

(2013) 01 KL CK 0189

In the High Court Of Kerala

Case No : Writ Petition (C) No. 26175 of 2011

Jaison

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 17-01-2013

Acts Referred:

Citation : (2013) 1 KHC 414

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : T.C. Suresh Menon, Jibu P. Thomas, P.S. appu, A.R. Nimod and C.A. Anoop, for the Appellant; Noushad Thottathil, Government Pleader and C.E. Unnikrishnan, for the Respondent

Final Decision : Allowed

Judgement

A.M. Shaffique, J.—The petitioner is a member of Nadathara Farmers Service Co-operative Bank Limited, the 3rd respondent herein, and challenges Ext. P5 order passed by the Government in an appeal filed by the party-respondents herein i.e. respondents 4 to 17. The appeal was filed against an order passed by the 2nd respondent imposing surcharge on the party respondents on the allegation that loss had been caused to the Society.

2. The facts involved in the case disclose that the party respondents were members of the Managing Committee of the Society who had given certain gift to the members as compliment by virtue of a decision taken in the General Body Meeting held on 26/02/2008, expending an amount of Rs. 5,91,483/-.

3. The petitioner being a member, seems to have filed a complaint before the Registrar who directed an enquiry to be conducted. The Joint Registrar after an enquiry on a consideration of the facts and circumstances involved in the matter came to a conclusion that it was a fit case to impose surcharge on the party respondents. Ext. P2 is the said order whereby each of the party respondents were directed to pay an amount of Rs. 42,248.79 by way of surcharge.

4. in the appeal filed by the party respondents, the Government had opined that the decision of the Board of Management to give compliments (steel vessel) to the members of the Society as an incentive, not to withdraw their membership from the Society could not be treated as a gross violation of Section 68 of the Co-operative Societies Act (hereinafter referred as the "Act"). It is also opined that many Co-operative Societies distributes such compliments to the members and no evidence was submitted by the Joint Registrar to substantiate that the Society is running in loss. Further it is also found that the compliment of a small vessel of meager amount is issued to the members only in connection with the business of the Society and also with the approval of the General Body and therefore covered by the constructive provisions of the proviso to Section 35(2)(a) of the Society. In that view of the matter, the Government found that there is no reason to impose surcharge on the party respondents u/s 68 of the Act and accordingly Ext. P2 is set aside.

5. The petitioner contends that providing gift amounts to payment as described u/s 68 of the Act. which is contrary to Section 55 of the Act, which reads as under:

Funds not to be divided:

No part of the funds other than the net profits of a society shall be paid by way of bonus or dividend or otherwise distributed among its members:

Provided that a member may be paid such remuneration, allowances or honoraria and on such scale as may be laid down by the bye-laws for any services rendered by him to the society.

6. Therefore, according to the petitioner, the Government had committed serious error of law in setting aside the order passed by the Joint Registrar u/s 68 of the Act. Petitioner also relied upon the Division Bench Judgment of this Court in State of Kerala v. Raju 1979 KHC 302 : 1979 KLT 589 especially paragraphs 4 and 5 which reads as under:

We find force in the contention urged on behalf of the appellants that the aforesaid view taken by the learned Single Judge is not correct. It is no doubt true that Section 55 of the Act prohibits only payment or distribution of any part of the funds of the Society other than the net profits by way of bonus or dividend amongst its members. But the very next section - Section 56 prescribes the only permissible modes in which the Society shall deal with its net profits. Under clauses (a) and (b) of sub-section (1) of Section 56 the Society is enjoined to transfer an amount not being less than 15% of the net profits to the reserve fund, and to credit such portion of the net profits, not exceeding 5%, as may be prescribed, to the Cooperative Education Fund. Sub-section (2) lays down that the balance of the net profits may be utilised for all or any of the purposes enumerated in clauses (a) to (e) thereof, it is manifest that no portion of the balance of the net profits remaining after complying with the provisions of sub-section (1) can be utilised for the Society for any purpose falling outside the scope of clauses (a) to (e). Clause (a) permits payment of dividends to the

members on their paid up share capital at such rate not exceeding 10% as may be prescribed. Under clause (b) the Society is empowered to make payment of bonus to members on the amount or volume of business done by them with the society, to the extent and in the manner specified in the bye-laws. Clause (c) permits the constitution of, or contributions to, such special funds as may be specified in the bye-laws. Under clause (d) the society can make donations of amounts not exceeding ten percent of the net profits for any charitable purpose as defined in Section 2 of the Charitable Endowments Act, 1890. And clause (e) empowers the society to make payment of bonus to employees of the society to the extent and in the manner specified in the bye-laws or in the Payment of Bonus Act, 1965 as the case may be.

5. The ex gratia distribution of stainless steel utensils to members of the Society on the occasion of the General Body meeting will not fall within any of the clauses (a) to (e) and it was not, therefore, competent for the Committee of the Society to incur any expenditure out of the net profits of the Society for making such ex gratia gift of articles to the members of the Society. With respect we hold that the contrary view taken by the learned Single Judge cannot be accepted as correct. Exts. P1 to P3 did not, therefore, call for any interference by this Court.

7. The party respondents have filed a counter-affidavit inter alia contending that the Society was collecting certain additional amount from the loanees which accrued to a sizeable amount. But no benefit was extended to the members. If the said amounts were to be refunded, the Society would incur substantial expenses. Therefore a decision was taken by the General Body to provide gift as compliment to its members and compared to the advantage derived by the Society, the value of the gifts were only meager. That apart, it is their case that providing gift is covered by the provisions of the bye-laws and as long as there is no willful negligence or the party respondents have not misappropriated the amount or gifts as the case may be, no proceedings u/s 68 was warranted.

8. Heard learned counsel for the petitioner and the learned counsel appearing for party respondents and the learned Government Pleader.

9. The main contention urged by the learned counsel for the petitioner is relying upon the Judgment in Raju's case (supra). That was also a case in which Society had given stainless steel utensils to its members. Proceedings were taken u/s 68 of the Act and surcharge was imposed. The appeal filed was also dismissed. This Court had come to a conclusion that the Society can expend amounts only in terms with Section 56 of the Act and therefore in so far as the distribution of stainless steel utensils to members of the Society will not fall within any of the clauses (a) to (e) of Section 56, it was not competent for the Committee of the Society to have incurred such expenditure out of the net profit of the Society for making such ex gratia gift of articles to the members of the Society. The factual circumstances involved in this case is almost similar to the facts and circumstances described in the Division Bench judgment. However, it is for the

authorities concerned to verify whether there is a deliberate attempt on the part of the members of the Managing Committee to expend amounts if the Society was running in loss. There is no factual material to come to such a conclusion. It is for the members of the Managing Committee to prove that the Society had a profit and it was only on account of earning a profit or loss under any other circumstances which according to them was justifiable action, that the gifts were given to the members. Learned counsel for the respondents also relied upon the Judgment in *A.K. Francis and Others Vs. Joint Registrar of Co-operative Societies, Trichur and Others*, That was a case in which proceedings u/s 68 of the Act was taken for having claimed conveyance allowance and also having purchased a car for the Society. In the light of the factual circumstances involved in the said case, this Court had held as under:

The first requirement of the section, which constitutes the condition precedent for its operation, is that the payment contemplated or the deficiency in the assets of the society should have been found in the course of audit, inquiry, inspection or the winding up of the society. The section can be invoked by the Registrar only if the finding was made in this manner and not otherwise. The facts giving rise to the charge have to be disclosed in the " course of an audit u/s 63, inquiry u/s 65, inspection u/s 66 or on the winding up of the society. - vide *Pentakota Srirakulu Vs. The Co-Operative Marketing Society Ltd.*, where the Supreme Court spoke as follows with reference to an analogous provision in Section 49(1) of the Madras Co-operative Societies Act, 1932:

Besides the two factors to which learned counsel referred and which we have just set out, there is also another condition which has to be satisfied before Section 49(1) could be attracted. The facts giving rise to the charge have to be disclosed in the course of an audit u/s 37 or an enquiry u/s 38 or an inspection u/s 39 or on the winding up of the Society.

It is evident that the Supreme Court related the audit, enquiry and inspection to the statutory proceedings contemplated by the Act, which in this case fall under Sections 63, 65 and 66. There is no case that the disclosure about the conveyance allowance was made in the course of any audit or inspection. The enquiry ordered by the first respondent on the complaint petition was also not one u/s 65 of the Act. Therefore the essential condition for Section 68 to be invoked did not exist and the entire proceedings leading to Exts. P13A and P17 have to fall as wanting in jurisdiction. (See also paragraph 6 of ILR 1979 (1) (29) Kar 739, *Gopal Krishna Vishweshwar v. Yellapura T.A.P.C.M. Society*)

12. The further requirement of Section 68 is that the payment or deficiency in the assets of the society was made, or caused by breach of trust or wilful negligence or misappropriation or fraudulent retention of money. It is not the mere wrongful payment or causing of deficiency in the assets that attracts Section 68, but the further fact that such payment or deficiency was made or caused by the breach of trust, wilful negligence, misappropriation or fraud of the person concerned. Unless the latter ingredients is found to exist, action u/s 68 is

ruled out.

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16. The uniform trend of decisions is therefore, that negligence simpliciter is not sufficient to visit the officer of a co-operative society with proceedings u/s 68. His conduct should be wilful, implying culpability with an element of deliberateness or mens rea involved in the conduct or omission which resulted in the loss. Without such conduct or omission, resulting in loss to the society, the Registrar is not entitled to proceed u/s 68 or to pass an order of surcharge.

10. Apparently on a perusal of Ext. P5, I do not think that the reasons stated for setting aside Ext. P2 is supported by sufficient materials. It is for the appellants to prove various circumstances involved in the matter and the burden of proof should not be attributed to the Joint Registrar. The Joint Registrar being a statutory authority had come to a finding that the managing committee offered the gifts in violation of Section 55 of the Act. The fact of providing gift is admitted. If any explanation is offered by the party respondents, it is for them to prove the same and not the concerned Joint Registrar. That being the situation, Ext. P5 is liable to be set aside and the matter requires reconsideration. The party respondents are free to produce any material before the Government when the matter is being heard afresh.

11. Another contention urged by the learned counsel for the petitioner is that he was not heard by the Government while issuing Ext. P5. I do not think that the petitioner requires to be heard in the matter. He had only put the law in motion. The Joint Registrar has conducted the enquiry and passed an order u/s 68. The petitioner has no say in the matter. It becomes a lis between the party respondents and the Department. It is for the department to see that the order passed as Ext. P2 is sustained. Hence, I do not think that Ext. P5 had been passed in violation of the principles of natural justice and there is no necessity for giving an opportunity for the petitioner to be heard during the course of hearing the appeal by the Government. In the result the writ petition is allowed.

(a) Ext. P5 is set aside.

(b) The first respondent is directed to consider the appeal filed by the party respondents afresh and in the light of the observations made above.

(c) The party respondents are permitted to submit necessary materials required for the purpose of the appeal.

(d) A decision on the appeal may be taken within a period of two months from the date of receipt of a copy of this judgment.

(e) Recovery pursuant to Ext. P2 shall be kept in abeyance until disposal of the appeal.