
(1969) 01 KL CK 0006

In the High Court Of Kerala

Case No : Original Petition No. 1127 of 1967

The President, the Commonwealth Co-operative Society Ltd.,
Ernakulam

APPELLANT

Vs

The Joint Registrar (General) of Co-operative Societies,
Trivandrum and Another

RESPONDENT

Date of Decision : 09-01-1969

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1971 Ker 34

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : K. Chandrasekharan and T. Chandrasekhara Menon, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

K.K. Mathew, J.—The petitioner challenges an order passed by the Joint Registrar of Co-operative Societies u/s 51(1) of the Travancore-Cochin Co-operative Societies Act, 1951 (Act 10 of 1952), hereinafter referred to as the Act, winding up the co-operative society in question and appointing a liquidator to manage its affairs. The appeal preferred before the Government against the order was dismissed by Ext. P2 order.

2. The only contention raised by the petitioner is that the society should have been given notice of the proceeding to wind it up and as no such notice was given, the proceeding is bad. Section 51(1) of the Act is as follows:

"If the Registrar, after an enquiry has been held u/s 45 or after an inspection has been made u/s 46 or on receipt of an application made by three-fourths of the members of a registered society, is of opinion that the society ought to be wound up, he may issue an order in writing directing it to be wound up, and when necessary appoint a liquidator for the purpose and fix his remuneration."

It is contended that though the Act does not specifically provide for notice being given to a society, rules of natural justice require such a notice before an order is passed under the sub-section.

3. In *Shri Bhagwan and Another Vs. Ram Chand and Another*, the Supreme Court said that an obligation to act judicially may in some cases be inferred from the relevant statute and its material provisions, that in such a case, the authority or body must act in accordance with the principles of natural justice before exercising its jurisdiction and its powers; that the obligation to follow the principles of natural justice need not be expressly imposed and that power to determine questions affecting the rights of citizens would impose the limitation that the power should be exercised in conformity with the principles of natural justice.

4. In *Cooper v. Wandsworth Board of Works* 1863) 14 CBNS 180 under an Act of 1855 it was provided that no one might put up a building in London without giving seven days' notice to the Local Board of Works. If any one did so, it was provided, that the Board of Works might have the building demolished. A builder, nevertheless, began to build a house in Wandsworth without having given the requisite notice, and when his building had reached the second storey, the Board of Works sent men late in the evening who demolished it. The Board did what the Act said they might do in exactly the circumstances in which the Act said they might do it. And their action was, of course, purely administrative. Nevertheless, the builder brought a successful action for damages for the injury to his building, and won it merely on the ground that the Board had no power to act without first asking him what he had to say for himself. Erie, C. J. said:--

"I think the Board ought to have given notice to the plaintiff and to have allowed him to be heard. The default in sending notice to the Board of the intention to build, is a default which may be explained. There may be a great many excuses for the apparent default, The party may have intended to conform to the law. He may have actually conformed though by accident his notice may have miscarried I cannot conceive any harm that could happen to the District Board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss. I fully agree that the Legislature intended to give the District Board very large powers indeed: but the qualification I speak of is one which has been recognised to the full extent. It has been said that the principleis limited to a judicial proceeding, and that a District Board ordering a house to be pulled down cannot be said to be doing a judicial act I do not quite agree with that; I think the appeal clause would evidently indicate that many exercises of the power of a District Board would be in the nature of judicial proceedings."

Byies, J. said:--

"It seems to me that the Board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's case. 1723 88 ER 111 and ending with some very recent cases, establish that, although there are no positive words in a statute, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature."

5. Section 4 of the Act provides for registration of a co-operative society and Section 24 says that on registration it will become a body corporate. You cannot visualise an act of a more serious nature to a "person", than the one which will inevitably put an end to his or its very existence. Dissolution is the ultimate consequence of an order of winding up. That is made clear by Section 54(1), which states:

"When the affairs of a registered society for which a liquidator has been appointed u/s 51 or Section 52 have been wound up, or, where no liquidator has been appointed, after two months from the date of an order u/s 51, or after confirmation of such order in appeal, or after two months from the date of an order u/s 52, the Registrar shall make an order cancelling the registration of the society, and the society shall be deemed to be dissolved from the date of such order."

The passing of an order of winding up is analogous to the passing of capital sentence on an individual. In either case, if the order or sentence is carried out, the extinction of the "person" will be the result. Normally, a society will be wound up only for reasons connected with its functioning. The order impugned says:

"The enquiry revealed that the working of the society is quite unsatisfactory. At the time of enquiry there were 74 members with a paid-up share capital of Rs. 3,330/-. General Body meetings were not convened regularly. The only activity undertaken by the society is the running of Ration Shops and even this business is working on heavy loss. The members in general are not benefited by the society. The accounts have not been maintained properly and the affairs are managed by the Secretary, contrary to the provisions under the Act, Rules and bye-laws of the society. The financial position of the society is bad. The Committee and the members are not interested in the working of the society. The Enquiry Officer as well as the Deputy Registrar of Cooperative Societies, Ernakulam has therefore recommended to wind up the affairs of the society"

Every one of the reasons mentioned in the order might be capable of being explained if an opportunity for being heard were given to the society. The fact that an ex parte enquiry was conducted by a nominee of the Registrar u/s 45 of the Act and that the conclusions in his report were arrived at bona fide by him

would not guarantee the truth of his conclusions. Generally for adjudicating truth of adjudicative as distinct from legislative facts, notice and an opportunity of being heard are essential. I mean by adjudicative facts, in the context, those facts concerning a person on the basis of which an action is proposed to be taken, as whether he, or it, did, or did not, do a particular act. The question whether the society has committed the acts or is guilty of the omissions is a question of fact. An adjudication of the facts without notice and an opportunity of being heard, when the adjudication will have serious civil consequences to the society is against the principles of natural justice. And even if the statute does not expressly provide for notice, the justice of the common law will supply the omission and would require notice and an opportunity of being heard. No person shall be condemned without being heard. Even if the ultimate conclusion is to be formed on the basis of the subjective satisfaction of the Registrar, I can conceive of very many advantages in formation of his opinion if an opportunity of being heard is given to the society. The fact that the expression used in Section 51(1) is: "If the Registrar is of opinion, it does not per se negative a duty to act judicially.

6. In *Durayappah v. Fernando* 1967 All ER 152 the Privy Council said:--

"On the question of *audi alteram partem* the Supreme Court followed and agreed with the earlier decision of *Sugathadapa v. Jayasinghe*, 1958 59 NLR 457a decision of three judges of the Supreme Court on the same section and on the same issue, namely, whether a council was not competent to perform its duties. That decision laid down (at p. 471):

"as a general rule that words such as "where it appears" or "if it appears to the satisfaction of or "if the considers it expedient that" or "if the is satisfied that" standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially."

Their Lordships disagree with this approach. These various formulae are introductory of the matter to be considered and give little guidance on the question of *audi alteram partem*. The statute can make itself clear on this "point, and, if it does, *cadit quaestio*. If it does not then the principle stated by Byles, J. in 1863 14 CBNS 180 must be applied,"

It must be admitted that the great majority of decisions deal with cases where some deficiency or default on the part of the person affected has to be found. But the principle is that drastic powers cannot lawfully be exercised against particular people without giving them an opportunity to state their case.

7. It was argued that the petitioner filed an appeal and that the society had every opportunity to controvert the grounds on which it was wound up and therefore the fact that no notice or opportunity of being heard to the society was given before the order for winding it up was passed is of no consequence. In other words, it was said that as the petitioner took the opportunity to contest the validity of the grounds of the order in the appeal, the defect in the order for want

of the initial opportunity of being heard was cured.

8. In *Ridge v. Baldwin* 1963 All ER 66 Lord Reid and Lord Hodson held that a decision rendered contrary to the principle of natural justice of *audi alteram partem* was void and that in *Wood v. Woad*. 1874 LR 9 Exch 190 it was expressly so decided.

9. As between the parties to an order, the proposition that failure to follow the principle of natural justice of *audi alteram partem* would render the order void, was assumed to lay down the correct law by the Privy Council in 1967 All ER 152. The Privy Council there, said that the action is voidable only at the instance of the person aggrieved but yet is void *ab initio* if he elected to challenge it. "This is a confusing use of void or voidable" (See H. E. R. Wade --Administrative Law -- II Edition --page 95).

10. If an appeal lies from a decision rendered in violation of natural justice, and an appeal is preferred, the appellant does not lose his right to complain to a court of law of such violation, if on appeal the decision is confirmed and there was no failure of natural justice in the appellate authority. Thus in *Annamunthodu v. Oil Fields Workers Trade Union* 1961 All ER 621 Lord Denning delivering the judgment of the Privy Council said:--

"Even if the order of expulsion were capable of being affirmed or disaffirmed their Lordships cannot regard an appeal as an act of affirmance. On the contrary, it is a disaffirmance -- complaint against the order of expulsion."

11. In 1963 2 All ER 66 Lord Reid. Lord Morris and Lord Hodson held that by appealing to the Secretary of State, the appellant did not abandon his right to contend that the decision of the watch committee was a nullity. Lord Reid said that there was no general rule that when two remedies were open to an aggrieved person by going to a tribunal he put it out of his power to seek redress in a court of law. The appellant had not expressly waived his right to contend that the decision of the watch committee was a nullity; on the contrary, he had expressly reserved it. It should make no difference whether the occasion for the exercise of the power is personal default or an act of policy. Lord Morris said that the appellant in his appeal to the Secretary of State had expressly reserved his right to contend that the order of the watch committee was a nullity and therefore nothing done by the appellant or by the Secretary of State could give validity to a decision which was invalid. According to Lord Hodson, the answer to the argument based on the finality of the order passed by the Secretary of State was that the decision of the watch committee was at all times a nullity and nothing that was done thereafter by way of appeal could give it validity. Therefore if the decision rendered in violation of the principles of natural justice is void and is a nullity, the view expressed by Lord Hodson is unassailable. In fact, the judgment of Lord Morris shows that the question of validity of the decision under appeal to the Secretary of State was a very different one from the question whether on the merits the order should or should not have been passed

and that it would not have been unreasonable for the Secretary of State to require that the question of the validity of the decision should be decided first. Denning, L.J. put the matter very clearly in *Barnard v. National Dock Labour Board* 1953 2 QB 18:--

"So far as the decision of the appeal tribunal is concerned, it seems to me that, once the order is found to be a nullity, it follows, that the order of the appeal tribunal is also a nullity. The appeal tribunal has no original jurisdiction of its own; it cannot itself make a suspension order; it can only affirm or disaffirm a suspension order which has already been made. If none has been made because it is a nullity, the tribunal can do nothing."

So where a decision is null by reason of want of jurisdiction, it cannot be cured by any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal "but he is not bound to do so, because he is at liberty to treat the act as void; (see "Jurisdiction and Illegality" by Amnon Rubinstein).

12. It was argued for the respondents that Section 49 of the Act, which provides for supersession of a committee, expressly provides for notice to the committee sought to be superseded, and therefore, if Section 51 of the Act is silent on the question of notice the intention of the Legislature is that no notice to the society or an opportunity of being heard to it is necessary. I cannot accept the argument. I agree that so long as there is no "due process" clause in our Constitution, it is open to the Legislature to dispense with notice and an opportunity of being heard, even in the case of a proceeding which involves civil consequences to a person. But, as there is no express provision here dispensing with notice, the question whether notice and an opportunity of being heard should be given has to be decided on a consideration of the effect of the proceeding upon the society concerned.

13. The learned Government Pleader submitted that the Registrar wanted to ascertain the sense of the General Body in the matter and required the officers of the society to convene a General Body meeting but that they did not convene the meeting. The holding of a General Body meeting to ascertain the views of that body is not obligatory under the Act before passing an order winding up the society. It was open to the Registrar or a person authorised by him to have called a General Body meeting and ascertained its views, That was not done. So, no inference can be made from the fact that the officers of the society did not call a meeting of the General Body.

14. I quash Exts. P-1 and P-2 orders: This will not preclude the Registrar from taking proceedings for winding up the society, if he is so advised, after giving notice and an opportunity to the society to state its case.

15. I allow the petition, but without any order as to costs.