

(2009) 08 KL CK 0005

In the High Court Of Kerala

Case No : Writ Petition (C) No. 22080 of 2009

Rajan

APPELLANT

Vs

Electoral Officer

RESPONDENT

Date of Decision : 12-08-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 4 ILR (Ker) 357 : (2009) 3 KLT 1046

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : D. Somasundaram, for the Appellant; M. Sasindran and K.S. Mohammed Hashim, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Antony Dominic, J.—Petitioner is a member of the 3rd respondent Co-operative Bank. Ext.P1 is the election notification issued by the 2nd respondent, scheduling election to the Board of Directors of the 3rd respondent on 16.8.2009. In terms of the schedule fixed in Ext.P1, preliminary voters list has been published on 24.7.2009. Objections were to be filed on or before 4 p.m. on 28.7.2009 and final voters list, was to be published at 11 a.m. on 30.7.2009.

2. Referring to Ext. P3 dated 17.3.2009, petitioner submits that as on that date, there were 11000 members in the 3rd respondent society. It is stated that in the General Body Meeting held on 25.3.2005, the bye laws were amended, enhancing the share value from Rs. 10/- to Rs. 50/-. The Society submits that, as provided in Section 12 of the KCS Act, the amendment was registered on 18.9.2006. According to the petitioner since individual notices as contemplated u/s 11(2) of the Act calling upon the members to pay enhanced share value was not given about 5000 members could not pay the enhanced share value.

3. In view of this, representations were made to the Assistant Registrar and also to the Joint Registrar. Accordingly, orders were passed and Ext.P5 is the order

passed by the Assistant Registrar on 29.6.2009, directing that the 33 complainants who had approached him be permitted to pay the enhanced share value and allowed to exercise their voting rights in the election. That order of the Assistant Registrar was challenged before this Court in W.P.(C), No. 20733/09 resulting in Ext.P7 judgment dismissing the Writ Petition.

4. Petitioner states that despite this, Ext.P5 order was not complied with and therefore he again complained to the Joint Registrar. He also approached this Court complaining that the Joint Registrar was not considering the representation, by filing W.P.(C). No. 19441/09, resulting in Ext.P6 judgment directing the Joint Registrar to deal with the complaints.

5. Accordingly, by Ext.P8 notice, hearing was fixed by the Joint Registrar at 2 p.m. on 28.7.2009. It is stated that the date fixed for filing objections to the preliminary voters list published on 24.7.2009, was on 28.7.2009. It is submitted that the petitioner reported at the office of the first respondent for filing his objections to the preliminary voters list but as the first respondent was not in office, though he waited till afternoon, he could not file the objections. It is stated that, in order to appear before the Joint Registrar for the hearing pursuant to Ext.P6 judgment, he had to leave the office of the first respondent. The Joint Registrar heard the parties and passed Ext.P9 order, directing that 33 persons who had complained to the Assistant Registrar should be allowed to pay the enhanced share value and exercise their voting rights.

6. Petitioner submits that on 29.7.2009 he again approached the first respondent and despite the lapse of time for filing objections to the preliminary voters list, Ext.P10 objection was filed and that the same was accepted. However, it is stated that without considering the objections raised in Ext.P10 filed by the petitioner, the first respondent published the final voters list on 30.7.2009. In the final voters list, 5323 members, who had not paid share value until then were excluded. In this Writ Petition what the petitioner submits is that, so long as individual notices as contemplated u/s 11(2) of the Act have not been given to the members requiring them to pay the enhanced share value, irrespective of whether payment has been made or not, all members of the society are entitled to exercise their voting rights in the election scheduled on 16.8.2009.

7. The counsel for the Bank submits that, the petitioner did not file a valid objection to the preliminary voters list. It is stated that, going by the schedule fixed in Ext.P1, objections ought to have been filed before 4 p.m. on 28.7.2009, that Ext. P10 objection dated 29.7.2009 was admittedly filed only on 29.7.2009 and that therefore, the first respondent had no obligation to consider the objections. As regards the claim of the petitioner that since individual notice u/s 11(2) was not given, irrespective of whether the enhanced share value has been paid or not, all members should be allowed to exercise their voting rights, counsel for the Bank contends that Section 11 is irrelevant, where a Society enhanced its share value by amending its bye laws. It is also contended that in view of the provisions contained u/s 19 read with Rule 28, those who have not

paid the share value before 60 days of the polling, are not entitled to exercise their voting rights. In this context, counsel placed reliance on the judgment of this Court in *Jose v. Registrar of Co-operative Societies* 1992 (2) KLT 673. Another contention raised by the counsel for the Bank is that election process having commenced, this Court should not exercise its power under Article 226 of the Constitution and interfere with the election process and the petitioner should be relegated to avail of the statutory remedies that are provided.

8. I have considered the submissions made by both sides.

9. The first question to be considered is whether the contention raised by the counsel for the petitioner that since individual notices as contemplated u/s 11(2) of the Act have not been given, all members of the society including those who have not paid the enhanced share value are entitled to exercise their voting rights. While answering this question, the scope of Section 11 of the K.C.S. Act has to be considered. Referring to Ext.P7 judgment, learned Counsel for the petitioner contended that this Court has already upheld the mandatory nature of Section 11. However having regard to the fact that in the judgment in W.A. No. 1762/09 filed against Ext.P7 judgment, the question regarding the applicability of Section 11(2) of the Act, has been left open, the findings in the judgment will not stand in way of this Court in considering the contention raised by the counsel for the Bank.

10. Section 11 of the Act provides that subject to the provisions of the Act and the Rules, a Society may by amendment of its bye- laws, change the form or extent of its liability. Sub-section (2) provides that when a Society has passed a resolution to change the form or extent of its liability, it shall give notice thereof in writing to all its members and creditors and that notwithstanding the provisions in Section 24 or any bye-laws or contract to the contrary, any member or the creditor shall, during the period of 2 months from the date of service of notice has the option to withdraw the shares, deposits or loans as the case may be. Sub-section (3) provides that any member or creditor who does not exercise the option u/s 11(2) within the time specified therein shall be deemed to have given his asset to the change. Sub-section (4) deals with the registration of the amendment. The effect of Section 11(1) to (3) is that by an amendment to its bye laws, the Society can change the form or extent of its liability. Once a resolution to the above effect is passed, notwithstanding Section 24 or bye-laws or the contract to the contrary, notice in writing shall be given to all members and creditors and within two months from the date of service of such notice, it will be open to such member or creditor to withdraw his shares, deposits or loans as the case may be. Rule 12 of the K.C.S. Rules deals with the procedure regarding the change of liability. This rule provides that without prejudice to Rule 9 which deals with the procedure regarding the amendment of the bye-laws, no amendment to the bye laws of a society changing its liability from un-limited to limited u/s 11 shall be registered unless the amendment has been approved by a resolution passed by 2/3 majority of the members present and voting in the

General Body Meeting specially called for the purpose and the claims of all the members and creditors who have exercised their option in terms of Sub-section (4)(b) of Section 11 have been satisfied.

11. A reading of Section 11 of the Act in the light of Rule 12 therefore indicate that Section 11 and the individual notices as contemplated u/s 11(2), cannot have any relevance when the Society enhances its share value. In view of Rule 12, Section 11 and the change of liability mentioned therein, is the change of liability from unlimited to limited and that to, only in respect of societies with unlimited liability, which were in existence at the time when the Act came into force and are continuing to function as such, in view of the proviso to Section 5(1) of the Act.

12. Admittedly, the 3rd respondent was incorporated under the Kerala Co-operative Societies Act, 1969 and in terms of Section 5 of the Act, registration of a Society under the Act is possible only with limited liability. Further the rights and liabilities of members are provided only in Chapter III of the Act. In the light of all these, the necessary inference is that Section 11 has no relevance when a society enhances its share value, as in the instant case. Therefore, the contention of the learned Counsel for the 3rd respondent Bank, which is duly endorsed by the learned Government Pleader, deserves acceptance and I do so.

13. In this case, admittedly, a substantial number of members have not paid the enhanced share value even as on the date of publication of the final voters list. If so, going by the provisions contained in Section 19 read with Rule 28, such members cannot have voting right. This position has been upheld by this Court in the judgment in Jose v. Registrar of Co-operative Societies 1992 (2) KLT 673, para 7 of which reads as under:

Bye-laws of a Co-operative Society cannot be relegated to secondary importance. So far as the society is concerned, the bye-laws are in the nature of Article of Association of a company incorporated under the Companies Act (See Co-operative Central Bank Ltd. and Others Vs. Additional Industrial Tribunal and Others, . Though they do not have the force of a statute, it is binding on all the members of the society. As the amendment has been effected only by the will of the General Body of the Society, the bye-laws of the Society bind the petitioners. As Clause 7 specifically says that at least one share should be taken by a member and as the bye-laws of the Society do not exempt the existing members like the petitioners from the payment of the enhanced amount towards the share their contention that they are not liable to pay the same cannot be accepted. Rule 28 is also a bar to the petitioners in advancing their contention that they are not liable to pay the enhanced share amount. Rule 28 makes the position clear that a member of the Society shall be eligible to vote at the meeting fixed for any election to the Committee of that society, unless 30 days prior to the date of such meeting he acquires the number of shares for membership as may be provided in the bye-laws of the society of which he is a member. As the petitioners have not paid the amount to become A class members as provided

under the bye-laws, they cannot challenge Ext.P2 voters" list.

14. Necessarily, therefore the exclusion of the members who have not paid the enhanced share value from the final voters list needs to be upheld. However, this exclusion cannot apply to those among the 33 members, who have paid the enhanced share value as directed in Exts.P5 and P9 orders passed by the Assistant Registrar and the joint Registrar, since these orders have become final.

15. Next contention that deserves consideration is whether the Electoral Officer can be faulted for not dealing with the objections filed by the petitioner. Admittedly, as per the schedule fixed in Ext.P1 objections ought to have been filed before 4.p.m. on 28.7.2009. Going by the pleadings in this Writ Petition, though the petitioner has given his own reasons to justify the delay, Ext.P10 objection was filed only on 29.7.2009. The justification offered for this belated filing of objection is that the Electoral Officer was not available in the office at the time when the petitioner reported there on 28.7.2009. In my view, even if the Electoral Officer was absent, nothing prevented the petitioner from delivering his objections in the office of the Electoral Officer and further, there is no material available to conclude that the Electoral Officer was absent in the office. Whatever that be, the Electoral Officer could not have acted against the schedule fixed in Ext.P1 and if so the belated objection filed by the petitioner on 29.7.2009 could not have been considered.

In the light of the above, the Writ Petition merits only to be dismissed and I do so.