
(2016) 04 MAD CK 0149

In the Madras High Court

Case No : W.P. No. 26080 of 2013 & M.P. No. 2 of 2013

V. Thirulokachander

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-04-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Multi-State Cooperative Societies Act, 2002 — Section 51(1)

Citation : (2016) 4 MLJ 757

Hon'ble Judges : T.S. Sivagnanam, J.

Bench : Single Bench

Advocate : R. Viduthalai Senior Counsel for L.N. Praghasham, Advocates, for the Appellant; Sunita Kumari CGSC and V. Prakash Senior Counsel for P. Satheesh Kumar, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Sivagnanam, J.—The petitioner seeks for issuance of a Writ of Certiorari filed Mandamus, to quash the amendments which have been made to the by-laws of the third respondent Co-operative Society, as being inconsistent with the provisions of the Multi State Co-operative Societies Act, 2002, (hereinafter referred to as the "Act") and to set aside the registration granted by the second respondent to those amendments and for a further direction to reinstate the petitioner as Secretary and Chief Executive of the third respondent society.

2. A brief prelude about the petitioner and certain earlier proceedings would be necessary before considering the subject in issue in this Writ Petition. The petitioner was appointed as a Senior Inspector of Co-operative Societies on 15.07.1993. During 1997, the petitioner was appointed by direct recruitment as Secretary of the third respondent society and functioned as such till 2003. During April 2003, a Criminal complaint was registered against the petitioner, which was taken on file as S.C.No.193 of 2003, and the petitioner was convicted by the

Principal Session Judge, City Civil Court, Chennai. The petitioner preferred an appeal against the said order before this Court and the sentence was suspended. By order dated 19.01.2005, the petitioner was placed under suspension on the ground that he has been convicted of a criminal charge and the conviction has not been stayed by the High Court. On a challenge made by the petitioner to such order of suspension in W.P.No.3657 of 2005, the same was stayed by order dated 28.04.2005. The Criminal Appeal No.1546 of 2003, was allowed by judgment, dated 27.04.2010 and there was no further challenge to the said decision. Thus, the petitioner was acquitted of the criminal charge. The Writ Petition which was filed challenging the order of suspension was allowed by order dated 30.09.2011. Therefore, the petitioner's contention is that he should be reinstated as Secretary and Chief Executive of the third respondent society. However, the Board of the third respondent society by resolution, dated 21.10.2011, increased the cadre strength of Secretaries from one to four and the fifth respondent was promoted as one of the Secretaries by order dated 02.01.2012. The Management of the third respondent society filed a Writ Appeal in W.A.No.2274 of 2011, against the order in W.P.No.3657 of 2005, which was dismissed by the Hon"ble Division Bench by judgment dated 05.01.2012. Thereafter, the Management of the third respondent society sent a letter to the petitioner calling upon him to join duty on 29.03.2012 and on the petitioner joining duty, he was placed under suspension on the same day on different set of charges. Alleging that such order of suspension is wilful disobedience of the order in W.P.No.3657 of 2005, the petitioner filed Contempt Petition No.782 of 2012. In the mean time, the Management had filed a Special Leave Petition before the Hon"ble Supreme Court against the judgment in W.A.No.2274 of 2011 and the Special Leave Petition was dismissed by order dated 17.08.2012. It is thereafter, the petitioner joined duty on 28.08.2012 and he was posted as Secretary-II. In the light of the same, the Contempt Petition was closed by order dated 31.08.2012 and it is thereafter on 24.11.2012, the Board passed a resolution amending various provisions of the by-laws of the society.

3. The petitioner sent a lawyer's notice to the second respondent calling upon him not to approve the amendments to the by-laws and the petitioner also moved for re-opening the Contempt Petition No.782 of 2012. Nevertheless the second respondent approved the amended by-laws, which is questioned in this Writ Petition. The Contempt Petition, which was reopened ended in a punishment being imposed on the President of the third respondent society, which was challenged before the Hon"ble Division Bench in Contempt Appeal No.6 of 2013, which was allowed by judgment dated 16.08.2013, imposing a cost of Rs.5,000/- on the petitioner. The petitioner was unsuccessful in a challenge made to the said order before the Hon"ble Supreme Court, as the Special Leave Petition was dismissed. In the background of these facts, the petitioner has filed this Writ Petition challenging the amendments made to the by-laws of the third respondent society, the registration of those amendments as granted by the second respondent and for a direction that he should be only Secretary of the

society and the Chief Executive.

4. The third respondent is a Multi State Cooperative Society governed under the provisions of the Act and the Rules and Regulations framed thereunder. The by-laws, which the petitioner seeks to question in this Writ Petition are the amended by-laws 2(h), 11, 14(a), 14(d), 16(i), 23, 25(1), 27(b), 33, 34, 36(d), 38(l) and insertion of 31(7) as being unconstitutional, ultra vires the Parent Act, arbitrary and null and void.

5. Mr. R. Viduthalai, learned Senior counsel appearing for the petitioner submitted that there cannot be more than one Chief Executive for a society as per Section 51 of the Act and the amendment of the by-laws providing for more than one Secretary is repugnant to the provisions of the Act. It is further submitted that the impugned amendment suffers from malice in law, as it was brought out with ulterior motive to deny reinstatement of the petitioner, as Secretary Cum-Chief Executive to which post, he is entitled to be reinstated by virtue of the orders passed in the earlier round of litigation. It is further submitted that the increase of cadre strength from one Secretary to four is only a ruse to increase the number of posts of Secretary without any rationale or nexus with the object sought to be achieved. In this regard, the learned Senior counsel referred to the definition of by-laws in Section 3(c); definition of Chief Executive in Section 3(e); Section 10 regarding the scope and ambit of the by-laws of the society; Section 11, regarding amendment of bylaws; Section 12, coming into force of the amended by-laws; and Section 51 relating to the appointment of the Chief Executive and his qualifications.

6. Elaborating on his submissions, it is argued that the Chief Executive means a person appointed under Section 51 of the Act and hence, his appointment is governed by the Act, more particularly, by Section 51 thereof and the impugned amendment renders the appointment of the Chief Executive as an appointment made as per the by-laws and hence, ultra vires the Act. It is further submitted that bylaw 2(h) creates plurality of post of Secretary, which is inconsistent with Section 51 of the Act and in particular, when singular term is used in Section 51 with regard to the Chief Executive and there can be only one Secretary for the society. Emphasis was placed on the expression "a Chief Executive" and it is argued that there cannot be more than one Chief Executive of the society, nor there can be more than one Secretary of the society. Further, it is submitted that the by-laws prescribing a designation applicable to multiplicity of persons, as a designation for Chief Executive and thereby, enabling the choice to be made by the General Body instead of Board to choose the actual appointee to exercise the powers of the Chief Executive would be in violation of the Act. Anticipating a challenge to the maintainability of the Writ Petition, it is argued that the decision rendered by the Hon'ble Larger Bench of this Court in the case of K. Marappan v. The Deputy Registrar of Co-operative Societies, Namakkal Circle, Namakkal and another reported in (2006) 4 CTC 685, relates to a society registered under the Tamil Nadu Co-operative Societies Act and not under the Multi State Co-operative

Societies Act and in the light of the recent decision of the Hon'ble Supreme Court in the case of Akalakunnam Village Service Cooperative Bank Ltd., & anr., v. Binu. N & Ors., reported in (2014) 9 SCC 294, the Writ Petition would lie against the Co-operative Society, when the registration of the amendments to the by-law is a statutory function discharged by the competent authority. It is further submitted that after setting aside the order of suspension passed against the petitioner, he is entitled to be reinstated as Secretary Cum-Chief Executive and amendments were made to the by-laws after the order of reinstatement was passed by the Court with a view to deny the petitioner the post of Chief Executive of the society. Thus, the legal submissions made by the learned Senior counsel are broadly under three heads, namely, that the impugned by-laws are ultra vires the provisions of the Act, the action of the Management of the third respondent society is actuated by malice in law and that the action is arbitrary.

7. In support of the contention that the action is ultra vires, reliance has been placed on the decision of the Hon'ble Supreme Court in the case of M.T. Khan & Ors., v. Govt., of A.P., and Anr., reported in (2004) 2 SCC 267; Global Energy Limited & Anr., v. Central Electricity Regulatory Commission reported in (2009) 15 SCC 570; Union of India & Ors., v. S.Srinivasan reported in (2012) 7 SCC 683; Vinod Kumar v. State of Haryana & Ors., reported in (2013) 16 SCC 293. For explaining the meaning of "malice in law" reliance has been placed on the decision of the Hon'ble Supreme Court in the case of Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors., reported in (2010) 9 SCC 437; State of Tamil Nadu & Ors., v. K.Shyam Sundar & Ors., reported in (2011) 8 SCC 737; Ratnagiri Gas & Power Private Ltd., v. RDS Projects Ltd & Ors., reported in (2013) 1 SCC 524; Reliance was also made to the decision in the case of Shreya Singhal v. Union of India reported in (2015) 5 SCC 1, to demonstrate as to what are arbitrary actions. On the above submissions, the learned Senior counsel sought for setting aside the impugned amendments to the by-laws and reinstating the petitioner as the only Secretary and Chief Executive of the third respondent Society.

8. Mr. V. Prakash, learned Senior counsel appearing for the respondent society submitted that the Writ Petition is not maintainable, as the petitioner has an effective alternate remedy and without exhausting the same, he could not have filed the present Writ Petition. Furthermore, as per the judgment in the case of Marappan, (supra), Writ Petition is not maintainable. It is further submitted that the petitioner for the first time, was placed under suspension on 19.02.2001 by the then President of the society and the second occasion on 20.12.2001 on an allegation of misappropriation of funds and on the third occasion namely, on 19.05.2005, based on the conviction by the Criminal Court. The petitioner challenged the order of suspension by filing W.P.No.3657 of 2005, in which the President of the society was not impleaded as a party and an order of stay was granted on 27.04.2005. Though, an order of stay was granted, the petitioner did not report for duty for nearly five years and one Mr. Jayakumar functioned as Secretary incharge. After, the fourth respondent took charge as President of the

society, the fifth respondent was posted as Secretary incharge after Jayakumar was relieved by order dated 11.07.2009. The petitioner was acquitted of the criminal charge by this Court by judgment dated 27.04.2010. The Writ Petition challenging the order of suspension was allowed and the Writ Appeal filed by the Management was dismissed and the Special Leave Petition against the said judgment was dismissed by the Hon'ble Supreme Court on 17.08.2012. In the mean time, the petitioner filed Contempt Petition and the Management of the society paid the petitioner a sum of Rs.31,35,262/- and the order of suspension was revoked. It is pointed out that the petitioner all along did not report for duty for more than four years. The Contempt Petition, which was closed by recording compliance was re-opened on mentioning and the designation given as Secretary-I, II, III, IV was removed by resolution, dated 25.03.2013. In the Contempt Petition, the President of the society was punished, however, the said judgment was set aside on appeal in Contempt Appeal No.6 of 2013 and fine of Rs.5,000/- was imposed on the petitioner by judgment, dated 16.08.2013. It is thereafter, this Writ Petition has been filed on 17.09.2013 and in the mean time, since the petitioner did not join duty, the fifth respondent was posted as the Chief Executive on 23.12.2013. The petitioner filed a Review Petition in R.A.No.200 of 2013, to review the judgment in Contempt Appeal, which was dismissed by the Hon'ble Division Bench by order dated 18.03.2014, and the Special Leave Petition was also dismissed by the Hon'ble Supreme Court on 04.08.2014. It is further submitted that the amendments to the by-laws are perfectly valid and justified, it has been done taking into consideration the requirement of the society and the amendments were placed before the larger democratic body i.e., Representative General Body consisting of more than 200 members empowered to seek amendment and based on such resolution, the by-laws were amended. The increase in cadre strength exclusively falls within the domain of the third respondent society and that has been done after following proper procedure strictly in adherence to the provisions of the Act and Rules framed thereunder and there is no malafide or any vindictive action as sought to be projected by the petitioner.

9. The learned Senior counsel appearing for the second respondent submitted that the amendment to clause 2(h) of the bylaws of the society was found consistent with the provisions of the Act and the same was registered. It is further submitted that Section 49(2)(e) of the Act, empowers the Board of the society to make provisions for regulating the appointment of employees of the society, and their scales of pay, allowance and other conditions of service, including disciplinary action against such employees and therefore, the society can decide the mode/pattern of appointment of its employees and an addition that one among the Secretaries shall be appointed as Chief Executive is well within the power of the Board of the society. Therefore, it is submitted that the amendments are in consonance with the provisions of the Act, it has been passed in the Annual General Body meeting held on 10.12.2012, which is ultimate authority of the society in terms of Section 38(2) of the Act. With regard

to the representation sent by the petitioner through his Advocate, the same was forwarded to the society as the powers of the appointment of Chief Executive falls under the powers and functions of the Board of Directors of the society. In this regard, the letter sent by the Deputy Director (Co-operation), Government of India, Ministry of Agriculture (Department of Agricultural & Cooperation), New Delhi, dated 23.01.2013, was referred to.

10. Heard the learned counsels appearing for the parties and perused the materials placed on record.

11. The first aspect of the matter, which requires to be considered is with regard to the maintainability of the Writ Petition. Placing reliance on the decision of the Hon"ble Larger Bench of this Court in the case of Marappan(supra), it is submitted that the Writ Petition is not maintainable. Countering the said objection, the learned Senior counsel referred to the decision in the case of Akalakunnam Village Service Cooperative Bank Ltd., & anr.,(supra), and submitted that Writ would lie against the co-operative society, when the duty enjoined by it is of a public nature or when there is infringement of any statutory rules by a cooperative society. The said decision arose out of a judgment from the High Court of Kerala by which the appeals filed by the appellant society were dismissed thereby the order passed by the Learned Single Judge allowing the Writ Petitions challenging notification inviting applications for appointment to the post of Attender/Peon were allowed. The Hon"ble Supreme Court while examining the correctness of the judgment of the said High Court, pointed out that the circulars issued by the Government and the Registrar of Co-operative Societies have statutory force and specifically stipulate the procedure for conducting selection. Finding that there has been a violation of the circular issued by the Registrar which has statutory force in terms of Section 69 of the Kerala Cooperative Societies Act, 1969, held that the appellants therein need not be driven to avail the alternate remedy under Section 69 of the said Act. In my view the decision does not render any support to the case of the petitioner and clearly distinguishable on facts.

12. In order to maintain this Writ Petition, the petitioner has contended that the second respondent having approved the amendment, exercising statutory power, the Writ Petition would be maintainable, but essentially the challenge is to an amendment, which was proposed by the Management placed before the General Body of the society which being the competent body to consider such proposal approved the same and it was forwarded to the second respondent for approval. Thus, essentially, what is being questioned is the decision taken by the General Body of the third respondent society and such decision cannot be amenable to challenge in a Writ Petition in particular on the grounds raised by the petitioner. Even assuming for arguments sake, since the second respondent exercises statutory power while considering the registration of the amendment, it has to be seen as to whether there is inconsistency between the amendments brought to the by-laws with that of the Parent statute (the Act).

13. The sheet anchor of the argument on behalf of the petitioner is by referring to the word "a Chief Executive" and it is submitted that plurality of the expression cannot be adopted and there can be only one Secretary and one Chief Secretary to the society. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of *M.T. Khan & Ors., v. Govt., of A.P., and Anr.*, (supra), where the challenge was to the appointment of the two Advocate Generals by the Andhra Pradesh Government. Emphasis was laid on the word "a" used in Article 165 of the Constitution of India and it was submitted that there can be only one Advocate General and the argument that singular would include a plural, was negated, when a reference was made to Section 13 of the General Clause Act, by pointing out that in Article 367 of the Constitution, the crucial words are "unless the context otherwise requires". It is submitted that Section 3 of the Multi State Cooperation Act), use the similar expression "unless the context otherwise requires". Therefore, it is the submission that the subordinate legislation namely, the by-laws as in the instant case cannot travel beyond the scope of the Act and it must confirm to the powers granted under the Act. To support such arguments, the decisions in the case of *Global Energy Limited & Anr., (supra)*, *Union of India & Ors., v. S. Srinivasan (supra)*, *Vinod Kumar v. State of Haryana & Ors.*, (supra), were relied on.

14. Un-amended by-law 2(h) defines Chief Executive to mean the Secretary of the society. After the amendment, Chief Executive has been defined to mean one among the Secretaries authorised by the Board of Management. This is stated to be impermissible in terms of Section 51(1) of the Act, which states that there shall be "a" Chief Executive of every Multi State Cooperation Society to be appointed by the Board and he shall be a full time employee of such Multi State Cooperation Society. The Multi State Cooperation Act has not defined "Chief Executive" of a Multi State Cooperative Society and what is contemplated under Section 51(1), that there should be a Chief Executive and the Act does not place an embargo on the society to restrict the number of posts of Secretary, since in terms of Section 49(2)(e), Board of Multi State Cooperation Society may exercise all such powers as may be necessary or expedient for the purpose carrying out its function under the Act and in terms of sub-section (2) of Section 49, without prejudice to the generality of the powers conferred under sub-section (1) of Section 49, such powers shall include the power to make provision for regulating the appointment of employees of the Multi State Cooperation Society, the scales of pay, allowances and other conditions of services, including disciplinary action against such employee. The society proposed an amendment to increase the cadre strength in the post of Secretary from one to four and this proposal was approved by the General Body of the society.

15. Furthermore, the second respondent has rightly stated that the power to make provision of regulating appointment of the employees is with the Board under Section 49(2)(e) of the Act. The contention raised by the petitioner that cadre strength was increased with a view to deny the petitioner the post of Chief Executive etc., as being a case of malice in law, has not been substantiated by

the petitioner.

16. The Hon"ble Supreme Court in the case of Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors.,(supra), has defined malice in law to mean something done without lawful excuse, it is an act done wrongfully and wilfully without reasonable or probable cause; a deliberate act in disregard to the rights of others and an act taken with an oblique or indirect objection. I find nothing on record, as placed by the petitioner, to bring about a case of malice in law, that too, attribute to a representative collective body namely Representative General Body consisting of more than 200 members, there is no specific allegation to establish "malice in law". Mere statement made by the petitioner that the action of the respondents has been done to reach a different end and it is a colourable exercise of power are mere statements made without any proof to substantiate the same. This Court may take note of the conduct of the petitioner, who has refused to join duty though the Court granted an order of interim stay of the order of suspension on 27.04.2005, and since then the petitioner did not report for duty, but has been paid more than Rs.31,00,000/- as wages pursuant to the order passed in the Contempt Petition. Hence, this Court finds there is no inconsistency in by-laws nor there is any repugnancy to the by-laws with that of the statute nor it is ultra vires of the provisions of the Act.

17. From the counter affidavit filed by the Secretary of the Society, it is seen that after the contempt proceedings were closed, the petitioner attended office on 31.08.2012, for two days and remained in the office for one to two hours and thereafter, he made representation seeking leave from 01.09.2012, which was not approved by the society and yet he still continued to be stay away to the duty and his absence is unauthorised. Therefore, the challenge to the by-laws by the petitioner, that too by filing this Writ Petition has to necessarily fail.

18. One more interesting fact, which has to be pointed out, could be culled out from the judgment of the Hon"ble Division Bench in Contempt Appeal No.6 of 2013. As mentioned above, this Appeal was by the President of the society against an order punishing him for wilful disobedience of the order in W.P.No.3657 of 2005, dated 30.09.2011. The petitioner in the Contempt Petition, expressed a grievance that his junior was posted as Secretary-I and he was posted as Secretary-II and as per the orders passed by the Writ Court, he should be reinstated in service as Chief Executive with all attendant benefits. The Hon"ble Division Bench rejected the contention of the petitioner by observing that when as per the reinstatement order, the petitioner was posted as Secretary-II and when all the attendant benefits were also given, unless it is brought to the notice of the Court that there is either loss of emoluments or loss of status, the Court cannot accept the case of the petitioner.

19. With regard to the change in designation and also cadre strength, the Hon"ble Division Bench held that these two aspects come within the prerogative of the Executive and an employee cannot have any say in such matters and he does not have any right to make an objection with regard to the same. Further,

the Hon"ble Division Bench noted that even the classification done as Secretary-I and Secretary-II has been removed by Board's resolution dated 25.03.2015. Therefore, the Hon"ble Division Bench held that there is no violation of the order passed in the Writ Petition. The Hon"ble Division Bench also considered the arguments of the petitioner that he should have been designated as Chief Executive as per Section 51 of the Act and it was pointed out that there is no direction in the Writ Petition to post him as Chief Executive and in the absence of such direction, the petitioner cannot claim that he should be posted as Chief Executive, when the post itself has been separately designated under Section 51 of the Act. Further, it was pointed out that if the petitioner had any grievance with regard to his non-posting as a Chief Executive, he should have taken appropriate steps before the appropriate forum, but will not give rise to contempt proceedings. Consequently, the contention that duties enumerated under Section 52 of the Act have to be allotted to him was also rejected.

20. In the light of the categorical finding recorded by the Hon"ble Division Bench in the said Contempt Proceedings, which has become final, as the Review Application filed to review the order was dismissed by order dated 18.03.2014 and the Special Leave Petition filed against the judgment in Contempt Appeal and the order in Review Application was dismissed by the Hon"ble Supreme Court by order dated 04.08.2014, the present attempt of the petitioner is to reopen a settled issue and to re-argue the case giving it a different colour, which the petitioner is not entitled to do. The findings regarding posting him as Secretary-II, the interpretation given by the petitioner to Section 51 of the Act were all rejected by the Hon"ble Division Bench and the judgment binds the petitioner. Therefore, the instant attempt of the petitioner to lay a challenge to the amended by-laws, which was tested and approved by the General Body and registered by the third respondent, amounts to a clear abuse of process of Court and therefore, the challenge made by the petitioner to the impugned bylaws on the grounds raised, has to be out rightly rejected.

21. For the foregoing reasons, the Writ Petition fails and it is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.