
(1993) 02 KL CK 0017
In the High Court Of Kerala
Case No : W.A. No. 213 of 1993

G. Krishnankutty Pillai and Another

APPELLANT

Vs

Joint Registrar and Others

RESPONDENT

Date of Decision : 26-02-1993

Acts Referred:

Kerala Co-operative Societies Act, 1969 — Section 69, 70(3)

Citation : (1993) 1 KLJ 802

Hon'ble Judges : M. Jagannadha Rao, C.J;K. Sreedharan, J

Bench : Division Bench

Advocate : K.S. Radhakrishnan, for the Appellant; K. Ramakumar and V.R. Ramachandran Nair, for the Respondent

Final Decision : Allowed

Judgement

Sreedharan, J.—Writ petitioners, two in number, in O. P. 15331 of 1992 challenge the judgment of the learned Single Judge dismissing their petition. They approached the Court on the allegation that they were elected to the Board of Directors of the third respondent - Co - operative Bank in the election held on 8-11-1992 and that first petitioner was elected as President of the Board. They contended that 11th respondent, the Administrator, refused to hand over charge to the newly elected Board of Directors. It was their case that fifth respondent, who lost in the election, challenged the second petitioner's election to the Board of Directors by filing Arbitration Case No. 75/92 u/s 69 of the Kerala Co - operative Societies Act, hereinafter referred to as "the Act", and that Arbitrator, the second respondent, passed Exhibit P5 order ordering re-count of the votes polled in favour of the second petitioner and fifth respondent. While so, the first respondent by order dated 6-11-1992 extended the term of the 11th respondent as Administrator from 10-11-1992 to 12-2-1993 or to the date on which an elected managing committee enters upon office, whichever is earlier. Petitioners prayed for the issuance of a writ of certiorari quashing Exhibit P5 order directing re-counting of votes and for the issuance of a writ of mandamus directing the

Administrator to handover charge to the Board of Directors which came out successful in the election held on 8-11-1992 and for consequential reliefs. Learned Single Judge dismissed the Original Petition holding that the extension of the term of the Administrator does not harm the petitioners since extension was limited upto the date on which an elected managing committee enters upon office and therefore if the committee has taken charge, the office of the Administrator came to an end. Regarding the order of re-counting of ballot papers, it was held that it is only an interlocutory order and that if irregularities are alleged, it is fair that doubts are removed by re-counting of the votes so that fairness is restored to the election process. As regards the contention raised by the petitioners that the Returning Officer violated Rule 35 (4) of the Kerala Co-operative Societies Rules, hereinafter referred to as "the Rules", by not handing-over the used and unused ballot papers to the Secretary of the Society, it was held that there is no violation of Rule 35 (4) inasmuch as the unused and used ballot papers are in the custody of the present Secretary. The questions that arise for consideration in this appeal are whether Exhibit P5 order of re-count issued without notice to the contesting parties, the resultant re-count and declaration of the defeated candidate as having succeeded in the election is valid, whether there was violation of the provisions contained in Rule 35(4) of the Rules, and whether the authorities under the Act acted in a proper manner.

2. For a proper understanding of the entire circumstances, we think it necessary to refer to the averments made by petitioners and respondents in the various affidavits filed by them. Petitioners state that first petitioner is the president and second petitioner is an elected member of the Board of Directors of third respondent-Co-operative Bank. Election to the Board of Directors was held on 8-11-1992 and seven persons were returned elected. Result of the election was declared at about 8.30 P. M. on that day. Administrator convened a meeting of the elected members on 16-11-1992, as per Exhibit P1 notice dated 9-11-1992. At that meeting, members expressed great concern on the conduct of the Administrator in not giving charge to the elected Board of Directors and they voluntarily assumed the administration of the Bank. That fact was recorded in the minute's book of the Bank. Returning Officer in collusion with the Administrator and fifth respondent, a defeated candidate, removed the used and unused ballot papers without handing them over to the Secretary. Thus, Returning officer violated the mandatory provision contained in Rule 35(4) of the Rules. Secretary of the Bank, as per Exhibit P3, informed the first petitioner of the violation of Rule 35 (4) of the Rules by the fourth respondent. That fact was brought to the notice of the Joint Registrar of Co-operative Societies by sending Exhibit P4. While so, petitioners received a copy of Exhibit P5 order from the Arbitrator. That order directed the Returning Officer to produce all the records in connection with the election held on 8-11-1992 along with ballot papers, used and unused, on 26-11-1992 for re-counting the votes of the fifth respondent and second petitioner. Exhibit P5 order was passed without notice to the elected members and was in clear violation of the principles of natural justice. The

Returning Officer had no power to keep the ballot papers with him and he could not have been directed by the Arbitrator to produce the used and unused ballot papers before him for recounting.

3. Fourth respondent, Returning Officer, did not file any counter affidavit in the Original Petition. In the Writ Appeal, he filed affidavit dated 8-2-1993. It was averred therein that the counting of votes was completed at 8.35 p. m. on 8-11-1992 and the results were declared at 8.50 p.m. After declaration of the results, used and unused ballot papers were put into two separate boxes and were sealed in the presence of the candidates who were present at that time and the employees of the Bank. Those boxes were handed over to Shri. K. Ramachandran, Senior Clerk of the Bank in the presence of Smt. Chandramathi, Secretary of the Bank (Learned Additional Advocate General, who was representing the 4th respondent, stated that the averment that the boxes were handed over to Shri. K. Ramachandran Senior Clerk, in the presence of Smt. Chandramathi, Secretary of the Bank, is not correct, because Smt. Chandramathi was not available at that time). He went on to state that as per order dated 19-11-1992 of the Arbitrator (Exhibit P5), he took the two boxes from the Bank for being produced before the Arbitrator. By the time, all proceedings before the Arbitrator was stayed by this Court. So, boxes were not produced before the Arbitrator. It is stated:-

Even though I took the boxes back to the Bank to entrust the same with the Bank, the Secretary and the Senior Clerk of the Bank refused to receive the same. Hence the two boxes are kept the office of the Assistant Registrar of Co - op. Societies (General), Karunagappally in my own custody.

4. An affidavit sworn to by the 4th respondent, Returning Officer, dated 18-2-1992 was filed in Court on 22-2-1993. At the time when the case was heard in full, that affidavit was not available to Court because office had returned the same for curing defects. The defects were cured and re - presented only on 24-2-1993, the date to which the case was posted for enabling the Government Pleader to make available the records of the Arbitration Case. The entire arguments in the Writ Appeal was heard on 22-2-1993. In this affidavit, Returning Officer wants to correct the sentence in the earlier affidavit as:-

Both the boxes were handed over to Shri. K. Ramachandran, Senior Clerk of the Bank in the absence of Smt. Chandramathi, Secretary of the Bank.

We are not giving any value to this affidavit Returning Officer has filed yet another affidavit, dated 23-2-1993 in Court on 24-2-1993. He seeks to explain the circumstances how he happened to keep the boxes containing used and unused ballot papers with him: This explanation is only to be rejected for his action is contrary to the provisions contained in Rule 35 (4) of the Act. We are at a loss to understand how the Arbitrator in this case required the Returning Officer to produce used and unused ballot papers before him for re-counting the same. In the ordinary course, Arbitrator could have only called upon the

Secretary of the Bank to produce the used and unused ballot papers. This circumstance shows the illegal manner in which the authorities acted in this case.

5. Administrator filed affidavit dated 21-2-1993 in this writ Appeal. According to her, she received a communication from the Arbitrator stating that fifth respondent has been declared elected. Thereupon she directed the Secretary of the Society convene a meeting of the elected members of the Board of Directors on 12th February, 1993. In that meeting, 7th respondent was elected as president in accordance with Rule 43 of the Rules. Charge was handed over to newly elected office bearers on the forenoon of 12th February. It was thereafter she came to know of the order passed by this Court on 12-2-1993.

6. Arbitrator, second respondent filed affidavit dated 16-12-1992 in the Original Petition. According to him, fifth respondent, in the petition filed under Sec. 69 of the Act, alleged irregularities in counting of votes. It was averred therein that fifth respondent requested for a re-count and the Returning Officer refused that prayer. Returning Officer thereupon declared the second petitioner as elected. On perusal of the petition filed by the fifth respondent and the objection filed by him before the Returning officer, he was satisfied that there is prima-facie case and felt that interest of justice demand re-counting of votes secured by the fifth respondent. It is averred:-

I also thought an exparte order (Ext. P5) directing the 4th respondent to produce all records in connection with the election held on 8-11-1992 along with the ballot paper, used and unused before me will not cause any harm or injury to the 2nd petitioner.

As per section 70(3) of the KCS Act (Act 21 of 1961) I am empowered to do so. Accordingly I have passed an interlocutory order.

This respondent is having ample power to issue interlocutory orders as empowered under Sec. 70(3) of the Act. In the nature of the allegations it was felt that such an order will meet the ends of justice. No prejudice is also caused by this order to the petitioners.

He also stated that the Original Petition is premature and the petitioners have approached this Court without seeking remedies available under the Act.

7. Respondents 5, 6, 7 and 10 filed counter affidavits supporting the action of the Administrator, Returning Officer and the Arbitrator.

8. It is common case that the election to the 3rd respondent-Cooperative Bank was held on 8-11-1992. In that election, seven candidates were declared to have been elected at 8.30 P. M. on 8-11-1992 itself. Petitioners were among those successful candidates. Thus a new Board of Directors, consisting of petitioners among others, came into office on 8-11-1992 itself. Thereupon 11th respondent, Administrator, issued Exhibit P 1 notice convening the meeting of the elected Board of Directors. In the counter affidavit filed by her before this Court, she has not stated anything regarding the business transacted at that meeting. Nor has

she given any reason for not handing over the administration of the Bank to the, newly elected Board. Instead, she continued to be in office. On 10th February, she claims to have received a communication from the Arbitrator stating that fifth respondent has been returned, defeating the second petitioner. Immediately she directed the Secretary to convene a meeting of the Board of Directors 10-2-1993. In that meeting, according to her, seventh respondent was elected President in accordance with Rule 43 of the Rules and so she handed over charge to the Board headed by seventh respondent. The above activities of the 11th respondent establishes her partisan attitude to favour someone. Being an Officer of Government the Administrator should not have taken such a hostile stand. She should have accepted the result declared by the Returning Officer on 8-11-1992 and should have handed over the administration of the bank to the newly elected body. The delay caused by her speaks volumes.

9. It has come out in evidence that the Administrator suspended the Secretary of the Bank. Secretary challenged that order of suspension before this Court in O. P. 15912/1992. This Court, it is conceded before us, directed Administrator to allow the Secretary to continue in office. It appears that 11th respondent, Administrator, has shown scant respect to that order as is seen from the following documents. On 10-2-1993, the Administrator issued a notice convening the meeting of the elected Board of Directors to be held on 12-2-1993. A copy of the notice issued by the Bank at her instance is marked as Annexure-3 filed by the appellants along with the affidavit dated 17-2-1993. That was signed by Secretary-in-charge. Annexure-5 filed along with that affidavit is another notice convening the meeting of the elected Board. That is also signed by Secretary-in-charge. If the Secretary of the Bank was allowed by the Administrator to continue as such, Annexure 3 and 5, referred above, could not have been signed by a Secretary-in-charge. They should have been signed by the Secretary. This circumstance also goes to establish the partisan attitude of the Administrator. It is a matter to be enquired into by the superior officers in the Department. We direct such an enquiry to be held by them.

10. Rule 35(4) of the Rules reads:-

After the announcement of the results of the election, the Returning Officer shall keep the ballot papers used and unused in a sealed cover and hand them over to the Secretary of the Society for safe custody. The Secretary shall preserve them for three months from the date of the announcement of the results of the election. They shall not be destroyed after the period referred to above if any dispute relating to or in connection with the election is pending.

As per this provision, 4th respondent ought to have entrusted the used and unused ballot papers with the Secretary of the Bank. No explanation is forthcoming for not complying with the above statutory provision. Eventhough in the affidavit filed by him before this Court he stated that the boxes, which contained the used and unused ballot papers, were handed over to Shri. K. Ramachandran, Senior Clerk, in the presence of Smt. Chandramathi, Secretary of

the Bank, he resiled c Secretary was not available at 8.50 P. M. on 8-11-1992 to take possession of the boxes. If she was not present at that time, Returning Officer was bound to entrust those boxes with the Secretary on the next day when she was in the office. Instead, the Returning Officer took the boxes containing the used and unused ballot papers from Mr. Ramachandran on 25-11-1992 and was keeping it with him. This was a clear violation of the provisions contained in Rule 35(4) of the Rules. The reason for violating the statutory provision is a matter to be enquired into by the superior officers of the Department. We hope that appropriate action will be taken against the Returning Officer by the Superior Officers after conducting a proper enquiry with due notice to him.

11. Immediately after the election was declared, fifth respondent, a defeated candidate, filed petition u/s 69 of the Act, challenging the election of the second petitioner. On the basis of those allegations and those allegations only, second respondent, Arbitrator, passed Exhibit P5 order for re-count of the votes polled in favour of fifth respondent and second petitioner. Before passing that order, he had not cared to serve notice on the respondents in the Arbitration proceedings. According to him, he got powers u/s 70 (3) of the Act to pass interlocutory order and Exhibit P5 is an interlocutory order by which "no prejudice is also caused by this order to the petitioners". Can a re-count be ordered in such a casual manner? The answer can only be in the negative. Election to the Co-operative Society is by secret ballots. The secrecy of ballot is sacrosanct. The secrecy of the ballot should not be violated unless a prima-facie case of a compulsive nature has been made out. If such a strict proof is not forthcoming at the instance of the person who wants the secrecy to be broken the ballot papers are not to be re-examined or re-counted.

12. In this case, it was contended by learned counsel representing the contesting respondents that re-count was justified in this case because on the re-count fifth respondent, who was declared defeated, got more number of votes than second petitioner, who was declared elected. We are unable to sustain this contention. An order of re-count must stand or fall on the nature of proof submitted by the petitioner before the Arbitrator asking for re-count. Re-count can be ordered only on the materials placed before the Arbitrator prior to the order. Re-count cannot be justified from the results emanating from the re-count of votes. The result of the re-count can by no stretch of imagination be considered as sufficient justification of the order re-count. In ordering the re-count, second respondent was carried away by the averments made by the fifth respondent, the defeated candidate. No other material was available to the Arbitrator. The contesting parties were not given an opportunity even to refute the averments made by the defeated candidate.

13. In *T. Penchalaiah v. Election Court* (1990 (1) ALT 669) Andhra High Court, after reviewing all the decisions rendered by the Supreme Court on the point, divided the cases coming for re-count of the votes into four categories. The first

category of cases is one where the allegations in the election petition can be held to be absolutely vague. Second category is one where some details are given, but are not sufficient to order re-count. In the third category, facts are given in great detail, but are made only for the purpose of satisfying the principle laid down in certain decided cases and there is no documentary evidence to support the correctness of the details. The fourth category is the one where details are given in the petition and also substantiated in evidence. We are in respectful agreement with above grouping made in that decision. Tribunals and Courts are not to order re-count in cases other than those falling within the fourth category. To the same effect is the decision of the Supreme Court in P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others, . Their Lordships stated the law in the following terms:-

Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hind sight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly or hastily broken unless there is prima facie genuine need for it. The right of a defeated candidates to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of a high degree of probability existed for the re-count of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes.

(Emphasis added)

14. As directed by us, learned Government Pleader made available to Court the entire files relating to the Arbitration Case, which was pending before the second respondent. We are not going into the merits of the petition or whether the petition has to be rejected on any of the grounds stated in Panchalaiah's case. That will be a matter for the Arbitrator. But, the appellants must have an opportunity to say that no case has been made out, - either on pleadings or on evidence for a recount. Re-count cannot be ordered as a matter of course. Secrecy of ballot paper is a basic principle of election law and is equally applicable to election in Co-operative Societies. Therefore, the appellants were entitled to a reasonable opportunity to say that re-count ought not to have been ordered either because there were no pleadings or evidence. Files clearly establish that Arbitrator did not give any notice of the petition before passing Ext. P5 order. It was passed in violation of the principles of natural justice. In the counter affidavit filed before this Court, Arbitrator has gone to the extent of saying that his order has not gone to prejudice the second petitioner. The

prejudice that has been caused to the second petitioner, on account of the order passed by the second respondent in violation of the principles of natural justice, is that he has been non-seated. Where there is violation of natural justice no resultant or independent prejudice need be shown, as the denial of natural justice is in itself sufficient prejudice. It is no answer to say that even with observance of natural justice the same conclusion would have been reached.

15. The unholy haste shown by the second respondent in ordering re-count of the votes, the manner in which the 4th respondent, Returning Officer, made available the used and unused ballot paper to the Arbitrator from his custody for effecting the re-count and the partisan attitude taken by the 11th respondent, Administrator, are shrouded in mystery. We fail to see why these officers under the Department acted in violation of the statutory provisions and the principles of natural justice.

16. Learned counsel Sri K. Ramakumar, representing respondents 5, 6, 7 and 10, submitted that pursuant to the declaration made by the Arbitrator of the success of the fifth respondent in the election, the newly constituted Board met on 12-2-1993; elected seventh respondent as President of the Bank in strict compliance with the provisions contained in Rule 43 of the Rules, and the new Board assumed office on 12-2-1993 itself. These steps undertaken by the new Board of Directors are strictly in conformity with the statutory provisions and so this Court at this stage is not to interfere with the election of the seventh respondent as the President and his assumption of the administration of the Bank. We are not in a position to agree with this argument. As we have already held, the re-count of votes ordered was illegal for violation of principles of natural justice. Consequently the election of the fifth respondent as a member of the Board of Directors of the Bank cannot stand.

17. Yet another argument that was advanced by learned counsel Sri. Ramakumar was that Arbitrator had issued notice to all the parties in the Arbitration proceedings of the re-count of votes that was to take place on 10-2-1993. That notice dated 1st February, 1993 was issued after the learned Single Judge disposed of the Original Petition. After getting that notice, petitioners, it is contended, cannot urge any violation of the principles of natural justice. We find precious little in this argument. Notice dated 1-2-1993 informing the re-count to be held on 10-2-1993 is of no legal effect in so far as the validity of Exhibit P5 order is concerned. The said notice dated 1-2-1993 can at best be one regarding the re-count. The re-count was based on Exhibit P5 order, which was a nullity on account of it having been passed in violation of the principles of natural justice. So, the subsequent notice regarding the re-count cannot in any way go to validate Exhibit P5 order.

18. Fifth respondent could not have taken part in any of the deliberations of the Board of Directors of third respondent Bank. Steps taken by the Board with him as member cannot stand scrutiny in the eye of law. As on today, the Board of Directors of Bank can consist of the petitioners and the other candidates who

were declared elected on 8-11-1992. Therefore, the clock has to be put back to 8-11-1992. On that day, the elected members of the Board were Petitioners and five others. Administration of the Bank should be entrusted with that Board. According to the petitioners, first petitioner was elected President of that Board. That has not been denied by the Administrator in the affidavit filed by her before this Court. So, we direct the seventh respondent to hand-over charge of the President of the Board to the first petitioner in the writ petition forthwith. First respondent, Joint Registrar, should see that first appellant is entrusted with the administration of the Bank without any delay whatsoever. The Arbitration Case filed by the fifth respondent should be proceeded with by a new Arbitrator. Second respondent should not be allowed to deal with that case. First respondent should appoint a new Arbitrator to proceed with the case filed by the fifth respondent. A copy of this judgment will be forwarded to the Registrar of Co-operative Societies for taking appropriate action against the Returning Officer, Administrator and the Arbitrator, who are respondents 4, 11 and 12 respectively in this appeal, for the illegal acts done by them which are made mention of earlier in this judgment.

Writ Appeal is allowed in the manner indicated above. We make no order as to costs. Issue photo copy of the judgment to the parties on usual terms.