried out at 11 a.m on 20.11.2020. The final voters list had to be published at 11 a.m. on 21.11.2020 and the date of filing of the nomination was

on 30.11.2020 between 11 a.m. and 1 p.m. The scrutiny of nomination was to be held at 11 a.m. on 1.12.2020 and the last date for withdrawal of nomination was at 5 p.m. on 2.12.2020. The poll was to be held between 8 hrs and 4 p.m. on 13.12.2020.

7. It so happened that the Electoral Officer, the Assistant Registrar (General), Chittoor was appointed by the State Election Commission, Kerala, as

the Returning Officer of the Vadakarapathy Grama Panchayat in connection with the elections notified to the Local Self Government Institutions. On

20.11.2020, he published a notice in the vernacular dailies that being engaged in duties as the Returning Officer, the objection to the preliminary voters

list would be taken up and considered between 11 a.m. and 1 p.m. on 24.11.2020. The petitioners in all these writ petitions contend that they were

present in the office of the bank to raise their objections to the preliminary voters list and they were unaware of the postponement unilaterally by the

Electoral Officer. Rule 35A(4) of the Rules mandate that the final voters list is to be published in Form No. 35 within 20 days prior to the date fixed

for the poll. According to the petitioners, if 24.11.2020 is taken as the date for finalization of the voters list, the above rule would be violated as the

election would have to be held on the 19th day of the finalization. The petitioners further contend that even if such an eventuality occurs, as per Rule

35A(3) only the Election Commission will have the jurisdiction to change the election schedule, that too, after publishing the same in two vernacular

dailies. They also contend that candidates can submit nominations only after publishing the final voters list and due to the delay in finalizing the voters

list, some of the petitioners who are candidates are grossly prejudiced. It is pointed out by the petitioner that after being appointed as the Returning

Officer in one of the constituencies, the Electoral Officer, as early as on 13.11.2020, had submitted a request to the Election Commission that owing to

the said development and due to lack of personnel, it would not be possible to hold the election to the society as per the original schedule.

8. The Managing Committee of the bank in their writ petition has contended that the Electoral Officer has abdicated his duty and has tinkered with the

election scheduled without any sanction or authority. They have contended that the said act was clearly against the statutory prescriptions. It is

contended that the Electoral Officer had come to the office of the Society only at 11.30 a.m. on 24.11.2020 and at about 4.30 pm., he informed the

Secretary of the Society that the Society had failed to produce documents with regard to the eligibility of 1480 members whose names have been

detailed in the objections in 28 complaints submitted before him. At about 7.30 pm on the same day, the Returning Officer published the final voters list

after deleting the names of 1480 members, who were included in the preliminary list of voters. They contend that the Electoral Officer was acting to

the tunes of certain political higher ups. They contend that the preparation of the voters list is a fraud and power and the same cannot be

countenanced. They further contend that the course adopted by the Electoral Officer is against the very tenets of democratic process and if allowed

to stand would turn the election into a farce and nothing more. They also contend that the election schedule cannot be rearranged or unsettled

according to the whims and fancies of the Electoral Officer and the tinkering carried out by him cannot be ratified by the Election Commission.

9. In view of the contentions raised and to avoid any delay in the adjudication process, the Election Commission was directed to file a statement. In

their statement, after narrating the schedule of election, it is stated that though the Electoral Officer had altered the election schedule, it was for an

unavoidable reason as he was required to act as the Returning Officer by the State Election Commission to fulfil the constitutional mandate to conduct

elections to the LSGIs. It is stated that had there been no election duty, the Electoral Officer would not have altered the appointed day for

consideration of the objection to the preliminary voters list. It is further stated that the Electoral Officer had heard all the objections to the preliminary

voters list on 24.11.2020 and after duly considering the objections, out of 7172 voters who found a place in the preliminary voters list 1443 persons

were removed. The Commission would also state that there is no infraction of Rule 35A(4) as the date appointed for polling being on 13.12.2020 and

the final voters list having been published on 24.11.2020, the same has been done within 20 days. They further state that the Apex Court, as well as

this Court, has held that interference can be made in matters relating to election only if it subserves the progress of the election and facilitates its

completion and not in any other case.

10. I have considered the submissions advanced and have carefully perused the records.

11. The petitioners have rushed to this Court complaining of blatant infraction of the Rules. With the consent of all parties, the matter is taken up for final disposal.

12. It was by incorporating Section 28A in the Act, that the Government had constituted a State Co-operative Election Commission for the superintendence, direction, and control of the preparation of electoral rolls and for the conduct of all elections to Co-operative Societies including election to the President/Vice President and Representative General body. Simultaneously, Rule 35A was incorporated in the Rules providing for the procedure regarding conduct of election to the committee of societies by the State Co-operative Election Commission. In fact, the legislature wanted that the elections to the Co-operative Societies should be conducted by independent statutory authority, uninfluenced by any directions from either the Government or the Registrar of the Co-operative Societies in any manner, so as to ensure transparency in elections in the Co-operative Societies.

13. It would be apposite to refer to the relevant provisions in the Rules at this juncture.

35A: Procedure regarding conduct of election to the committee of Societies by the State Co-operative Election Commission.

The election of the members to the committee of Societies by the State Co-operative Election Commission shall be conducted in the following manner:

(1) The committee shall meet at least 60 days prior to the date of expiration of its term and pass a resolution fixing the date, time and place for the conduct of the election to the new committee. A copy of such resolution shall be sent to the State Co-operative Election Commission by registered post within a week through the Registrar

Explanation.â?" The expression â??Registrarâ? means (a) in the case of societies having State wide jurisdiction or having jurisdiction over more than one district, the Registrar of Co-operative Societies, (b) in the case of societies where the jurisdiction of which is confined to one district and in the case of Primary Societies, the jurisdiction of which exceeds one circle, the Joint Registrar of the district concerned and (c) in the case of Primary Societies the jurisdiction of which does not exceed one circle, the Assistant Registrar of the circle concerned.

(2) The Co-operative Election Commission may on receipt of such a resolution

appoint returning officer from among the officers of the concerned

Administrative Department for the conduct of election. The Returning Officer so appointed may be given such remuneration as may be fixed by

Government from time to time. The Returning Officer shall take necessary steps for the conduct of election and the Committee shall render all

necessary assistance to the returning officer for the conduct of election to the committee.

(3) The State Election Commission shall notify the details of election to the committee of the society, in two vernacular dailies having wide circulation

in the area. A copy of the information shall also be affixed on the Notice Board of the head office and the branches, if any, of the Society. The

notification shall contain the following particulars:

(i) The number of vacancies to be filled up by election;

(ii) Any area or constituency that is specified in the bye-laws from which members are to be elected;

[(iii) The date on which and the place at which the preliminary notification of the list of members qualified to vote as the voter shall be published;

(iv) The date between which objections shall be filed and the date on which, the hours between which, and the place at which, the objections, if any,

shall be scrutinized;

(v) The date on which, and the place at which, the final voters list shall be published.

[(vi) The date on which, the place at which, and hours between which nomination paper shall be filed by the contesting candidate or by his proposer or

seconder;

(vii) The date and hour when the nomination paper will be scrutinised;

(viii)] The date on which, the place at which and the hours between which, polling if necessary will take place. (emphasis supplied)

(3A) xxxxxxxxxxxxxx

(3B) xxxxxxxxxxxxxx

(4) The State Co-operative Election Commission shall appoint an Electoral Officer from among the officers of the concerned. Administrative

Department who shall be responsible for the publication of the list of members qualified to vote at the election in accordance with the provisions of the

raising objections was from 11.11.2020 to 19.11.2020. As per the schedule, the objection of the voters list had to be considered by the Electoral Officer on 20.11.2020. There are materials to suggest that the petitioners in W.P.(C) No. 25824 of 2020 approached the office of the Society and furnished their objection to the inclusion of certain voters in the preliminary voters list. Less said the better about the things that transpired on that day. The Electoral Officer, without the junction of knowledge of the Election Commission, published a notice in two vernacular newspapers informing the members that the objection to the voters list would be considered only on 24.11.2020. It is admitted by the Election Commission that it was not with their authorisation. The Electoral Officer has his own reasons for tinkering with the dates as he was appointed as the Returning Officer by the State Election Commission to the local bodies election of the Vadakarapathy Grama Panchayath. Astonishingly, as early as on 13.11.2020, he had issued a letter to the Election Commission pointing out all the above aspects and had sought for postponing the election as according to him a minimum of 50 employees are required to successfully hold the election. How the Election Commission responded to this request is anybody's guess.

15. Of course, the Election Commission in their statement has taken a stand that the Electoral Officer has tinkered with the notification as he had no other option and due to the exigencies. However, when the Rules stipulate a definite procedure and time schedule, which even the Election Commission cannot tinker with, it stands to no reason to contend that the acts committed without jurisdiction by the electoral officer, can subsequently be ratified by the commission.

16. Furthermore Rule 35A (4) states that it is the duty of the Electoral Officer to publish the preliminary voters list in Form No. 34 in the Notice Board of the Head Office and branches, if any, of the Society and call for objections, if any, on the voters list within seven days of publication and publish final voters list in Form No. 35 within twenty days prior to the date fixed for the poll. The final voters list so prepared should be published in the Head Office and branches of the concerned society. In the instant case, the date of polling is on 13.12.2020 and if that be the case, the statutory requirement of a gap of 20 days will get reduced to 19 days due to the

misadventure committed by the Electoral Officer. This is another clear infraction of the Rules and the Election Commission could not have ratified the same. The candidates will be able to submit their nomination only after the final voters list is published, and as per sub rule (6)(d) of Rule 35A of the Rules, only the candidates whose names are included in the final voters list can submit their nomination. As per the original schedule, the Electoral Officer had to publish the final voters list on 21.11.2020 and the last date of filing the nomination was on 30.11.2020. By the refixation of the schedule by the Electoral Officer, he was in a position to publish the final voters list in the office only on 25.11.2020 . This is yet another infraction of the Rules. The fixation of the time schedules in the original notification is for a definite purpose and it provides certainty to the election process. If one person alters the date to the disadvantage of the other stakeholders, it would certainly cause grave prejudice. In other words, if the dates are altered unilaterally, it would have a knock-on effect on the overall schedule.

17. I am unable to accept the submission of the standing counsel appearing for the Election Commission that these aspects can also be agitated before the forum constituted for deciding election disputes. It is quite unfortunate that the Election Commission takes such a stand in a case of instant nature and that too at the expense of maintaining the sanctity of the election process. If the act committed by the Electoral Officer is approved, it can become the norm and every Electoral Officer when faced with any difficulties in complying with the schedule, would be in a position to tinker with the election schedule in the manner he chooses. The election schedule is fixed by the Election Commission and if they are of the opinion that some alteration is required for subserving the election process, it is for the Commission to act in accordance with Rule 35A(3) of the Rules and that too by ensuring that the other provisions of the Rules are not violated. By no means, the Electoral Officer can interfere with the schedule as has been done in the instant case. I have no doubt in my mind the said acts committed by the Electoral Officer against the statutory provisions, cannot subsequently be ratified by the Commission. When the Election Commission received a request from the returning officer as early as on 13.11.2020, requesting for adjoining the election, instead of sleeping over the same, they should have made appropriate arrangements. They could have very well acted as per the

Rules and published an altered schedule instead of forcing the Electoral Officer to take up the mantle of rescheduling the date on his own.

18. When the legislature bestows statutory power on a public authority to do a thing in a particular way, the manner of doing the thing is mandatory or

jurisdictional. In other words, when a statute is passed for the purpose of enabling something to be done, and prescribes the formalities which are to

attain the performance, those prescribed formalities which are essential to the validity of the thing done are called imperative or absolute, but those

which are not essential and may be disregarded without invalidating the thing to be done are called directory. (Craies on Statute Law (6th Edn.) Page

63). The stipulations in Rule 35A (3) and (4) provisions of Rule 35A being mandatory, any deviation from the same without authorization cannot be

accepted. It is trite that a command to do a thing in a particular manner would imply a prohibition to do it in any other manner. when the provision

directs acts or proceedings to be done in a certain way and indicates that a compliance with such provisions is essential to the validity of the act or

proceedings, or requires some antecedent and pre-requisite conditions to exist prior to the exercise of the power, or be performed before certain other

powers can be exercised, the statute may be regarded as mandatory. [See Crawford's Interpretation of Law (1989 reprint Page 515)].

19. In the case on hand, what disturbs the conscience of the Court is not relating to any minor breach of rule or matters with regard to the preparation

of the electoral roll or an improper rejection of a nomination or the deletion of certain persons from the voters list. If that was the case, the petitioners

could have been relegated to the Co- operative Arbitration Court and prefer an election petition. On the other hand, what is apparent is a blatant and

brazen breach of the statutory provisions rendering the entire process into a farce. It needs no reiteration that gross prejudice would have been caused

by the voters by the altering of the schedule.

20. The learned standing counsel appearing for the Election Commission reminded this Court that this Court should be slow to interfere with election

matters and the parties should be relegated to the forum constituted for deciding election disputes.

21. I am conscious of the principles laid down by the Apex Court in Election Commission of India Vs. Ashok Kumar [(2000) 8 SCC 216]wherein

their Lordships had occasion to lay down the principles governing the jurisdiction of this Court to entertain petitions under Article 226 of the

Constitution of India after commencement of electoral process. After taking into consideration of the decisions of the Constitution Bench in

N.P.Ponnuswami vs. Returning Officer, Namkkal Constituency [AIR 1952 SC 64]and Mohinder Singh Gill v. Chief Election Commissioner [1978 (1)

SCC 405], the Supreme Court held as hereunder: -

32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said

and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification

of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or

protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in

elections.

(2) Any decision sought and rendered will not amount to calling in question an election if it subserves the progress of the election and facilitates the

completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the

election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which

enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory

body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has

been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of

evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the

jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.

22. It has been held by the Apex Court in no uncertain terms that though the attempt of this Court must be to subserve the progress of the election and facilitate the completion of the election, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies. It has to be shown that there has been a mala fide or arbitrary exercise of power or that the statutory body must be shown to have acted in breach of law. It is luculent that the provisions of the Rules governing the election to the society have been violated with impunity and the Electoral Officer has exercised powers which he does not have. The election Commission could not have ratified the acts as they themselves could not have acted in violation to the statutory provision. Instead of making corrections to save the situation the Election Commission has taken the easy way out by ratifying the acts of the Electoral Officer. I hold that there has been a manifest error in the exercise of power by the Election Commission in ratifying the acts of the Electoral Officer retrospectively. The said exercise is manifestly arbitrary and will tantamount to an abuse of the provisions. Such exercise of power would stand vitiated as the order has been passed by the authority beyond the limits conferred upon the authority by the legislature. I am satisfied that if the election proceedings are permitted to go on by turning a blind eye to the illegalities perpetrated, it would amount to gross abuse of the process of law. Having considered the entire aspects, I am of the considered opinion that this is a fit case wherein this Court will be well justified in interfering with the election notification on the ground of illegality, irrationality

and procedural impropriety.

In the result, the following directions are issued:

a) W.P.(C) No.25824 of 2020 will stand allowed and Ext.P1 election notification dated 28.10.2020 for conduct of election to the 4th respondent bank

will stand quashed. Consequently, Ext.P4 communication will also stand quashed. It is held that the Electoral Officer has no jurisdiction to change the

election schedule as fixed by the Election Commission. Consequently, the Society shall take steps to conduct the election and forward a fresh

resolution to the Election Commission within a week and on receipt of the resolution, the Election Commission shall issue fresh notification to hold the

election to the Managing Committee in strict compliance with the statutory provisions.

b) In view of the directions above, no further orders are required to be passed in W.P.(C) Nos.26277, 26032, 26040 and 26260 of 2020. The

petitioners therein will be able to seek inclusion or exclusion in the fresh proceedings that is to be initiated.

c) Parties are directed to suffer their costs.