
(1993) 01 KL CK 0022
In the High Court Of Kerala
Case No : O.P. No. 891 of 1993

P. N. Ravi

APPELLANT

Vs

Kottayam Co-op. Urban Bank and Others

RESPONDENT

Date of Decision : 29-01-1993

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1993) 1 KLJ 538

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

Bench : Single Bench

Advocate : R. Rajasekharan pillai, for the Appellant; D. Somasundaram, Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

G. H. Guttal, J.—The Kottayam Co-operative Urban Bank Ltd. the respondent No. 1 herein is currently under the control of the Administrator, the respondent No. 2 to this petition. Elections to the Managing Committee of the respondent No. 1 society are scheduled to be held on 7-2-1993. The respondent No. 3 to this petition is the Returning Officer. The Joint Registrar of Co operative Societies, Kottayam is respondent No 4 to this petition.

The petitioner a member seeks a direction to accept the petitioner's nomination as valid. The petitioner filed his nomination before 14-1-1993 which was the time stipulated by the Returning Officer. On 15-1-1993 at the time of scrutiny it was found that the petitioner as a guarantor had not discharged the debt of the principal debtor. Meanwhile on 14-1-1993 the petitioner claims to have paid off the debt of Rs. 465/- owed by his principal debtor to the respondent No. 1 bank. A copy of the receipt (Ext. P1 to the petition) was produced before the Returning Offices on 15-1-1993. The Returning Officer came to the conclusion that the petitioner was a defaulter and therefore ineligible u/s 28(1) of the Kerala Co-operative Societies Act read with Rule 44(1)(c) of the Kerala Co-operative Societies Rules and rejected the nomination paper.

2. Section 28 of the Act has obviously no application because the nomination has not been rejected on any of the grounds stated in sub-section (2) of Section 28. Rule 44 has the marginal note "disqualification of membership of committee." Sub-rule (1) of Rule 44 enacts that no member of the society shall be eligible for being elected or appointed as a member of the committee of the society if he has incurred any of the disqualifications set out in clause (a) to (k) of that sub-rule, it is sub-rule (1) of Rule 44 that would govern the present case because the challenge to the nomination has arisen at the stage of determination of the eligibility for being elected. Contrast this with sub-rule (2) of Rule 44 which enacts that a member of the committee shall cease to hold his office as such" if he incurs any of the disqualifications set out in clauses (a), (b), and (c) of that sub-rule. Sub-rule (2) of Rule 44 therefore applies after the elections to the committee. The proviso to clause (a) of sub-rule (2) of Rule 44 lays down that the disqualification under sub-clause (1) of clause (c) of sub-rule (1) shall be deemed to be accrued only after expiry of a period of one month from the date of receipt by the member concerned of a notice from the society demanding him to clear off the defaulted amount. In other words, the disqualification arising out of a default to pay the debt cannot arise unless the member concerned has failed to pay the debt in spite of a month's notice. As held in O. P. 16101 of 1992 by my learned brother Pareed Pillay, J. the proviso has no application to a case where a member seeks election to the managing committee. Therefore one thing is clear. The petitioner's case undoubtedly falls within clause (c) of sub-rule (1) of Rule 44 and not under sub-rule (2) of Rule 44 of the Act.

3. Assuming, however, that the petitioner has not discharged the debt of his principal debtor can it be held that the petitioner "is in default to the society?" Since the question of receipt of notice referred to in the proviso to clause (a) of sub-rule (2) of Rule 44 does not arise, the question as to whether the petitioner is a defaulter has to be decided without reference to the proviso to clause (a) of sub-rule (2) of Rule 44.

The question of default by the petitioner arose because he stood surety to another member. It is therefore necessary to consider the law in regard to the liability of a surety. The contract between the petitioner, his principal debtor and the creditor society is a contract of guarantee. A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the surety; the person in respect of whose default the guarantee is given is called the principal debtor and the person to whom the guarantee is given is called the creditor. Section 126 of the Contract Act which defines the contract of guarantee makes the surety liable "in case of his default meaning thereby that default of the principal debtor. It is thus clear that a contract of guarantee is a contract to perform the promise only in case of default by the principal debtor. The liability of the petitioner to pay the debt of his principal debtor arises only if the debtor fails to pay the debt. Contrast this with the liability under a contract of indemnity where under the promissory makes himself primarily liable and undertakes to discharge the

liability in any event. (See Indian Contract and Specific Relief Act Pollock and Mulla-Ninth Edition, Page 612) It follows, therefore, that the petitioner incurs no liability to pay the debt until his principal debtor fails to discharge the debt in this case it is nobody's case that the principal debtor fails to pay his debt and therefore the petitioner's liability arose. Therefore, in my opinion, even if the debt of the principal debtor remained undercharged the petitioner cannot be a defaulter.

4. The matter would be different if the principal debtor had failed to pay his debt and the petitioner had been called upon by the creditor to discharge his obligation under the contract of guarantee. This has been made clear by this Court in Abdul Rasheed v. State of Kerala (1988 (1) K. L. T. 190) where it was held that a guarantor or surety cannot be disqualified under clause (c) of sub rule (1) of Rule 44 of the Kerala Co-operative Societies Rules solely on the ground that the debtor has not discharged his debt unless the surety was informed of the default and there was a demand from the surety also. In this case, there is no such demand, therefore the petitioner who had no notice that his principal debtor had defaulted and that he was called upon to pay, cannot be disqualified under clause (c) of sub rule (1) of Rule 44.

5. In my opinion, therefore, the petitioner cannot be held to be a defaulter for two reasons. Firstly his liability did not arise until the principal debtor failed to perform his part of the contract with the creditor which has not occurred in this case. Secondly, even if the principal debtor had defaulted, on the authority of Abdul Rasheed v. State of Kerala (1988 (1) K. L. T. 190), the petitioner did not incur the disqualification under clause (e) of sub rule (1) of Rule 44 unless the creditor informed him of the fact and demanded the payment of debt.

6. Learned counsel for the respondents urged on the authority of Vadakkanchery K S. Sangam v. Joint Registrar (1984 K L. T, 477) that the discretionary remedy under Article 226 of the Constitution cannot be invoked In a case where the only dispute is about the rejection of the nomination paper. The judgment in Vadakkanchery K. S. Sangam v. Joint Registrar (1984 K, L. T. 477) also held that in cases of patent illegality and lack of jurisdiction the courts could interfere under Article 226 of the Constitution of India. In Anthrayose P. K. v. Returning Officer & Others (1992 (2) KLT 491) a Division Bench of this Court held that in cases of patent errors, jurisdiction under Article 226 of the Constitution of India can be resorted to. Similarly in Devi v. Commissioner & Secretary to Govt. (1991 (1) K. L. T. 819) and Damodaran v. Joint Registrar (1989 (1) K. L. T. 858) this Court did interfere when it was found that the nomination papers were rejected on patently illegal grounds.

7. In view of my finding recorded in paragraphs 3, 4, 5 and 6 above It is unnecessary to decide whether the petitioner in fact paid off the debt on 14th January, 1993.

8. In my opinion the petitioner cannot beheld to be a defaulter within the

meaning of clause (c) of sub-rule (1) of Rule 44. The Returning Officer committed a grave error of fundamental character. The rejection of the nomination of the petitioner is patently illegal. For all these reasons the petition is allowed. The Returning Officer shall accept the petitioners nomination as valid.