

(2013) 07 KL CK 0076

In the High Court Of Kerala

Case No : Writ Petition (C) No. 18455 of 2012 and connected cases

Mohanachandran Nair, B.

APPELLANT

Vs

State Co-operative Election Commission and Others

RESPONDENT

Date of Decision : 08-07-2013

Acts Referred:

Constitution of India, 1950 — Article 324, 324(1)

Citation : (2013) 3 ILR (Ker) 434 : (2013) 3 KHC 473 : (2013) 3 KLJ 578 : (2013) 3 KLT 506

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

Bench : Single Bench

Advocate : M. Rajagopalan Nair, Sri P. Ramakrishnan, Sri P.C. Sasidharan and Sri G. Biju, for the Appellant; D. Somasundaram, Special Government Pleader for Respondents 1 and 2 and Sri George Poonthottam for Respondent 3, for the Respondent

Judgement

A.M. Shaffique, J.—These Writ Petitions relates to the conduct of election to the Board of Directors of Andoorkonam Service Co-operative Bank Ltd. and hence decided by this common judgment. The facts involved in the case would disclose that the term of Board of Directors of the Bank expires on 18-9-2012. The Board of Directors had decided to conduct election on 26-8-2012. The first respondent, State Co-operative Election Commission appointed Returning Officer for conducting the election as per proceedings dated 6-7-2012. By a separate proceedings dated 6-7-2012, an Electoral Officer was also appointed. As per the schedule of the election, the preliminary voters list had to be published on 23-7-2012. The objections were to be called for by 31-12-2012. The final voters list was to be published on 1-8-2012. The last date of submitting nomination was on 9-8-2012. Scrutiny of nomination was to be done on 10-8-2012. The last date for withdrawal of nominations was on 13-8-2012 and the election was to be conducted on 26-8-2012. It is stated that the final voters list was published after verifying the objections. The Writ Petition is filed for appointing an Advocate Commissioner to oversee further proceedings in the election to be held as

notified. Petitioner apprehends interference by the official respondents in respect of the election process and hence sought for a declaration that they shall not interfere in the election proceedings on any ground except those mentioned in Rule 35A(6)(v) and 35A(6)(x) of the Kerala Co-operative Societies Rules, 1969 (hereinafter referred to as "the Rules"). Hence the President of the Board of Directors, by W.P.C. No. 18455 of 2012 seeks appointment of Advocate Commissioner and for non-interference by the respondents other than by invoking the provisions of the rules.

2. W.P.C. No. 19304 of 2012 came to be filed by the petitioner in W.P. C. No. 18455 of 2012, as subsequent to the filing of W.P. C. No. 18455 of 2012 the Election Commission, by Ext. P-6 had withdrawn the earlier notification for conduct of the election by invoking power under Rule 16A and 35A of the Rules. In Ext. P-6 it is inter alia stated that Form 6B Register was not properly maintained. This according to the petitioner is without authority as the Assistant Commissioner has no authority to invoke any power other than Rule 35A(6)(e) (v) and 6(m)(x) of the Rules. It is therefore contended that issuance of Ext. P-7 is arbitrary and illegal and allegations stated in Ext. P-6 are devoid of any merit. Ext. P-7 is a consequential order passed pursuant to Ext. P-6 cancelling the earlier notification.

3. W.P.C. No. 29857 of 2012 is filed by a member of the Bank challenging the proceedings of the Election Commission as stated in 19304 of 2012. Exts. P-4 and P-5 are the impugned orders of the Election Commission in this case which are the same as Exts. P-6 and P-7 in W.P.C. 19304 of 2012.

4. Counter-affidavit is filed by the 1st respondent in W.P.C. No. 19304 of 2012. It is inter alia contended that when the process of election was going on, the respondent has received several complaints regarding the electoral roll, maintenance of 6B register, issuance of identity cards to eligible members etc. When reports were called for from the Electoral Officer, it was informed that the said officer had also received similar complaints which cannot be rectified within the prescribed time limit. Respondent personally visited the bank and inspected the records relating to the election and found various irregularities which are narrated in the counter-affidavit. It is stated that in many 6B forms, the identity cards, photos of the members are not affixed. In the case of affixed photos there is no signature and seal of the Chief Executive of the Co-operative Bank. Large number of identity cards are not genuine and in many 6B forms only member number is entered and other particulars are kept blank. Seal of the bank is not affixed in many photographs in 6B forms and in many 6B forms photograph of the members are not pasted but the identity card is issued with date. It is also pointed out that volumes 31 to 43 of 6B form register are missing especially in regard to member Nos. 3515 to 4816. The officer could verify volumes 39 and 42 which were maintained recently and it is seen that most of the photographs affixed are very old. It is also pointed out that except volumes 39 and 42 (member numbers 4716 to 4816) all other volumes from 31 to 42 are old. It is

also pointed out that in some 6B forms photographs are not clear due to passage of time. In the 39th volume of 6B forms almost all the photos are very old photos. It is also contended that the Assistant Registrar has stated that identity cards were issued to 50% of the members which is admitted by the President and Secretary of the Bank. It is therefore stated that it is without issuing identity cards and maintaining 6B register, final voters list is prepared. Therefore the respondent had formed an opinion that it is impossible to conduct election without maintaining 6B forms of all members and there is no way to verify the identity cards with 6B register if the voters identity is challenged at the time of polling. Reference is also made to Rule 16(A)(1) of the Rules in order to contend that the procedure prescribed therein had not been properly complied. Reference is made to Section 28B of the Act in order to contend that the State Co-operative Election Commission has the power of superintendence in respect of the conduct of election and this power can be exercised at any point of time and when the Election Commission has the power to issue notification it has the power to withdraw the notification also. In that view of the matter, the 1st respondent supports its stand.

5. Reply affidavit has been filed by the petitioner reiterating the stand taken in the writ petition.

6. The additional 4th respondent has filed a counter-affidavit supporting the stand taken by the Election Commission.

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

8. Learned counsel for the petitioner relied upon the following judgments.

(i) George Kuruvilla and Others Vs. Kerala State Co-operative Election Commission and Others, . This was a case in which election was fixed on 24-10-2009. Certain writ petitions were filed alleging irregularities in maintaining the form 6B register. Election Commission postponed the election by order dated 21-10-2009, one day prior to the poll. Certain candidates filed a writ petition before the Court for holding election on the date fixed earlier. It was found that the postponement of election was against orders of court and interim orders were issued on 23-10-2009 to conduct the election on the notified date. The interim order reached finality. In an appeal filed against the judgment of the learned Single Judge, this Court held as under:

3. The only question to be considered in the Writ Appeals is whether the learned Single Judge was justified in directing holding of election on 24-10-2009, after the Election Commission issued orders postponing the election on 21-10-2009 and the same was published in the newspapers on 23-10-2009. Counsel appearing for the Bank represented by it's present Board constituted after the election conducted under the interim orders of this Court contended that postponement of election was mala fide and the same was in violation of Division Bench orders of this Court on 30-9-2009. On the other hand, counsel appearing

for the appellants in the Writ Appeals and the petitioners in the Writ Petitions contended that the election was postponed only because the Chief Electoral Officer was satisfied about the irregularities in Form 6B register of members to whom election identification cards were issued and pending sorting out of the issues on membership, the Election Commission postponed the election and this Court need not have interfered with the postponement of election. Even though the postponement of election was not justified and the identification of members could have sorted out by directing them to produce some other acceptable identification, we feel, once the election is postponed by the competent authority, viz., the State Co-operative Election Commission and published it in the newspaper, election could not be validly held without a further publication about the date of holding the poll. Even though this Court was satisfied about the illegality, irregularity and impropriety in postponement of election, we feel, the Court should have fixed the date of poll only after ensuring that the date of poll is published in advance for the members to participate in the election. Once the election is postponed by the State Co-operative Election Commission and the same was published in the newspaper on 23-10-2009, we feel, there was no justification for this Court to direct holding of election on the next date, i.e., 24-10-2009 without ensuring sufficient publicity of the date of poll for the members to participate in the election. Even though counsel appearing for the elected candidates produced newspaper reports published on the date of election i.e., 24-10-2009, where newspapers have published that the High Court has ordered holding of election by the society on 24th October itself, we do not think, this is sufficient notice for the members to get ready and participate in the election. In our view, the election held on 24-10-2009 under interim orders of this Court passed on the previous day i.e., on 23-10-2009 cannot be said to be a fair or proper election because members had no notice of it. In fact, it is the mandatory requirement of R. 35A(3) of the Kerala Co-operative Societies Rules, 1969 that the Election Commission should notify the details of election to the Committee of the society, which certainly involves publication of date of poll which was in fact done by the Election Commission. However, once the Election Commission notified postponement of date of poll, then without publishing, the next date of poll, no election could be held in a fair and proper manner under the Rules. On facts, we find that in the last election held to the Board on 6-11-2004, as many as 9200 members participated in the poll and cast their votes. On the other hand, in the election conducted under the interim orders of this Court, only 4416 members participated in the poll and out of whom, around 350 ballot papers are kept in separate box on account of controversy about their eligibility to vote. It is common knowledge that people take membership in Co-operative Banks to avail loans, because only members are entitled to take loan. Many of them may not be interested to cast their vote and therefore, polling may be of low percentage of members. However, we notice that at least around 25,000 members have taken photo identification cards which means that at least so many of members are interested to participate in the election to the Board. Even though total membership of the society is stated to be around 68,000 compared

to even 25,000 who have taken photo identification cards, we find that not even 20% of the members who have taken photo identification cards have participated in the election. The non-participation in the election by large number of members may be on account of a postponement of election published by the State Co-operative Election Commission on the date previous to the date notified for election. When this Court ordered advancement of election after postponement by the State Election Commission, we feel, this Court should have ordered holding of election only after notifying the date of election at least in newspapers sufficiently early. Therefore, in our view, the election held under interim orders cannot be said to be a free and fair election and the representing character of the Board will be reflected only if sizeable number of members participated in the election. Of course, there is nothing in the statute and rules which prescribed minimum number of members to participate in the poll for the validity of the election. However, taking note of the total number of members who have obtained photo identification cards which is only for the purpose of participating in the election, we feel, the election of the Board by a little over 4000 members cannot be said to be free or fair election. Even though all the elected members are not parties in these cases, we do not think, there is any need to implead all of them before setting aside the election, because the election itself was held under interim orders of this Court and further, we notice that there is effective representation for the two rival groups. We therefore allow the appeals by vacating the interim orders of this Court and direct the State Election Commission to renotify the poll date and hold the election at the earliest. We do not think, there is any need to sort out the dispute on Form 6B register or the issuance of the photo identification cards before election because if members, who are issued by the society with photo identification cards, do not find their names in the register, can prove their identity with the help of the election identification card issued by the State Election Commission or even a passport or even a PAN Card with which the returning officer or polling officer can reconfirm their identity and permit them to participate in the election and cast their votes.

(ii) P.S. Haridas Vs. The Alleppey Urban Co-operative Bank Ltd. and Others, . This is a case in which the polling was adjourned as the nomination paper was snatched away during scrutiny. The learned Single Judge of this Court held that there was no necessity to interrupt the election process and it was possible for the Returning Officer to receive another nomination paper and conduct the election as notified.

9. The learned Government Pleader referred to the following judgments:

(i) Bhagwan Budha P.T.T. College v. State of Bihar 2010 (4) KLT S.N. 84 (C. No. 97) S.C. This judgment is relied upon for the proposition that the power to issue an order includes a power to withdraw the same for valid reasons.

(ii) Reference is made to the judgment in Rajendran Vs. State Co-operative Election Commission, . That was a case in which the Division Bench held that the election proceedings cannot continue on account of amendment to Section 20

conferring voting right to ordinary members also. The Division Bench therefore justified the action of the Election Commission in renotifying the Election. It was also held that the State Co-operative Election Commission constituted u/s 28B of the Act has absolute powers to ensure that the election to the co-operative societies are conducted strictly in accordance with the provisions of the Act, It is held as under:

8. As per Ext. P-1 notification issued on 27-4-2002, the preliminary voters" list was to be published on 13-5-2002. According to the averments in the Original Petition and the Memorandum of Writ Appeal, the preliminary voters" list was published on 14-5-2002. It appears to be a typing error. Whether the date of publication of the preliminary voters" list is 13-5-2002 or 14-5-2002, it was after the amendment to S. 20 of the Act providing that every member of a Society shall have one vote in the affairs of the Society. In other words, on the date on which the preliminary voters" list was published, every member of the Society was entitled to vote in the affairs of the Society and hence, eligible to be included in the preliminary voters" list. But admittedly, active members alone were included in the preliminary voters" list. Thus, the preliminary voters" list was prepared and published in violation of the provisions contained in S. 20 of the Act. It is to avoid such illegalities in the preparation of the voters" list that Ext. P-2 Circular was issued by the first respondent, State Co-operative Election Commission directing that in the case of preliminary/final voters" list published on or after 4-5-2002, the election shall be conducted only after including all the eligible members of the Society in the voters" list. It is to give effect to the statutory provisions contained in S. 20 of the Act that the first respondent directed that where the voters" list was published on or after 4-5-2002 including only the active members, the election proceedings should be immediately stopped and resolution should be sent to the first respondent through the Joint Registrar after fixing the date of election providing for sufficient time as per R. 35A(4) of the Rules. It is in compliance with Ext. P-2 Circular that the Electoral Officer published Ext. P-3 notice stopping the election proceedings and enabling the Bank to fix a date for election in terms of Ext. P-2 and to prepare the list of members qualified to vote at the election in accordance with S. 20 of the Act. Hence, there was no illegality or impropriety in issuing Ext. P-2 Circular by the first respondent and in publishing Ext. P-3 notice by the 4th respondent.

9. There is no merit in the contention of the appellant that the first respondent Commission had no jurisdiction to issue Ext. P-2 Circular directing to stop the election proceedings. The State Co-operative Election Commission was constituted under S. 28B of the Act. According to S. 28B of the Act, notwithstanding anything contained in the Act or in the Rules, the Government shall by notification in the Gazette constitute a State Co-operative Election Commission for superintendence, directions and control of the conduct of elections to the committees of all credit, apex, central and federal societies in the State. Hence the powers and functions of the State Co-operative Election Commission included "the superintendence, directions and control of the conduct

of elections" to the Committees of the Societies. Therefore, it is the duty of the State Co-operative Election Commission to ensure that election to the Committees of the Societies are conducted strictly in accordance with the provisions of the Act. When it came to the notice of the first respondent that notwithstanding the amendment to S. 20 of the Act with effect from 4-5-2002 making every member of a Society eligible to vote in the affairs of a Society, elections were going to be held based on voters' list published on or after 4-5-2002 including only active members, the first respondent had the power and duty to take cognizance of such illegality in the preparation of the voters' list and to ensure that elections are held in accordance with law, after removing the illegality and publishing the voters' list in accordance with the provisions of S. 20 of the Act. It was in exercise of the said power and duty of the first respondent that the directions contained in Ext. P-2 Circular were issued by the first respondent, Hence, in our view, the first respondent had the competence and jurisdiction to issue Ext. P-2 Circular and he was fully justified in issuing the said Circular.

(iii) Reference is also made to the judgment of the Supreme Court in Union of India (UOI) Vs. Association for Democratic Reforms and Another, .

27. Further, this Court in Kanhiya Lal Omar v. R.K. Trivedi dealt with the constitutional validity of the Election Symbols (Reservation and Allotment) Order, 1968 which was issued by the Election Commission in its plenary exercise of power under Article 324 of the Constitution read with Rules 5 and 10 of the Conduct of Elections Rules, 1961. The challenge was on the ground that the Symbols Order which is legislative in character could not be issued by the Commission because the Commission is not entrusted by law the power to issue such an Order regarding the specification, reservation and allotment of symbols that may be chosen by the candidates at elections in parliamentary and assembly constituencies. It was urged that Article 324 of the Constitution which vests the power of superintendence, direction and control of all elections to Parliament and to the Legislature of a State in the Commission cannot be construed as conferring the power on the Commission to issue the symbols. The Court negated the said contention and pertinently observed that: (SCC p. 635, para. 9) The word "elections" in Article 324 is used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. India is a country which consists of millions of voters. Although they are quite conscious of their duties politically, unfortunately, a large percentage of them are still illiterate.

(emphasis supplied)

The Court in paragraph 16 held: (SCC pp. 639---40)

16. Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the

Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions. Article 324 of the Constitution operates in areas left unoccupied by legislation and the words "superintendence", "direction" and "control" as well as "conduct of all elections" are the broadest terms which would include the power to make all such provisions. (See *Mohinder Singh Gill v. Chief Election Commr.* and *A.C. Jose v. Sivan Pillai*)

(emphasis supplied)

The Court further observed: (SCC p. 640, para 17)

While construing the expression "superintendence, direction and control" in Article 324(1), one has to remember that every norm which lays down a rule of conduct cannot possibly be elevated to the position of legislation or delegated legislation. There are some authorities or persons in certain grey areas who may be sources of rules of conduct and who at the same time cannot be equated to authorities or persons who can make law, in the strict sense in which it is understood in jurisprudence. A direction may mean an order issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order. One has also to remember that the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved. Viewed from this angle it cannot be said that any of the provisions of the Symbols Order suffers from want of authority on the part of the Commission, which has issued it.

10. Having regard to the factual circumstances involved in the writ petition and the arguments of the respective parties, the short question to be considered is whether the State Co-operative Election Commission has the power to pass the impugned orders. A reference to the judgment in *Rajendran's case* (supra) virtually indicates the absolute power vested with the Election Commission in terms of Section 28B of the Act. The argument of the learned counsel for the petitioner is with reference to Rule 35A of the Rules especially sub-rule (6) which indicates a procedure to be complied by the Returning Officer in respect of receipt of nomination and other proceedings. No doubt, the Returning Officer has no power to adjourn the proceedings except under certain circumstances mentioned in sub clause (e) (v) which reads as under

R. 35A(e)(v). The Returning Officer shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or affray or by causes beyond his control. If any adjournment of the proceedings have been done due to the reasons mentioned above, the fact should be reported by the Returning Officer to the State Co-operative Election Commission forthwith.

11. However, a reference to sub-rule (9) of Rule 35 A would show that the Election Commission shall have powers to issue any directions or guidelines or

instructions for the conduct of election to the Societies and also to the officers appointed to perform the election duties. Sub-rule (9) reads as under:

(9). The Election Commission shall have powers to issue any directions or guidelines or instructions for the conduct of election to the societies and also to the officers appointed to perform the election duties. The officers appointed on election duty shall be subject to the superintendence, control and discipline if the Election Commission.

12. No doubt, the Returning Officer may not have the power to adjourn the election. But the question is whether the Election Commission has such powers. Going by sub-rule (9) of Rule 35A and the judgment in Rajendran's case (supra) the power of the Election Commission cannot be disputed. The power to appoint an Electoral Officer can also be withdrawn if it is found that the election proceedings cannot be conducted in a fair manner. Reference is made by the Election Commission regarding the preparation or manner in which form 6B register is maintained and discrepancies in the identity cards and photographs affixed etc. Under normal circumstances these are all matters to be considered by the Electoral Officer while preparing the final voters' list. But if the discrepancy is such that it goes to the extent of effecting a fair election definitely the Election Commission can interfere in the matter. Going by the impugned orders, the Election Commission has formed an opinion that a fair election cannot be conducted with the available materials. The judgments in George Kuruvila's case (supra) and Haridas's case (supra) do not have any application to the facts of this case. Such being the situation, I do not think that the 1st respondent has exceeded his jurisdiction in adjourning the election. Hence there is no reason to interfere with the impugned order.

Accordingly the writ petitions are dismissed. It is made clear that the Election Commission can take further steps to conduct fair election in accordance with the procedure prescribed. This may be done as expeditiously as possible.