(2021) 11 KL CK 0132

In the High Court Of Kerala

Case No : Writ Appeal Nos. 1447, 1448, 1462, 1486 Of 2021

E.J.Thomas	APPELLANT
Vs	
State Of Kerala	RESPONDENT

Date of Decision : 22-11-2021

Acts Referred:

Kerala Cooperative Societies Act, 1969 — Section 65(1), 66(2), 68
Kerala Cooperative Societies Rule, 1969 — Rule 54
Kerala High Court Act, 1958 — Section 5

Citation : (2021) 11 KL CK 0132

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

Bench : Division Bench

Advocate : George Poonthottam, Nisha George, M.Isha, Amal Kasha,T.B.Hood

Final Decision : Dismissed

Judgement

P.B.Suresh Kumar, J.

1. These writ appeals arise from the common judgment in three writ petitions viz, W.P.(C) No.40266 of 2017 and W.P.(C) Nos.16828 and 22866 of 2018.

2. Appellants in W.A.No.1447 of 2021 are the petitioners in W.P.(C) No.22866 of 2018, appellants in W.A.No.1448 of 2021 are the petitioners in W.P.(C) No.40266 of 2017, appellants in W.A.No.1462 of 2021 are petitioners 1 to 3 in W.P.(C) No.16828 of 2018 and the appellant in W.A.No.1486 of 2021 is the fourth petitioner in W.P.(C) No.16828 of 2018.

3. As the questions arise for consideration in the writ appeals are closely interlinked, they are disposed of by this common judgment. Parties and documents are referred to in this judgment, unless otherwise mentioned, as they appear in W.P.(C) No.40266 of 2017.

4. The petitioners were two among the members of the successive Managing Committees of Sreekandamangalam Service Co-operative Bank Ltd. (the Bank), a Co-operative Society registered under the Kerala Co-operative Societies Act,

1969 (the Act). The latest election to the Managing Committee of the Bank took place on 24.12.2016. Prior to the said election, on 03.10.2016, the concerned Joint Registrar of Co-operative Societies ordered an inquiry into the affairs of the Bank in terms of Section 65(1) of the Act. The officer authorised in this connection has submitted the report of inquiry to the Joint Registrar on 18.11.2016 stating that the Managing Committee of the Bank has caused loss to the tune of Rs.14,40,000/- to the Bank by purchasing an item of land on 11.07.2016. Ext.P1 is the report of inquiry. Though proceedings under Section 68 of the Act was initiated against the then members of the Managing Committee of the Bank including the petitioners on the strength of Ext.P1 report on 19.12.2016, the same was not concluded and in the meanwhile, the new Managing Committee elected to power took charge of the Bank. Thereupon, on 09.03.2017, there was an inspection in the Society in terms of Section 66(2) of the Act. The officer who conducted the said inspection submitted an interim report to the Joint Registrar concerning the affairs of the Bank on 16.03.2017 and the Managing Committee of the Bank was thereupon suspended on 17.03.2017 on the basis of the findings in the report of inspection. Later, on 05.05.2017, Ext.P4 show cause notice was issued by the Joint Registrar to the members of the Managing Committee of the Bank including the petitioners who have taken the decision to acquire the land referred to in Ext.P1 order, directing them to show cause why they shall not be surcharged under Section 68 of the Act. Exts.P6 and P7 are the objections preferred by the petitioners to Ext.P4 notice. The Joint Registrar rejected the contentions taken by the petitioners in the objections to the show cause notice and issued Ext.P8 order surcharging the petitioners and other members of the Managing Committee, holding that they have caused loss to the Bank to the tune of Rs.14,40,000/- by acquiring the land referred to in Ext.P1 report. In terms of Ext.P8 order, the Joint Registrar has also apportioned the liability among the members of the Managing Committee and called upon them to pay the respective amounts and directing further that in the event of non payment, the same shall be recovered from them. Ext.P8 order has been challenged by the petitioners and others in appeal before the Government, and in terms of Ext.P10 order, the Government affirmed Ext.P8 order. Exts.P8 and P10 orders were under challenge in the writ petition.

5. W.P.(C)No.16828 of 2018 is a writ petition filed by four other similarly placed members of the Managing Committee who have been surcharged, challenging Exts.P8 and P10 orders.

6. It is seen that insofar as the petitioners in W.P. (C) No.40266 of 2017 and W.P. (C) No.16828 of 2018 who were the members of the Managing Committee became disqualified to hold their office consequent on their surcharge resulting in loss of quorum for the Managing Committee, an Administrator was appointed to administer the affairs of the Bank. W.P.(C) No.22866 of 2018 was one instituted by the petitioners in W.P. (C) No.40266 of 2017 and others, challenging the order appointing the Administrator.

7. Registrar in P10 orders. A counter affidavit has been filed by the Joint W.P.(C) No.40266 of 2017 supporting Exts.P8 and P10 orders.

8. In Ext.P1 report of inquiry, on the basis of which Ext.P8 order surcharging the petitioners was passed, it is noted, among others, (1) that prior sanction of the Registrar for purchase of the property, as required under Rule 54 of the Kerala Co-operative Societies Rules (the Rules) was not obtained, (2) that the purpose of acquisition is stated to be for the establishment of a branch of the Bank, but the property in question is hardly 600 metres away from the head office, (3) that right through the middle of the property in question runs a 'thodu', (4) that at one corner of the property in question there exists a pond, (5) that a L.T. electric line passes over the middle of the property, (6) that through the eastern boundary of the property runs a 11 KV electric line and the stay wire of the electric post is planted in the property in question and (7) that the valuation of the property, as reported by the Tahsildar is Rs.2,72,733/-, whereas the sale consideration paid is Rs.14,40,000/-.

9. In the objections preferred to Ext.P4 show cause notice, the petitioners and others contended, among others, that non compliance of Rule 54 of the Rules cannot result in a surcharge proceedings against the members of the Managing Committee; that the electric line which was passing over the land was removed later; that the land has been purchased only for the market value; that the original owner of the land is prepared to repurchase the land and therefore, there is no loss to the Bank. It is rejecting all the aforesaid contentions that Ext.P8 order has been passed and the same has been later affirmed by the Government.

10. The learned Single Judge found that, having regard to the bye-laws of the Bank, it was unnecessary to obtain permission under Rule 54 of the Rules and the finding to that effect in Exts.P8 and P10 orders is unsustainable. The learned Single Judge, however, noticed that the remaining defects pointed out in Ext.P1 report other than the defects concerning the valuation of the land have not been seriously disputed by the petitioners and others. The learned Single Judge also noted that the stand taken by the petitioners and others as regards the valuation of the land is only that the purchase was for the market value of the land. The learned Single Judge, on a reappraisal of the facts, found that the factual findings rendered by the officer who conducted the inquiry in Ext.P1 report do not call for any interference. The learned Single Judge also found that the finding of the authorities that the land acquired was unnecessary for the Bank does not call for any interference and that the acquisition of the land has caused loss to the Bank. The learned Single Judge has also observed that though the petitioners contended that the original owner has come forward for repurchase of the land, the repurchase is yet to take place. One among the contentions raised before the learned Single Judge was that before passing an order of surcharge, a provisional order should have been passed granting the petitioners an opportunity to pay off the alleged loss caused to the Bank. The learned Single Judge rejected the said

contention holding that Section 68 of the Act does not call for such a procedure. The learned Single Judge also observed that the materials on record speak volumes that the acquisition of the land in question was not in the interests of the Bank and that the petitioners and others have caused loss to the Bank by wilful negligence and mismanagement. In the light of the findings and observations aforesaid, the learned Single Judge dismissed all the three writ petitions.

11. Heard Sri.George Poonthottam, the learned Senior Counsel for the appellants in W.A.Nos.1447 and 1448 of 2021, Sri.T.R.Harikumar, the learned counsel for the appellants in W.A.No.1462 of 2021, Sri.B.Pramod, the learned counsel for the appellant in W.A.No.1486 of 2021, Sri.Sunil V.K., the learned Senior Government Pleader for the official respondents as also Sri.P.C.Sasidharan and Sri.T.B.Hood, the learned counsel for the Bank.

12. Placing reliance on the sequence of events viz, the date on which the inquiry under Section 65(1) of the Act was ordered, the date on which the officer who conducted the inquiry has submitted his report, the date on which proceedings have been initiated under Section 68 of the Act, the date on which new committee took charge in the Bank, the date on which inspection under Section 66(2) of the Act was ordered, the date on which the officer who conducted the inspection under Section 66(2) has filed his interim report, the date on which the newly elected committee was suspended and the date on which the petitioners have been surcharged, Sri.George Poonthottam, the learned Senior Counsel for the appellants in W.A.Nos.1447 and 1448 of 2021, contended that the proceedings initiated against the petitioners and others under Section 68 of the Act which culminated in Ext.P8 order is vitiated by malice and is liable to be set aside on that sole ground. Placing reliance on the finding in Ext.P8 order that the land acquired by the Managing Committee of the Bank is not useful for the Bank and the Bank cannot recoup the loss caused to it on account of the purchase of the said land by selling it, the learned Senior Counsel contended that it is on that premise that it was found in Ext.P8 order that the Managing Committee has caused loss to the Bank. According to the learned Senior Counsel, in so far as the owner of the land has appeared before the officer who conducted the inquiry under Section 65(1) of the Act as also before the Government and offered to purchase back the land from the Bank, an order surcharging the petitioners and others ought not have been passed. Placing reliance on the decision of this Court in Thrikkadavoor Service Co-op. Society Ltd. v. Sivasankara Pillai, 1990 (2) KLT 594 and the decision of the Apex Court in Pollachi Coop. Marketing Society v. K.N. Valuswami, 1994 Supp (3) SCC 134, the learned Senior Counsel also asserted that it cannot be inferred from the materials on record that the decision to purchase the land was done by the members of the Managing Committee with the knowledge that the same would cause loss to the Bank. According to the learned Senior Counsel, the proceedings initiated against the petitioners and others under Section 68 of the Act is therefore, without jurisdiction also, for what is contemplated under the said provision is not any or every act which is

resulting in loss to the Society, but only wilful acts resulting in loss to the society.

13. Sri.T.R.Harikumar, the learned counsel for the appellants in W.A.No.1462 of 2021 supported the arguments advanced by the learned Senior Counsel Sri.George Poonthottam. In addition, it was argued that insofar as Section 68 provides not only for surcharge, but also for recouping the loss caused to the society, the petitioners should have been given an opportunity to liquidate the liability before they are surcharged.

14. Sri.B.Pramod, the learned counsel for the appellant in W.A.No.1486 of 2021 has also supported the arguments advanced by the learned Senior Counsel, Sri George Poonthottom. In addition, it was pointed out that the very premise on which the learned Single Judge proceeded to hold that loss has been caused to the Bank is that it was unnecessary for the Bank to acquire the land involved in the matter, for the same cannot be used for the purpose of establishing its branch for which the same is stated to have been acquired. According to the learned counsel, the said view of the learned Single Judge is incorrect. The learned counsel elaborated the said submission pointing out that the learned Single Judge has expressed the said view on the wrong premise that the subject land is situated hardly 600 meters away from the head office of the Bank. It was pointed out that the land referred to in the order is actually situated about 1½ kilometers away from the head office of the Bank. It was also pointed out by the learned counsel that it was found by the learned Single Judge that the land is unfit for construction for the reason that there is a 'thodu' running through the middle of the land and there exists a pond in a corner of the land. According to the learned counsel, the said finding has been rendered without taking note of the fact that the 'thodu' is running through the boundary of the land and that construction could be effected on the land, after reclaiming the thodu and the pond. The learned counsel has relied on Annexure A1 sketch issued from the concerned Taluk to substantiate the stand that the 'thodu' is running through the boundary of the land. It was also asserted by the learned counsel that the land has been purchased by the Bank for the market value and the valuation of the land made by the Tahsildar is grossly low and no one would sell similar lands in that area for that price. In order to substantiate the contention that the land value fixed by the Tahsildar is grossly low, the learned counsel has relied on a copy of the sale deed executed in respect of another land, produced as Annexure A2 in W.A.No.1486 of 2021. It was also argued by the learned counsel that the learned Single Judge went wrong in not analysing the nature and extent of the individual role of the members of the Managing Committee in the transaction. According to the learned counsel, going by the provision contained in Section 68 of the Act, only the person who caused loss to the society could be surcharged. Placing reliance on Annexure A5 resolution in W.A.No.1486 of 2021, it was pointed out by the learned counsel that as per the said resolution, the Managing Committee has only authorised the President of the Bank to effect purchase of the land after obtaining permission from the competent authority and after obtaining valuation of the land from the Taluk concerned. It was argued that

insofar as the President of the Bank has effected purchase of the land without complying with the conditions stipulated in Annexure A5 resolution, the petitioners cannot be made responsible for the loss, if any, caused to the Bank in connection with that transaction. It was also pointed out by the learned counsel that though document has been prepared and presented for registration, it is yet to be registered on account of a dispute whether the Bank is entitled to exemption from payment of stamp duty and therefore, at any rate, the proceedings initiated against the petitioner and others under Section 68 of the Act is premature as well.

15. Sri.P.C.Sasidharan, the learned counsel for the Bank in one of the writ petitions pointed out that though the document has already been registered, the same was not released on account of the dispute as to whether the Bank is entitled to exemption from payment of stamp duty for such a transaction and even the said dispute has been subsequently resolved directing the Bank to pay the stamp duty for the document. Sri.T.B.Hood, the learned counsel appearing for the Bank in a connected writ petition submitted that the argument of the petitioners that they should have been granted an opportunity to pay off the liability before being surcharged is unsustainable, for the statute does not provide for such a course of action.

16. We have considered the contentions advanced by the learned counsel for the parties on either side.

17. Section 68 of the Act reads thus:

"Surcharge.- (1) If in the course of an audit, inquiry, inspection or the winding up of a society, it is found that any person, who is or was entrusted with the organization or management of such society or who is or has at any time been an officer or an employee of the society, has made any payment contrary to the Act and the rules or the bye-laws, or has caused any loss or damage in the assets of the society by breach of trust or wilful negligence or mismanagement or has misappropriated or fraudulently retained any money or other property belonging to such society or has destroyed or caused the destruction of the records, the Registrar may, of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorised by him by an order in writing in this behalf, to inquire into the conduct of such person.

(2) Where an inquiry is made under sub-section (1), the Registrar may, after giving the person concerned an opportunity of being heard, by order in writing, require him to repay or restore the money or other property or any part thereof, with interest at such rate, or to pay contribution and costs or compensation to such extent, as the Registrar may consider just and equitable.

(3)Where the money, property, interest, cost or compensation is not repaid or restored as per sub-section (2), the Registrar shall take urgent steps to recover such amounts from the concerned persons as arrears of public revenue due on land as specified in Section 79 of the Act."

As evident from the extracted provision, the purpose of Section 68 is to surcharge persons who cause damage or loss to the assets of the society by wrongful payment or breach of trust or wilful negligence or mismanagement or misappropriation or fraudulent retention of money or other property of the society or destruction of the records of the society and to recoup the loss caused to the society on account of such conduct. Going by the said provision, if it is revealed in the course of an audit, inquiry, inspection or winding up that any loss or damage has been caused to the assets of a society on account of any of the reasons mentioned therein, the Registrar is empowered to inquire into the conduct of persons responsible for the same, and require the persons concerned to repay the money with interest or restore other property of the society. If the money is not repaid or if the property is not restored when directed to do so, the provision also empowers the Registrar to take necessary steps to recoup the loss by proceeding against the persons responsible.

18. Having thus understood the scope of Section 68 of the Act, we shall now proceed to deal with the contentions of the parties. A reading of Ext.P8 order would show that the essence of the finding therein is that the Bank has purchased a land in an inappropriate location which is unfit for putting up a building to establish its branch, that too, without obtaining permission from the competent authority under Rule 54 of the Rules, at a far higher price than the market value. Though it was found that it was not obligatory for the Bank to obtain permission of the competent authority under Rule 54 of the Rules, the findings in Ext.P8 order that the said acquisition was unnecessary for the Bank and that it does not serve the purpose of the Bank have been affirmed by the learned Single Judge. The learned Single Judge has also affirmed the finding in Ext.P8 order that the said acquisition has been made at a far higher price than the market value of the land.

19. As noted, the finding in Ext.P8 order as affirmed by the learned Single Judge that it was unnecessary for the Bank to acquire such a land has been challenged only by the appellant in W.A.No.1486 of 2021 on the ground that the said finding has been rendered on a wrong premise that the acquired land is situated hardly 600 meters away from the head office of the Bank and that the land is unfit for any construction. According to the appellant in that case, the land is situated almost 1.5 kilometers away from the head office of the Bank and that construction can be made in the land by reclaiming the 'thodu' and pond therein, as the electric line drawn over the land and the stay wire erected in the land to support the 11 KV line passing near the land have since been removed. It is seen that the appellant in the said case has not taken the said contentions either before the authority who passed Ext.P8 order or before the Government which confirmed Ext.P8 order. She has neither pleaded such a case in the writ petition from which the writ appeal arises or raised such a contention before the learned Single Judge. In the said circumstances, we do not find any bona fides in the said

contention taken for the first time in the appeal preferred against the judgment of the learned Single Judge. Needless to say, the said contention does not deserve consideration. Similarly, the finding rendered by the learned Single Judge that the acquisition of the land was for a far higher price than the market value of the land has been challenged only by the appellant in W.A.No.1486 of 2021, placing reliance on a document produced for the first time in the appeal. In the absence of any evidence adduced before the authorities as also before the learned Single Judge to show the market value of the land, according to us, the appellant in the said case is not entitled to canvass the correctness of the finding rendered by the authority which passed Ext.P8 order as also the learned Single Judge on a question of fact for the first time in an appeal under Section 5 of the Kerala High Court Act. If that be so, the findings aforesaid in Ext.P8 order and in the impugned judgment that the acquisition was unnecessary for the Bank and that it has been made at a far higher price than the market value of the land cannot be interfered with. If the said findings cannot be interfered with, the contention of the petitioners and others that the proceedings which culminated in Ext.P8 order is vitiated by malice is liable to be rejected as irrelevant.

20. True, there is a finding in Ext.P8 order that the Bank cannot recoup the loss caused to its assets by selling the land and therefore, the petitioners and others who are responsible for the same are liable to be surcharged. The contention advanced by the petitioners in this regard is that insofar as the owner of the land has appeared before the officer who conducted the inquiry under Section 65(1) of the Act and offered to purchase back the land, the said finding is unsustainable. As noted, the issue considered in Ext.P8 order is as to whether the conduct of the petitioners and others has caused loss to the assets of the Bank, and it was found that the petitioners and others have caused loss to the assets of the Bank by purchasing the land in question. The issue whether such a loss could be mitigated by selling the land is not an issue relevant for consideration in a proceedings under Section 68 of the Act.

21. There is also no substance in the contention of the petitioners that the case on hand is not one falling within the scope of Section 68 of the Act. As noted, the finding in Ext.P8 order, which is affirmed in Ext.P10 order by the Government, and the learned Single Judge in the impugned judgment is that the petitioners and others have acquired a land which cannot be utilised by the Bank for its purpose by spending a sum of Rs.14,40,000/-. There cannot be any doubt to the fact that such conduct would amount to gross negligence. Be that as it may, the above conduct of the petitioners and others would certainly fall within the scope of mismanagement contained in Section 68(1) of the Act, even if it is found that negligence on the part of the petitioners and others in the matter of acquiring the land which is not required for the Bank at a price far above the market value of the land, is not wilful. The decision of this Court in Thrikkadavoor Service Co-op. Society Ltd. and the decision of the Apex Court in Pollachi Coop. Marketing Society cannot have any application to the facts of the present case, for the decision in Thrikkadavoor Service Co-op. Society Ltd. is a case dealing with un-

amended Section 68 of the Act which did not provide for surcharge for mismanagement, and the decision in Pollachi Coop. Marketing Society is a case dealing with the scope of wilful negligence only.

22. As noted, the scope of the proceedings under Section 68 of the Act is only to ascertain whether loss or damage has been caused to the assets of the society on account of the reasons made mention of therein and to surcharge the persons responsible for the same and to recoup the loss caused to the society, if it is found that loss or damage has been caused to the assets of the society, after affording the parties concerned an opportunity of hearing. The above being the scope of the proceedings, there is absolutely no merit in the contention of the petitioners and others that they should have been given an opportunity to recoup the loss, once it is found that loss has been caused by them, before surcharging them, for the provision does not provide for such a course of action. The scheme of the provision is that the parties concerned shall have an opportunity to recoup the loss caused to the assets of the society only before deciding the question as to whether loss has been caused and not thereafter.

23. As noted, one of the contentions raised by the appellant in W.A.No.1486 of 2021 is that the learned Single Judge failed to consider the individual roles of the petitioners and others. According to the appellant in that case, Section 68 of the Act does not provide for vicarious liability and it provides only for surcharging the person concerned who caused loss to the assets of the society. The above contention is taken based on Annexure 5 resolution. Annexure 5 resolution reads thus :

BDR No.191/30.06.2016

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The contention is that the extracted resolution is a conditional one and it is the President who caused loss to the assets of the society inasmuch as he has effected purchase of the land without complying with the conditions stipulated therein. We do not find any substance in this contention also. As evident from the extracted resolution, the decision to purchase the land involved in the matter for a sum of Rs.14,40,000/- is one jointly taken by the petitioners and others who had been surcharged. As noted, the learned Single Judge found that permission of the competent authority under Rule 54 of the Rules was not required for the transaction. If that be so, merely for the reason that the President of the Bank was required to obtain a valuation certificate for the land, the petitioners cannot be heard to contend that they are not responsible for the transaction, especially in the absence of any condition in the resolution that the land shall not be purchased for any amount exceeding the valuation directed to be obtained.

The writ appeals in the circumstances, are without merits and are accordingly dismissed.

