
(1983) 03 KL CK 0004
In the High Court Of Kerala
Case No : W.A. No. 674 of 1982

Madanamohanan Kartha

APPELLANT

Vs

Ernakulam Service Co-operative Bank Limited and Another

RESPONDENT

Date of Decision : 23-03-1983

Acts Referred:

Citation : (1983) KLJ 345

Hon'ble Judges : V. Sivaraman Nair, J;V. Khalid, J

Bench : Division Bench

Advocate : N. Nandakumara Menon, for the Appellant; T.R. Raman Pillai and T.R. Ramachandran, for the Respondent

Final Decision : Dismissed

Judgement

Khalid, J.—The Petitioner in O. P. No. 8581 of 1982 is the Appellant. The 1st Respondent is the Elamkulam Service Co-operative Service Bank Ltd., and the 2nd Respondent, the Joint Registrar of Co-operative Societies, Kottayam. The Original Petition was filed challenging the order of the 2nd Respondent Ext. P-8, dated 29th October 1982 declaring that the Petitioner had ceased to be a member of the Board of Directors of the 1st Respondent society with effect from 5th October 1980 under Rule 44(1)(c)(i) read with Rule 44(2)(a) of the Kerala Co-operative Societies Rules, 1969. The Original Petition was dismissed in limine. Hence this appeal.

2. Shorn of the unnecessary details, the facts necessary for disposal of this appeal are as hereunder. The Petitioner was elected to the Board of the 1st Respondent in June 1980. He assumed office on 1st July 1980. He had stood a surety in respect of a chitty subscribed by one P.M. Mathew. The amount payable to the 1st Respondent society under the surety bond had to be paid on or before 4th October 1980 including the three months grace period. The amount was in default and was paid only on 23rd December 1981. This led to Ext. P-4 notice from the 1st Respondent calling upon the Appellant to show cause why the declaration that he had ceased to be a member of the Board should not be made.

Ultimately, Ext. P-8 order was passed declaring that the Appellant had ceased to be member of the Board with effect from 5th October 1980. It is this order that was challenged before the learned Judge.

3. From Ext. P-8 it is clear that the declaration was made under Rule 44(1)(c) read with Rule 44(2). The challenge against Ext. P-8 stated in the Original Petition and repeated before us is as follows: Rule 44(1) deals with disqualification of a member from being elected. Rule 44(1)(c) deals with the default that such member commits to the society or any other society in respect of any loan or loans taken by him or loan in which he has stood surety or such member being sentenced for any offence other than an offence of a political character etc. The Petitioner's counsel submits that he does not come within the mischief of the disqualification mentioned in this rule. According to him, he does not come within the mischief of Rule 44(2)(a) either because disqualification under Sub-rule (1) does not attach itself to him. In other words, the contention raised by the Appellant's counsel is that Rule 44(2)(a) cannot be pressed into service to disqualify his election since there was no disqualification attached to him when he was elected. It is this disqualification that is mentioned in Rule 44(2)(a). He further submits that neither clause (b) nor clause (c) of Rule 44(2) applies to him. According to him, by the time Ext. P-8 order was passed P.M. Mathew had paid the amount (that is on 23rd December 1981), and as such when proceedings were taken there was no default so far as he was concerned. Even before Ext. P-4 show cause notice was issued the principal debtor had paid the amount and as such Rule 44(2)(a) cannot be pressed into service to disqualify him. For this contention he strongly relies upon a Division Bench decision of this Court in *Thomman v. State of Kerala* 1978 KLT 887.

4. The Respondents' counsel meets this plea with the submission that the payment of the loan after it had become due will not absolve the Appellant from the disqualification that is prescribed under the rule, for, once the default is committed the disqualification comes into being which disqualification continues. For this purpose he relies upon another bench decision of this Court in *Mathew v. Deputy Registrar Co-operative Societies* 1979 KLT 818 and a decision of a learned Single Judge of this Court who was a party to the second division Bench in *Thankappan v. Deputy Registrar* 1983 KLT 88.

5. We will examine these rival contentions presently and see whether there is any apparent conflict between the two decisions rendered by the two Division Benches which cannot be reconciled.

6. At the outset we may state that Rule 44(1) and (2) are not happily worded and they leave much to be desired. But a close reading of the two sub-rules will enable us to resolve the dispute pressed before us by the counsel on both sides. Rule 44 deals with disqualification from membership of committee : Rule 44(1) at the time of election and Rule 44(2) after. Rule 44(1)(c) and Rule 44(2) as far as they are necessary, read as follows:

44 Disqualification for membership of committee.--(1) No member of the society shall be eligible for being elected, or appointed as a member of the committee of the society u/s 28 if he:

* * *

(c)(i) is in default to the society or to any other society in respect of any loan or loans taken by him or loan in which he has stood surety, for such period, as is prescribed in the bye-laws of the society concerned or in any case for a period exceeding three months or is a defaulter to the society or to any other society; or

(ii) has been sentenced for any offence other than an offence of a political character or an offence not involving moral delinquency such sentence not having been reversed or offence pardoned and a period of three years has not elapsed from the date of expiration of the sentence; or

* * *

(2) A member of the committee shall cease to hold his office as such, if he:

(a) becomes disqualified under sub-rule (1),....

(b) ceases to be a member of the society; or....

(c) is subsequently seen to be disqualified under Sub-rule (1) on the date of election itself.

The disqualifying factors as per the Rule 44(1)(c) are (1) that the person sought to be disqualified is in default to the society as mentioned therein of (2) has been sentenced for any offence mentioned therein. These two disqualifications under the rule are pre-existing disqualifications. It is not the case of the Respondents that the Appellant before us suffers from either of the two disqualifications mentioned in Rule 44(1)(c) at the time he was elected. The question then is whether he suffers from any disqualification to attract Rule 44(2).

7. That y as surety was in default in paying the amount on 4th October 1980, the due date, is not disputed. The amount was paid only on 23rd December 1981. He assumed office on 1st July 1980. When Rule 44(2)(a) speaks of disqualification under Sub-rule (1), it is necessary to bear in mind that the disqualification mentioned therein is not the pre-existing disqualification but the disqualification that came into existence subsequent to the election. Otherwise the mention in Rule 44(2)(a) of Sub-rule (1) becomes otiose and unnecessary. The disqualifications in Rule 44(1)(c)(i) and (ii) have to be understood as not disqualifications that arose prior to the election but disqualifications that arose subsequently. An elected member can be in default subsequent to his election. He can be sentenced for an offence after he is elected. If the Appellant's submission is to be accepted, subsequent default that is committed by an elected member or a subsequent conviction and sentence against him will not afford a ground to disqualify him once he is elected. We cannot agree with this submission. Rule 2(d) defines default as meaning failure on the part of any

person, to repay to the financing bank or to any other society a loan or any other amount due to it within the time fixed. Therefore, default can be not only a default that existed prior to the election but also a continuing default after the election. Similarly, sentence for an offence can be prior to election and subsequent to the election. The words used in Rule 44(1)(c)(ii) are "has been sentenced for any offence". These words cannot be understood to mean only past conviction and sentence. They denote also future sentences. This is the manner in which a Full Bench of this Court in *Kunhammad Keyi v. Premalatha* 1962 KLT 366 understood the tense "has been", dealing with Section 5 of the Rent Control Act relating to fixation of fair rent. While construing the expression "has been fixed" it was observed that "has been fixed" should be understood to mean "was and continues to be fixed". Adopting this view, the expression "has been sentenced" should mean "was sentenced in the past or sentenced subsequently". The Appellant's contention would mean that a pre-existing conviction and sentence will only disqualify a member and not a post election conviction and sentence. We cannot agree. The default and the sentence mentioned in Rule 44(1)(c) is not only the default and sentence that existed prior to election but even subsequently. So viewed, the contention of the Appellant's counsel has to fail.

8. However, strong reliance placed by the Appellant's counsel on a Bench decision in *Thommen Itticherianthu v. State of Kerala* 1978 KLT 887 has to be noted and the plea based on it answered, for, the subsequent Bench decision reported in *Mathew v. Deputy Registrar, Co-operative Societies* 1979 KLT 818 has not noticed the said decision. In 1978 K. L. T. 887 disqualifying action taken under Rule 44(1)(c) was challenged in the O.P. At the time action was taken there was no default. The order under challenge Ext. P-4 was passed by the Government setting aside the order of the Deputy Registrar of Co-operative Societies declaring that Respondents 4 to 6 therein had ceased to be members of the society. The learned Single Judge endorsed Ext. P-4. That was confirmed by the Division Bench. It was held:

Action under Rule 44(1)(c) would be justified only if the member concerned "is in default" to the society or to any other society in respect of a loan or loans taken by him or loan in which he has stood surety, for such period, as is prescribed in the bye-laws or in any case for a period exceeding three months or "is a defaulter to the society or to any other society". In employing the present tense by using the word "is", the rule-making authority has clearly indicated its intention that the disqualification will be attracted only if at the time when the proceedings under the rule are initiated the person actually occupies the character of a defaulter. The mere fact that at some time in the past a member might have been in default to the society or to any other society in respect of any loan etc. will not afford a valid ground for taking action under Rule 44 unless it is further shown that the state of such default actually continued to exist as on the date when the proceedings under the rule are initiated.

It is this passage that is strongly relied upon by the Appellant's counsel in support of his submission. Though at the first blush it might appear that the reliance on the above passage is well-founded, on a closer scrutiny it can be seen that the decision related to a case of a past disqualification which had by the time of election disappeared. This is clear from the observation that the mere fact that at some time in the past there was a default should not be made use of to declare that an elected member had ceased to be a member. The observations in the Judgment about the effect of use of the word "is" have to be understood, with respect, as obiter for the purpose of the disposal of that case as the Bench had no occasion to consider a post election disqualification and the effect of Rule 44(2). That case is authority for the position that past default will not disqualify a member.

9. The decision reported in Mathew v. Deputy Registrar of Co-operative Societies 1979 KLT 818 dealt with an almost identical case as we have before us. The earlier Bench case was not brought to the notice of this Bench. We may preface our reference to this decision by saying that by the time the decision was rendered the question at issue had become academic since the term of the Committee had by then expired. Perhaps that accounts for the absence of detailed discussion in the Judgment about the interaction of Rule 44(1) and Rule 44(2). There, Ext. P-1 show cause notice, dated 31st August 1977 was issued to the Petitioner, a member of the Managing Committee stating that he had availed of a loan of Rs. 10,000 under a mortgage deed and that the fifth instalment due on 1st November 1976 was remitted by him only on 26th March 1977. This default rendered him liable to be disqualified. After noting Rule 44(1) and 44(2), the Division Bench wound up the short Judgment as follows:

It will thus be seen that while the disqualification is provided for by Clause (1) of the rule and seems to cover primarily a case of preexisting disqualification vis-a-vis the time of the election, Sub-rule (2) both on its language, and its tenor is wide enough to cover a supervenient disqualification, or a disqualification that has actually emerged or is even noticed subsequent to election. This seems to be indicated by the language of Clause (2) which speaks of a member of the Committee ceasing to hold office, if he "becomes disqualified" under Sub-rule (1), etc. or ceases to be a member of the society or is subsequently shown to be disqualified under Sub-rule (1). These contingencies contemplated for action under Sub-rule (2) appear to us to indicate a supervenient disqualification. In the circumstances, we see no ground to interfere with the order impugned. We dismiss the writ petition with no order as to costs.

What is said is that Rule 44(2) deals with a supervenient disqualification or a disqualification that has actually emerged or is noticed subsequent to the election. With respect, this is how Rule 44(1) and (2) has to be understood. While Rule 44(1) deals with pre-existing disqualifications, Rule 44(2) deals with a disqualification that is discovered and emerges subsequently. That the object of the rule is this is absolutely clear by embodying a dichotomy between pre-

existing disqualification and subsequent disqualification by having two sub-rules to Rule 44. Else there was no need why the rule should have been framed in this manner. G. Balagangadharan Nair, J. had occasion to consider the same question in *Thankappan v. Deputy Registrar* 1983 KLT 88. The learned Judge who was a party to 1979 KLT 818 has this to say after quoting Rule 44(1) and (2):

3. The grounds of disqualification prescribed by Sub-rule (1) apply to the election or appointment of a member as a member of the committee of a society; in other words they deal with the election or appointment of members who are subject to pre-existing disqualification. Sub-rule (2) as its opening words state, prescribe the effect of supervening disqualification or a disqualification that is discovered or noticed subsequent to the election or appointment. That is further made clear by the words "becomes disqualified" in Clause (a), "cease to be a member" in Clause (6) and "is subsequently seen to be disqualified under Sub-rule (1) on the date of election itself in Clause (c) of Sub-rule (2). This is so despite the fact that clause (2)(a) attracts the disqualifications prescribed by Sub-rule (1). This aspect has been pointed out by the Bench decision in *Mathew v. Deputy Registrar Co-operative Societies* 1979 KLT 818:

* * * *

We agree with respect that the approach to Rule 44 made by the learned Judge is correct.

10. We hold that the Bench decision in *Thommen v. State of Kerala* 1978 KLT 887 on the facts of that case which related to a pre-existing disqualification, was correctly decided and the Bench decision in *Mathew v. Deputy Registrar Co-operative Societies* 1979 KLT 818 on the facts of that case also was correctly decided. We do not therefore think it necessary to refer this case to a Full Bench to resolve what is submitted to be an apparent conflict between the two Bench decisions. In this case the Appellant was in default in making the payment to the society on the due date, namely, 4th October 1980. It was paid only on 23rd December 1981. This means that he was in default in making the payment after 4th October, 1980 and therefore attracts the mischief in Rules 44(1)(c)(i) read with Rule 44(2). For this reason, the order Ext. P-8 declaring him to have ceased to be an elected member of the Board of Director of the society has to be sustained. In our Judgment, therefore, Ext. P-8 was validly passed. We dismiss this writ appeal and direct that the parties shall bear their costs.