(1993) 02 KL CK 0082

In the High Court Of Kerala

Case No : O. P. No. 268/93 and OP. 12423 of 1992

M.V. Sekharan and others — APPELLANT

Vs

Joint Registrar and others — RESPONDENT

Date of Decision : 05-02-1993

Acts Referred:
Companies Act, 1956 — Section 31
Constitution of India, 1950 — Article 226

Citation : (1993) 1 KLJ 480

Hon'ble Judges : G.H. Guttal, J

Bench : Single Bench

Advocate : M.K Domodaran, for the Appellant; Cyriac Joseph, Addi. Advocate General, D. Somosundaram, Senior Govt. Pleader jose J. Mathaikal and K. K Raveendranath, for the Respondent

Final Decision : Dismissed

Judgement

G.H. Guttal, J.—There petitions under Article 226 of the Constitution of India raise an interesting question. The question is whether a Co-operative society registered under the Kerala Co-operative Societies Act (the Act for brevity) has the power to amend its byelaws to raise its authorised share capital retrospectively and thereby validate the allotment of shares made in excess of the share capital. The petitioners are members of the Nattika Firka Co-operative Rural Bank Ltd, the respondent No 3 herein. The respondents 1 & 2 are respectively the Registrar of Co-operative societies and the Administrator of the society, appointed u/s 28(1) of the Act.

2. The facts giving rise to the question set out in paragraph 1 above arc these:

On 10-2-1992 when he entered office, Administrator discovered that the paid up capital of the society was Rs 14,02,030/- which means that shares worth Rs. 4,12,030/- in excess of the authorised capital of Rs. 10,00,000=00 had been issued by the managing committee. The managing committee which is the Board of Directors of the Bank, had admitted 1789 members between 15-9-1990 and

9-2-1992 The committee had issued loans of Rs. 56,55,000/- to these "members.

By resolution No. 1365 dated 10-5-1991, the committee, decided to amend the byelaw No. 4 so as to raise the share capital. In pursuance of this resolution, the Administrator, on 26-5-1992, resolved to convene a meeting of the general body of the society on 15-11-1992. In view of the Supreme Court''s direction in S. L. P. (C) Nos. 6396, 6682, 6935 and 9989/1992 and Writ Petition (C) No. 379 of 1992. to conduces elections to the committees of all societies in Kerala, within six months from 13-5-1992, the meeting of the general body was not held. Since 1789 "members" had received loans which are still outstanding, the Administrator decided to continue their membership by increasing the authorised share capital. In view of the judgment of this Court in janardhanan v. Joint Registrar (1990 (1) K. L. T. 530) the allotment of shares and therefore the membership of 1789 debtors of the society would be void. The increase in the share capital became necessary for continuing these members and recover the loans from them. The Administrator also admitted 19, 110 members between 10.2.1992 and 31-8-1992 much before the Supreme Court directed that no members shall be enrolled after 13.10.1992.

The total number of members including the disputed "members" is 50,315. The Administrator called a special general body meeting on 3-1-1993. The general body by a resolution, amended byelaw No. 4 and raised the authorised share capital to Rs. 25,00,000/- which would accommodate shares allotted to the members in excess of the share capital. The amended bye-law No. 4 not only raised the share capital to Rs. 25,00,000/- but also made the increase in the share capital effective retrospectively from 15-9-1990. This amendment to the bye-laws is impugned in OP 268 of 1993.

3. O. P. 12423 of 1992 filed on 28-9-1992 is for a direction to the Joint Registrar of Co-operative Societies, and the Administrator of the society to delete from the register of members, 19123 members who were allotted shares in excess of the share capital of the society. But the general body of the society amended bye-law No. 4 retrospectively subsequent to the filing of this petition and raised the share capital to Rs.25,00,000/-. Therefore the grievance of the petitioner based on the share capital did not survive. O. P. 12423 of 1992 has thus become infructuous. Thereafter on 6-1-1993 the petitioners filed O. P. 268 of 1993. O. P. No 12423 off 1992 has, therefore, to be dismissed. The order which is made in this judgment governs O. P. 268 of 1993 in which the question set out above arises.

4. Before considering the question arising in this petition, the nature of the byelaws needs to be considered. Bye-laws of a co-operative society partake the character of Articles of Association of a company registered under the Companies Act. They constitute a contract between the society and its members Like articles of association of a company, the bye laws of [a society bind the members to the tame extent as if they has been signed and sealed by each member contained covenants on the part of each member to observe all provisions (Palmer''s Company Law, 23rd Edition, Page 162). This fundamental character of the

byelaws determines the capacity of the members of a society to make, or alter the nature of their relationship with the society, subject of course to the other provisions of law and the rules.

5. The general body of a society is the repository of the ultimate or final authority of a society. The exercise of the final authority is, however, subject to the previsions of the Act, Rules and the byelaws (Section 27 of the Act) Thus the general body, may do every act in exercise of its authority. That is why the society has been clothed with the power "to do all things necessary for the purpose of which it was constituted" (Section 9 of the Act). The only limitation on the exercise of this final authority by the general body is that it shall not transgress the Act, rule and the byelaws.

6. Is there any limitation on the amending power of the general body? The bye-laws themselves do not place any limit. Sections 7 and 12 are relevant Registration of bye-laws which makes bye laws valid is governed by Section 7. The only limitation is that bye-laws shall not be contrary to the provisions of the Act and the Rules. Section 12 also lays down that amendment to bye-laws shall not be valid unless registered under the Act. No limitation on the authority of the general body to amend is discernible. Section 7 is based on the basic assumption that it is the society that may prepare byelaws. The registrar may register them if they fulfill the conditions laid down therein. Section 12, which deals with amendment to byelaws reiterates that the amendment too shall comply with the conditions laid down in Section 7 which governs to the registration of original bye-laws. Since both these sections place no limitation on the authority of the general body to amend bye-laws, it is reasonable to hold that the general body may propose any amendment, provided it is within the law.

7. The above proposition about the authority of the general body to make and amend the byelaws is not in dispute. What is disputed is the authority of the general body to make the amended bye-laws operative retrospectively. This question is considered in paragraphs 9-13 below.

8. Before considering the power of the general body of a co-operative society to amend its bye-laws retrospectively, the law in regard to the amendment of Articles of Association of companies may be noted.

The power of the general body of the members of a company to amend the article of association with retrospective effect has been accepted by judicial decisions relating to corporations Thus in Allen v. Gold Reefs of West Africa Ltd. ((1900) 1 Ch. 656) and Sidebottom v. Kershaw Leese & Co. (1920) 1 Ch. 154 the authority of the general body to amend the articles retrospectively was upheld. In Pepe v. City and Suburban Permanent Building Society (1893) 2 Ch. 311, alteration of the Articles of Association. of the company which took away the vested right of members was held valid. Therefore, the general law applicable to corporations recognise the authority of the general body to amend the articles retrospectively. The limitation on this power is that the power to amend the articles of association must be exercised bonafide for the benefit of the company Whether a given amendment is for the benefit of the company or the society would depend upon the nature of the amendment and the purpose for which it was passed. For instance, retrospective alteration of the articles of association of a company which enables the company to recover its debts from the members was held to be for the benefit of the company. (Pennington''s Company Law, Fourth Edition, Page 76) This is the background of the general law in regard to the retrospective amendments of articles of association of companies. A co-operative society is not different from a company. Against this background consider the provisions of the Act. As already stated, the only limitation on the power of the general body to amend its byelaws, whether prospectively or retrospectively, is that it shall conform to the requirements of Section 7 of the Act. The basic principle which underlies Sections 7, 9, 12 and 27 of the Act is that the power to make and amend byelaws belongs to the society. The Act places no fetters on this power of amendment except that the amendments shall conform to the provisions of the Act, Rules and the bye laws Section 13 of the Act is important. It expressly deals with amendment of bye laws of a society. The ordinary rule enacted by this section is that the amendment of the bye laws shall come into force on the date on which it is registered. However, this section also provides that the society may stipulate that an amendment shall come into operation on a particular day The words "unless it is expressed to come into operation on a particular day" employed in Section 13 are a manifestation of the principle that it is open to the general body of the society to bring the amendment into operation on a day chosen by it. This implies that the general body may express the amendment to come info operation on a day prior to the resolution.

The procedure regarding the amendment of bye laws laid down in Rule 9 also does not exclude retrospective amendments.

Learned counsel for the petitioners relied upon subsection (3) of Section 80 of the Act which enables the Government to make rules regulating conditions of service of the employees of the societies. By an amendment introduced with effect from 15-2-1988 the words "prospectively or retrospectively" were added in subsection (3) of Section 80. According to learned counsel, where the Act intended to permit retrospective rule making power it has expressly done so. Since such a power is not conferred on the General Body, it cannot amend the byelaws retrospectively. The argument erroneously assumes that the General Body seeds legislative authority to clothe it with the power Jo amend its byelaws. The General Body possesses the power to make its contract with the society under the general law. Such power is subject to the Act and the Rules. As long as the Act and the Rules do not take away such power, the General Body continues to possess it. There is no merit in this submission.

9. Therefore, I have no hesitation in holding that neither the Act nor the Rules limit the authority of general body in the matter of amendment of byelaws to

prospective operation only. Having regard to the general law and the provisions of the Act and the Rules I hold that the general body of a co-operative society possesses the power to amend its byelaws retrospectively. But it must be borne in mind that the exercise of such power is subject to limitations. Firstly the amendment, whether prospective or retrospective, must conform to the provisions of the Act and the Rules. Secondly the amendment, whether prospective or retrospective, must be bonafide and in the interest of the society.

10. Then the question is whether the amendment with which this petition is concerned is bonafide and in the interest of the society. The Administrator was confronted with the situation in which 1789 members had been admitted to membership. Shares were allotted at a time when the share capital of the company did not permit it. Loans of fifty six lakh rupees were granted to these "members". If these members were deprived of their membership on the ground that the allotment of shares was in excess of the share capital of the society, there was a risk of losing this amount. It is for this reason that the Administrator chose to call a general body meeting to consider the retrospective amendment so that the admission of these members is validated. Therefore the validation of the membership of 1789 members and those admitted by the Administrator himself, was for the benefit of the society. Allen v. Gold Reefs.of West Africa Ltd. ((1900) 1 Ch. 656) referred to at page 76 of Pennington''s Company Law, illustrates that the alteration which imposes a lien on the company''s shares for debts owed to it by its shareholders was for the benefit of the company. As in Allen v. Gold Reefs of West Africa Ltd. ((1900) 1 Ch. 656), in this case too, the retrospective operation of the amendment which validates the membership of the persons in question, enables the society to recover its debts. Therefore it is bonafide and for the benefit of the society.

11. Learned counsel for the petitioner relied upon the principle laid down la Janardhanan v. Joint Registrar (1990 (1) K. L. T 530) in that case the general body of the society had not amended the byelaws to raise the authorised share capital. But it had issued shares in excess of its share capital. The Joint Registrar of Co-operative Societies granted "permissive sanction" to the society to amend its byelaws to enhance the share capital. so as to accommodate, the share allotted in excess of the share capital, it was the Managing Committee who sought and the Registrar who granted "permissive sanction." Therefore the principle that emerges is that the managing committee shall not amend the byelaws and the Registrar shall not grant permissive sanction to amend the byelaws. The judgment does not lay down that the general body of a society cannot retrospectively amend its byelaws so as to validate membership which in the absence of share capital would be invalid. In paragraph 13 of the judgment 1 find recognition of the power of the general body to amend the byelaws. The judgment lays down that without the sanction of the general body an amendment cannot be made. The question whether general body can amend its bye laws retrospectively never arose in that case. No doubt as a result of the judgment the increase in the share capital "permissively" sanctioned by the

Registrar did not take effect thereby rendering the allotment of shares to a large number of members void. But such a result followed because the general body had not passed a resolution. In my opinion this case does not support the petitioners.

12. Learned counsel for the petitioners then relied upon the judgment of the Division Bench in Mathrubhumi Printing and Publishing Company Ltd. v. Vardhaman Publishers (73 Company Cases 80) with reference to what the Division Bench said at page 97. The judgment considered interpretation of Section 31 of the Companies Act Sub-section (2) of Section 31 of the Companies Act lays down that any alteration made in the articles of association pursuant to sub section (1) of that section shall "be as valid as if originally contained in the articles". Sub-section (2) of Section 31 was relied upon to urge that since the amended article is as valid "as if" originally contained in the articles of association, such amendment should be understood to operate retrospectively. This argument was negative. In the present case the question is different. The amendment has been expressly made retrospective by the general body. The judgment has no application to this case.

13. Learned counsel for the respondents urged the following points. They are:

(i) In view of the judgment of the Supreme Court in Co-operative Central Bank Ltd. and Others Vs. Additional Industrial Tribunal and Others, byelaws cannot be challenged by the petitioners.

(ii) If the petitioners seek a relief quashing the amendment to the byelaws made by the general body, in effect, they seek a relief ageist the society. In view of the judgments in P Bhaskaran v. Additional Secretary (1987 (2) KLT 903) (F B.) and Devadas v. Administrator (1992 (2) K. L. T. 955), such relief cannot be granted.

(iii) If the petitioners challenge the registration of the amended byelaws, such an order is appealable.

In view of my conclusions about the power of the general body to amend the byelaws retrospectively I do not think it necessary to consider these arguments made by learned Additional Advocate General.

14. In my opinion the respondent No. 3, the Society was within its authority in amending the byelaw No. 4 retrospectively and thereby validating the enrolment of members by the committee and the Administrator. The original petitions are dismissed.