

(2021) 11 KL CK 0168

In the High Court Of Kerala

Case No : Writ Appeal Nos. 1854, 1940 Of 2019

Babu.T

APPELLANT

Vs

Enathu Service Co-Operative Bank Ltd

RESPONDENT

Date of Decision : 24-11-2021

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Cooperative Societies Act, 1969 — Section 19, 20, 28
Kerala Cooperative Societies Rules, 1969 — Rule 35A(4)

Citation : (2021) 11 KL CK 0168

Hon'ble Judges : P.B.Suresh Kumar, J;C.S. Sudha, J

Bench : Division Bench

Advocate : T.R.Harikumar, Arjun Raghavan, Adithya Rajeev, George Poonthottam, K.Shaj, Renjit George, Lakshmi Narayanan, T.K.Vipindas

Final Decision : Dismissed

Judgement

P.B.Suresh Kumar, J

1. Among these appeals, W.A.No.1854 of 2019 is one preferred challenging the judgment in W.P.(C) No.18773 of 2019 and W.A. No.1940 of 2019 is one preferred challenging the judgment in W.P.(C) No.21006 of 2019. As the questions arising for consideration in the appeals are common, they are disposed of by this common judgment. Parties and documents are referred to in this judgment, as they appear in W.P.(C) No.18773 of 2019.

2. Petitioners, who claim to be the members of the Enathu Service Co-operative Bank Limited (the Bank), a Co-operative Society registered under the Kerala Co-operative Societies Act, 1969 (the Act) have preferred the writ petition challenging their exclusion from the electoral roll finalized by the Electoral Officer appointed by the Kerala State Co-operative Election Commission (the Election Commission) for conducting election to the Managing Committee of the Bank scheduled to take place on 27.07.2019. The Electoral Officer excluded altogether 340 persons from the draft electoral roll published for the election on different

grounds, of which the exclusion of 204 persons was on the ground that they were found to be residing outside the area of operation of the Bank, the exclusion of 133 persons was on the ground that their statutory identity cards were found to be forged and the exclusion of 3 persons was on the ground that they were found to have not subscribed to the necessary share value as per the bye-laws of the Bank. The case set out by the petitioners in the writ petition was that the exclusion of the petitioners and others from the electoral roll is otherwise than in accordance with the provisions of the Act and the Kerala Cooperative Societies Rules (the Rules). The petitioners, in the circumstances, sought directions to the Electoral Officer to include them and others who were excluded from the electoral roll, in the final electoral roll published for the election and permit them to cast vote.

3. On 23.07.2019, this Court passed an interim order in the writ petition directing the official respondents to permit all those who have been removed from the electoral roll to cast vote in a separate ballot box. Though in terms of the said interim order this Court permitted the said votes also to be counted separately, it was made clear that the results of the election shall not be declared without further orders from the Court.

4. After the election, on 29.07.2019, after hearing the parties concerned, this Court took the view that having regard to the nature of the jurisdiction under Article 226 of the Constitution, it will not be proper for this Court to consider the contentions of the petitioners on merits and that the petitioners have to pursue their remedies in terms of the provisions of the Act for redressal of the grievance voiced in the writ petition. The writ petition was consequently disposed of relegating the petitioners to avail the alternative remedy available to them.

5. The writ petition was listed again on 02.08.2019 on a request made by the learned counsel for the petitioners for further hearing and it was urged on behalf of the petitioners on the said day that the petitioners and others were excluded from the voters list without following the provisions contained in Sections 19, 20 and 28 of the Act and Rule 35A(4) of the Rules. It was also urged on behalf of the petitioners on that day that the Electoral Officer did not give individual notices to the members before they were removed from the electoral roll. The learned Single Judge was not impressed by the said arguments. It appears that it was also urged on behalf of the petitioners before the learned Single Judge that having entertained the writ petition and passed the interim order dated 23.07.2019, this Court should have decided the questions raised by the petitioners. In that context, it was held by this Court that the interim order was passed not because this Court found the exclusion of the members from the electoral roll to be illegal, but so as to pave way for their rights to be exercised, if they are so interested after the election. It was also made clear by this Court in the order dated 2.8.2019 that it was solely with a view to protect the rights of the petitioners and similarly placed that this Court had directed their votes to be cast in a separate ballot box, which obviously was intended to facilitate

invocation of their remedies in future. As noted, the petitioners are aggrieved by the decision in the writ petition and hence, W.A.No.1854 of 2019.

6. In the meanwhile, a few other persons similarly placed like the petitioners preferred W.P.(C) No.21006 of 2019 seeking identical reliefs claimed by the petitioners. In the light of the judgment in W.P.(C) No.18773 of 2019, this Court disposed of the said writ petition clarifying that the directions in the said judgment will be applicable to that case as well and that all the liberties reserved in favour of the petitioners in W.P. (C) No.18773 of 2019 will be equally reserved to the petitioners in W.P.(C) No.21006 of 2019 as well. As noted, the petitioners in W.P.(C) No.21006 of 2019 are also aggrieved by the decision in the said writ petition and hence, W.A.No.1940 of 2019.

7. Heard the learned Senior Counsel for the petitioners, the learned Standing Counsel for the Election Commission as also the learned counsel for the additional respondents in W.P.(C) No.18773 of 2019.

8. The learned Senior Counsel for the petitioners contended that Ext.P2 order, in terms of which the Electoral Officer removed 340 persons from the draft electoral roll published for conduct of election is patently illegal. Placing reliance on the Division Bench decision of this Court in Vijayakumar v. Joint Registrar, 1996 (1) KLT 285, the learned Senior Counsel contended that what is expected from an Electoral Officer, when objections are raised against the draft electoral roll, is to make a summary enquiry, if the objections are specific and definite against each individual member which can be subjected to verification with reliable materials which are made available to him by the objectors and which are available in the society. It was pointed out that the Electoral Officer cannot conduct a roving enquiry and if the objections are general or vague in nature, the Electoral Officer is not bound to make any enquiry at all. It was also submitted by the learned Senior Counsel, placing reliance on paragraph 31 of the judgment of this Court in W.A.No.1660 of 2020 that notice has to be issued to the person concerned before he/she is removed from the electoral roll. According to the learned Senior Counsel, in the case on hand, individual notices have not been issued to persons who were removed from the electoral roll. Similarly, it was pointed out that the objections were not specific or definite, but only vague and sketchy. It was asserted by the learned Senior Counsel that the Electoral Officer, in the circumstances, ought not have removed any one from the electoral roll. To a query from the court as to whether any specific instance of malice is attributed against the Electoral Officer, the learned Senior Counsel submitted that only legal malice is attributed against the Electoral Officer. The learned Senior Counsel conceded that the petitioners have an alternative remedy by way of an election petition in terms of the provisions of the Act for redressal of the grievance voiced in the writ petition, but nevertheless he asserted that in a case of this nature, this Court should certainly entertain a writ petition and set right things so that such instances will not occur in future.

9. Per contra, the learned counsel for the additional respondents submitted that

the grievance in the nature of one voiced by the petitioners in the writ petition could be raised only in a properly instituted election petition and not in a writ petition under Article 226 of the Constitution. Placing reliance on the decision of the Division Bench of this Court in *State of Kerala and Others v. Noufal Babu E.K. and Others*, 2020 KHC 5613, the learned counsel for the additional respondents argued that the entire process from the preparation of the electoral roll upto the declaration of the result of the election is a composite electoral process and interference by this Court under Article 226 of the Constitution is not contemplated at all at any stage of this process. It was also submitted by the learned counsel for the additional respondents that this Court entertained the writ petition and passed the interim order dated 23.07.2019 only to protect the interests of the petitioners, in the event they are resorting to the remedy available to them by way of an election petition, for such remedy may not be effective otherwise.

10. On a query from the court, the learned Standing Counsel for the Election Commission submitted that the votes cast by those among 340 persons who were removed from the electoral roll on different grounds are collected and kept in a common ballot box without segregation.

11. We have considered the arguments advanced by the learned counsel for the parties on either side.

12. There cannot be any doubt to the various propositions of law put forth by the the learned Senior Counsel for the petitioners relying on the decisions of this Court in *Vijayakumar and W.A.No.1600 of 2020*. Needless to say that if the order impugned in the writ petition is one passed otherwise than in accordance with the said propositions of law, the same is illegal. But the moot question is whether this Court would be justified in examining the factual question as to whether the process undertaken by the Electoral Officer is in consonance with the said propositions of law.

13. As noted, the question aforesaid is a pure question of fact to be adjudicated after calling for the records maintained by the Electoral Officer. Insofar the votes cast by persons who have been removed from the electoral roll are collected in a common ballot box without segregation, it will be a difficult task for this Court to resolve the said question of fact if it is found that the decision taken by the Electoral Officer is partially correct. It is trite that this Court shall not undertake any adjudication on the disputed questions of fact under Article 226 of the Constitution, though in an exceptionally exceptional case, this Court would be justified in doing so. It is with a view to ascertain as to whether the case on hand is an exceptionally exceptional case for this Court to undertake an adjudication on a question of fact, the learned Senior Counsel was asked to point out as to whether the petitioners had a case that the impugned decision of the Electoral Officer is vitiated by malice. As noted, the petitioners have not attributed any personal malice against the Electoral Officer. Be that as it may, as explicit from the observations made in the impugned judgment that in the matter of passing

the interim order dated 23.07.2019, the learned Single Judge never intended to adjudicate the said question in the writ petition and the interim order was intended only to protect the interests of the petitioners and others, if they choose to challenge the election in accordance with the provisions contained in the Act and Rules, after the election. In other words, merely for the reason that this Court entertained a writ petition and passed an interim order, the petitioners cannot be heard to contend that this Court should adjudicate the questions raised by the petitioners in the writ petition when they have alternative remedy for the same. That apart, in the course of hearing, it has come out that an election petition has already been instituted by a few persons similarly placed like the petitioners challenging the election held to the bank on 27.07.2019 and the same is pending adjudication. In the said circumstances, we are of the view that the learned Single Judge was justified in relegating the petitioners to avail their alternative remedy.

The writ appeals are, therefore, without merits and are accordingly dismissed.