

(2013) 12 KL CK 0057
In the High Court Of Kerala
Case No : W.P. (C). No. 21362 of 2012

A.K. Kunhimohammed

APPELLANT

Vs

Returning Officer and Others

RESPONDENT

Date of Decision : 11-12-2013

Acts Referred:

Citation : (2014) 1 KLJ 222 : (2014) 1 KLT 201

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—The petitioner in W.P(C) No. 234R4/2012 is an erstwhile member and the identical petitioner in the other two writ petitions is the erstwhile President of the Managing Committee of the respondent bank. The petitioners challenge the order of the Registrar E2/1775/2012/SCEC, dated 26.9.2012 which directed the Joint Registrar (General) Kozhikode to prepare the voters list after deleting the members who are from outside the area of operation of the Society and who had expired. This was a pre-cursor to the elections to be held in the Managing Committee which election was earlier scheduled and disrupted in the course of polling.

2. The brief facts leading to the present challenge are that the elections were notified as per Ext. P1 and Electoral Officer and Returning Officer were appointed by the Election Commission. The election notification itself was dated 24.7.2012 which is produced as Ext. P1 in WP(C)28484/2012. The draft voters list was published and after considering the objections the final voters list too came to be published on 14.8.2012. The respondent Bank through its Secretary had moved a writ petition for police protection for the conduct of elections and an interim order was granted as is evidenced by Ext. P2. The elections took place as scheduled on 9.9.2012 and though the polling commenced and continued for some time, admittedly, it was disrupted by certain miscreants, despite the police protection granted. The polling materials kept in Booth Nos. 1, 2, 5, 6, 8 and 9

were destroyed. In this backdrop, Ext. P3 order was issued by the Returning Officer stopping the polling as provided under Rule 35A(6)(n)(x) of the Kerala Co-operative Societies Rules, 1969, on specific reasons stated therein.

3. Subsequently, an Administrator was appointed and then an Administrative Committee, which appointments are not the subject of challenge in the above writ petitions. The challenge is with respect to the order passed by the Election Commission directing the Joint Registrar to re-cast the voters list. That order is already stayed by a detailed interim order dated 11.10.2012 in W.P(C) No. 23484/2012. Admittedly, appeals are filed against the interim order and are pending, though the order is not stayed.

4. Learned Senior Counsel Sri. Sreekumar and learned Counsel Sri. Kunhikrishnan appearing for the petitioners canvas the position that the polling has to be commenced from the stage at which it was stopped. The petitioners relied on three decisions of this Court reported in Pulickal Abubaker Vs. K. P. Kunhavarani and Others, , P.K. George Vs. The Joint Registrar of Co-operative Societies Calicut and Others, , P.S. Haridas Vs. The Alleppey Urban Co-operative Bank Ltd. and Others, and Nalinam Vs. Joint Registrar, .

5. Sri. George Poonthottom appearing for the Administrative Committee draws a distinction insofar as the decision rendered u/s 35(p) of the Co-operative Societies Act and contends that the Election Commission under Rule 28B of the Act has all pervasive control over the election and the directions issued by the Election Commission to aid the democratic process of the elections cannot be lightly interfered with by this Court under Article 226. The learned counsel also places reliance on Rajendran Vs. State Co-operative Election Commission, to buttress the above position. The power of the Election Commission as conferred under sub-rule 9 of Rule 35A is put forth, placing further reliance on the judgment of a learned Single Judge of this Court in Mohanachandran Nair, B. Vs. State Co-operative Election Commission and Others, . The said judgment has been confirmed by a Division Bench of this Court in W.A 1286/2013 and 1260/2013. Since the Election Commission has all pervasive control over the elections he, necessarily, could exercise a control over the voters list going by the language of Section 28B as also control the preparation of electoral roll and the Commission is perfectly justified in issuing Ext. P6 order, is the contention.

6. The facts put forth brook no dispute. The only issue is as to whether the polling has to commence from the stage at which it was stopped or the Election Commission is to be left with the decision as to, at what stage the election is to be re-commenced or whether a fresh election is to be notified. This question arises in the context of a specific contention raised by the respondents that after cancellation of the election scheduled, the stage for exercise of such power by the Election Commission has not so far reached and Ext. P6 can only be understood as an exercise of an ancillary power by the Election Commission, so as to decide upon how to proceed with the conduct of elections. The law on the subject is fairly clear and what assumes significance is the distinction now placed

on the decision rendered under Rule 35 and the present position under Rule 35 A.

7. Pulickal Abubaker Vs. K. P. Kunhavarani and Others, considered two questions, whether the Returning Officer has the power to fix a date for polling, once an election already scheduled was stopped and whether this Court could direct resumption of polling from the stage it was stopped. The Court found that there is no specific interdiction on the Returning Officer to fix the date, as per the Act and Rules. Though the situation therein was not falling under Rule 35(1); to allay any apprehension, the Administrator was directed to fix the date. On the second question the Court drew a distinction between cancellation and stopping. While cancellation effaced all what had already transpired; in stopping an election, for reason of obstruction of or obstacle to continuing the polling, that does not render ineffective what has already been done, was the finding. The Court also cautioned against treating these two circumstances similarly, since it would provide an incentive to create an obstruction, to anyone seeking to stultify the democratic functioning of a Society.

8. P.K. George Vs. The Joint Registrar of Co-operative Societies Calicut and Others, referred to Section 35(p), but this Court cannot discern the same to be a declaration as such, since that was not a question arising for resolution therein. The proposition it did lay down was that the Administrator had the power to enrol members and exercise all or any of the functions of the Committee under sub-section(2) of Section 33; and that stood impliedly overruled in K. Shantharaj and another Vs. M.L. Nagaraja and others, , K. Shantaraj v. M.L. Nagaraj; as declared in Hassan v. Joint Registrar, 1998 (2) KLT 746 (FB)). Nalinam Vs. Joint Registrar, is a case in which the Returning Officer refused to accept nominations which resulted in there being only so much number of valid nominations; after scrutiny, as the number of constituencies. This Court found the procedure adopted, refusing even acceptance of the nominations, to be illegal and refused to relegate the matter to be decided u/s 69, finding such alternative remedy to be, not one efficacious for reason of the ensuing total miscarriage of justice; such relegation would entail. The Court found the facts to be such, warranting commencement of the elections from the stage at which it was interrupted.

9. Mohanachandran Nair, B. Vs. State Co-operative Election Commission and Others, considered the powers of the Election Commission under sub-rule (9) of Rule 35A and found that though the power to adjourn elections is conferred on the Returning Officer under Rule 35 A(6)(c)(v) sub-rule (9) confers an all pervasive control over the election procedure. What this Court laid down is that though certain powers are specifically conferred on the Electoral Officer and the Returning Officer appointed by the Election Commission, that does not mean that the Election Commission on such appointment; remains a mere spectator and cannot at any point of time interfere with the election process. The said case was one in which the Election Commission, on the basis of complaints called for a report from the Electoral Officer, as to the maintenance of 6B registers and issuance of identity cards. The Electoral Officer reported that there were defects

in the 6B registers which were not possible to be rectified within the prescribed time limit. The Election Commission personally inspected the records and found the discrepancies and thereafter adjourned the elections.

10. Rule 35(3)(p) and the procedure under the same is fairly settled by the decisions referred to above. Rule 35(3)(p) contemplates a situation where an interruption or an obstruction by reason of a riot or affray causes hindrance to the election process and in such circumstance of the poll being not possible to be proceeded with, the Returning Officer has to exercise the power to stop the polling recording the reasons for such action. In the present case also the power exercised by the Returning Officer under Rule 35A(6)(n)(x) would be a similar power since the provisions under rule 35(p) and that under Rule 35A(6)(n)(x) are in pari materia. However, the distinction pointed out by the learned counsel is with respect to the power of the Election Commission as distinguished from those of the Registrar under Rule 35.

11. What is essentially canvassed is; under Rule 35, on the appointment of a Returning Officer, the Registrar would not have any further powers and the conduct of the elections is under the direct control of the Returning Officer. Where as, by the appointment of an Electoral Officer and Returning Officer as provided in Rule 35 A, the Election Commission does not cease to have any further control over the elections. Under sub-rule (9) of Rule 35A, Election Commission appointed u/s 28B, continues to exercise supervision though out the election process and till a Managing Committee assumes its office. There can be no dispute to such a proposition. The powers for conduct of an election as has been conferred on the Returning Officer appointed by the Election Commission under Rule 35A is qualified insofar as the Election Commission has a supervisory power over the conduct of the elections. The Returning Officer appointed by a Registrar under Rule 35 exercises power by virtue of his appointment; a delegation made under Rule 35(2) and that would extent to the specific functions so delegated, though not all pervasive as in the case of the Election Commission. That the power to be exercised under Rule 35(p) and Rule 35A(6)(n)(x) are similar and identical cannot at all be assailed. The decisions on Rule 35(p) also were concerned with the question of the Returning Officer exercising such powers, by consequence of which the elections came to a stand still; and the orders to be passed in ensuring the continuance of the democratic process of election. The principle on which stoppage has been distinguished from cancellation squarely applies here too. Election, hence has to be revived from the stage from which it is stopped. The Election Commission and the powers exercised by such office cannot at all be related with the power of the Registrar or the Returning Officer under Rule 35.

12. The Election Commission exercises powers only with respect to the election and of course the Electoral Rolls, but the same is to be understood as confined to having jurisdiction over those officers appointed by him for the conduct of elections. In the present case, the Electoral officer was appointed by the Election

Commission who had published the final voters list, at which stage the Returning Officer took over, for scrutiny and acceptance of nomination, conduct of polling and declaration of results. True, the Returning Officer under Rule 35 would cease to have any further powers on the publication of results; but however, after introduction of Section 28B and Rule 35A even the election of the office bearers of the Managing Committee would be under the supervision of the Election Commission. However, we have not reached that stage and are at a stage when the polling has been disrupted midway.

13. The lynchpin of the contention is the reliance placed on the decision of the Division Bench in *Rajendran* (supra). In the said case, an amendment was brought to Section 20 of the Act, which provided for even ordinary members to be included as against the earlier provision permitting participation of only the active members in elections. On such amendment being brought into the statute, the Election Commission issued general directions to all Co-operative Societies to comply with Section 20 and in the case of Societies where election process had commenced, that was directed to be stopped, so as to ensure compliance with Section 20.

14. The respondents would contend that the Division Bench had accepted and declared the statutory authority of the State Cooperative Election Commission appointed u/s 28B for the superintendence, direction and control of the conduct of the elections to the committees of the Societies and that orders issued, even, interfering with the election process already commenced would be within the powers conferred on the Election Commission. It is trite that the power of "superintendence, direction and control" conferred on the Election Commission takes in contingencies not provided for in law to facilitate the proper conduct of election. Despite this power being of the widest amplitude, for the conduct of a free and fair election; such powers are to be exercised in the conduct of elections and over the officers appointed to carry out the proper conduct of elections. In that context it is to be specifically noticed that in the instant case the Election Commission has directed the Joint Registrar (General) to conduct an enquiry and remove the members who have been enrolled from outside the area of operation and prepare a draft voters list.

15. What has to be immediately noticed is that the Joint Registrar is an officer of the Department not appointed by the Election Commission to conduct elections, as is specifically mandated in sub-rules (3) and (4) of Rule 35 A. Neither is the issue of membership a concern of the Election Commission nor is a preparation of voters list a duty of the Joint Registrar(General). The inclusion of members in the voters list definitely is a concern of the Election Commission. The Election Commission, as authorised by the Act, appointed two persons to conduct the election. Why deviate and then resort to officers under the Department? This Court restrains itself from any speculation, since that cannot be the basis of adjudication. It is also to be specifically noticed that in *Rajendran* (Supra) the Division Bench was concerned with the illegality which would be perpetrated by

continuing the elections already notified, since the electoral rolls had included only the active members, as was provided in the Act, prior to the amendment of Section 20. On the amendment of Section 20 even ordinary members were allowed to participate in the elections to the Co-operative Societies and as a measure of advancing and aiding the democratic process the Division Bench upheld the action of the Election Commission. This Court does not find any distinction on the basis of the above Division Bench judgment from the powers dilated upon in *Abubacker and George (Supra)*. In the instant case there is no junction of a statutory amendment as was the issue in *Rajendran (supra)*. What is indicated by Ext. P6 is a direction issued to the Joint Registrar to publish the voters list removing the members, who are from outside the area of operation of the Society, also the members who had expired. According to the respondents this is to aid the democratic process and to exclude those members who are ineligible.

16. The duties enjoined upon by Section 35 on the Returning Officer appointed by the Registrar is bifurcated by Section 35A and cast upon the Electoral Officer and Returning Officer appointed by the Election Commission. The preparation of voters list is not a duty cast on either the Returning Officer or the Electoral Officer; the latter of whom has the duty to publish it, after considering the objections. The duty is on the Chief Executive of the concerned Society to prepare, update and submit the list to the Electoral Officer; after due approval from the Committee. The Election Commission cannot usurp such powers and in the context of absence of such powers he cannot confer it on an officer of the department by delegation or in purported exercise of his supervisory powers, That is what has been done in Ext. P6. In the present case, it is also pertinent that the Electoral Officer appointed by the Election Commission has published the final voters list after considering the objections.

17. In any event looking at Ext. P6, there cannot be any revision of the final voters list published as directed therein. Any exclusion of members could be only on the ground of their having residence outside the area of operation and the persons included therein having expired, as is clear from the impugned directions also. Needless to say that no dead person would come forward to exercise their franchise. Any apprehension of impersonation is taken care of by the powers conferred on the Returning Officer, to act on an objection raised at the time of polling. The power of the Electoral Officer under Rule 35 A and the power of the Returning Officer under Rule 35, in considering objections prior to the publication of final voters list have been judicially recognized as identical [*Abraham K. Mathew and Another Vs. Returning Officer to Thariodu and Others*]; in which context no roving enquiry is contemplated on the validity of the membership of persons included in the preliminary list submitted by the Society [*K.V. Vijayakumar Vs. The Joint Registrar of Co-operative Societies and Others*, . When the delegate of the Election Commission has completed the process; the Election Commission cannot in purported exercise of power of superintendence of election direct an officer of the department, not involved in the election process at all, to

prepare a voters list. Which action if proceeded with would eventually result in cancellation of the membership of persons so excluded by the Joint Registrar. Ext. P6 cannot be said to be an exercise of power under sub-rule 9 of Rule 35 A or under the general, power conferred under Rule 28 B. Ext. P6 in WP(C) No. 23484/2012 and Ext. P8 in W.P(C) 23008/2012 being the very same order, is hence, set aside.

18. There shall be a direction to the Administrative Committee in charge of the respondent Society to pass a resolution deciding upon the date of polling and forward the same to the Election Commission. The Election Commission shall appoint an Electoral Officer as also a Returning Officer to conduct the elections. Since the polling materials were destroyed and it would not be possible to resume the voting from the stage it was stopped; despite the submission that votes already polled are kept in safe custody. There would be absolutely no possibility to know which of the members cast their votes in the circumstance of the marked voters list having been destroyed. The Electoral Officer appointed shall publish the final voters list as was published as per Ext. P1 notification. The direction to appoint an Electoral Officer and to publish the final voters list is only to ensure that the list brought out earlier is published in accordance with law for the purpose of polling. The Returning Officer appointed is only for the purpose of conduct of the polling and there shall be no fresh nomination or scrutiny. After the final voters list is published, the Returning Officer shall publish the earlier list of candidates as published prior to the polling on 9.9.2012, and the polling shall be conducted on the date notified by the Election Commission.

19. The Administrative Committee shall take steps to pass a resolution as expeditiously as possible, within three weeks from the date of receipt of a certified copy of this judgment.

Writ petitions are allowed as above.