

(2014) 08 AHC CK 0104

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 45314 of 2014

Vandana Varma

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 29-08-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Co-operative Societies Act, 1965 — Section 128, 130, 2(o), 38, 38(1)

Citation : (2014) 9 ADJ 545 : (2015) 1 ESC 76 : (2014) 4 UPLBEC 3115

Hon'ble Judges : Vivek Kumar Birla, J;A.P. Sahi, J

Bench : Division Bench

**Advocate : Rohit Agarwal and Shashi Nandan, Advocate for the Appellant;
Dhirendra Singh and Nikhil Kumar, Advocate for the Respondent**

Judgement

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1. Heard Sri Shashi Nandan learned Senior Counsel assisted by Sri Rohit Agarwal learned counsel for the petitioners, Sri Nikhil Kumar for the respondent Nos. 5 and 6, Sri Dhirendra Singh for the respondent No. 7 through its alleged Director Sri Ashok and the learned Standing Counsel for the respondent Nos. 1 to 4. Learned counsel for the parties have agreed that the writ petition be disposed of finally at this stage itself as the respondents do not propose to file any counter-affidavits at this stage keeping in view the nature of the order that is proposed to be passed.

2. The contention raised by Sri Shashi Nandan, while questioning the impugned action of removal of the petitioners, who are office bearers of the Society and fall within the definition of "Officer", under the impugned orders dated 13.8.2014 and 21.8.2014, is to the effect that the exercise of powers under which such removal has been made does not fall within the jurisdiction of the Committee of Management of the Society, inasmuch as, the removal of the office bearers can only be done by proceeding to take action under Section 38 of the U.P. Cooperative Societies Act, 1965 and the rules framed thereunder. He submits

that the action in the present case has been purportedly taken by invoking Rule 115 read with Rule 453 and Rule 454 of the U.P. Cooperative Societies Rules, 1968 which is a malicious exercise of power that is colorable and unlawfully executed.

3. The contention is that none of the disqualifications have been incurred by the petitioners as envisaged under Rule 453 and therefore Rule 454 cannot be invoked by the respondent No. 7 for the removal of the petitioners in exercise of such powers. It is a colorable exercise of power and without any material to substantiate the same. He further submits that the procedure also prescribed for the same has not been followed inasmuch as if the action was sought to be taken for charges relatable to Rule 115 then in that event Section 38 is clearly attracted and a notice to that effect ought to have been given by the Society before proceeding to exercise any such powers.

4. Learned counsel submits that an agenda notice for a meeting of the committee is not a notice for the purpose of such exercise of powers under Rule 115, hence the impugned order suffers from manifest illegalities.

5. Sri Shashi Nandan further contends that in view of the law laid down by the two Division Benches of this Court in the case of Madan Pal Singh and another v. The Additional District Magistrate, Meerut and others, 1980 ALJ 1098 and the law laid down in the case of Kamil Kidwai v. State of U.P., 1992 (10) LCD 263, it is evident that the exercise of powers to indict under Rule 115 has to be processed only in terms of Section 38 and not under Rule 454.

6. The contention therefore is that the impugned orders under the garb of exercise of such powers under Rule 454 are without jurisdiction and in violation of the procedure prescribed under the Rules.

7. Sri Nikhil Kumar and Sri Singh as well as the learned Standing Counsel for the respondents have opposed the aforesaid arguments contending that the petitioner has an alternative remedy of invoking arbitration as provided for in Rule 454 itself, and even otherwise such disputes can be resolved by the Registrar in exercise of the omnibus power conferred on him under Section 128 of the U.P. Cooperative Societies Act, 1965.

8. On merits, they contend that the procedure even if presumed to be in relation to Section 38, then too the permission and the communication from the Registrar on record does indicate that the Committee of Management has proceeded only after such permission has been granted and therefore the orders impugned cannot be said to be without jurisdiction. They therefore contend that the alternative remedy as indicated above could be invoked by the petitioners for resolution of such disputes. They further contend that so far as the charges are concerned as enumerated in the agenda notice dated 13.8.2014, the same clearly indicate the disqualifications that are relatable to Rule 453 incurred by the petitioners, and in such circumstances this Court would be loathe to interfere with the orders.

9. They further urge that even in relation to the charges of Rule 115 no reply was given by the petitioners who had received the notices and instead of giving a reply, they were simply seeking time and vague informations, basically challenging the authority of the Committee of Management to proceed to take action. They also contend that once an opportunity had been given to the petitioners they cannot raise any dispute of violation of principles of natural justice.

10. Learned counsel for the respondent has further relied on the decision in the case of Dilbag Singh Vs. Deputy Registrar, Cooperative Societies and Others, , to urge that the alternative remedy rule should be adhered to. They have also relied on another Division Bench judgment in the case of Uma Nath Mishra v. State of U.P. and others, 1978 (4) ALR 949, to contend that when the provision for arbitration is available, then the discretion under Article 226 of the Constitution of India should not be invoked. This view, according to the respondent, has been consistently followed by this Court including the division bench judgment in the case of Ram Chandra Jaiswal v. State of U.P., Writ Petition No. 5131 of 2013 decided on 30.1.2013.

11. Having considered the aforesaid submissions, taking up the issue of alternative remedy first, there is no quarrel that Rule 454, in the event of any dispute of disqualification, requires the party aggrieved to invoke the arbitration clause. There is also no dispute that the Registrar has powers under Section 128 to annul any resolution passed by the Society or the Committee of Management in exercise of such powers.

12. However, coming to the decisions that have been relied on by Sri Nikhil Kumar particularly in the case of Dilbag Singh (Supra) we find that the Division Bench proceeded to observe that alternative remedy is not an absolute bar and if the allegations of violation of principles of natural justice and the order being without jurisdiction are made then this Court may take into consideration such factors.

13. The aforesaid proposition has been canvassed before this Court as well as before the Apex Court time and again and the most celebrated judgment cited at the bar is that in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, . To our mind the exceptions entailed therein are attracted on the facts of the present case.

14. The issue therefore is as to whether the exercise of powers by the respondent No. 7 suffers from the vice of jurisdiction or not.

15. We have considered the arguments at length and the impugned action appears to have been taken on two premises, firstly that which is based on the allegations as per Rule 115 of the U.P. Cooperative Societies Rules, 1968. The second on incurring disqualifications under Rule 453(1)(f), (g), (h) and (q) of the 1968 Rules.

16. For illustration sake the charges against the petitioner No. 1 mentioned in the agenda notice are to the effect that she has acquired her membership in violation of the provisions, she has committed irregularities in ex-cadre selections, she has forcibly occupied the residence of the Secretary of the Bank and that she had misutilized an Innova vehicle of the society. Except the first charge relating to membership, the other three charges clearly indicate that they are in relation to Rule 115 which could not be disputed by Sri Nikhil Kumar and Sri Singh. The procedure provided for taking action under Rule 115 is clearly relatable to Section 38 of the 1965 Act and we have not been able to find any good reason to differ from the view taken by the Division Bench in the cases of Madan Pal Singh and Kamil Kidwai (Supra). A perusal of paragraph 7 of the decision in the case of Madan Pal Singh would indicate that the same lays down clearly that if the alleged charge is a violation of Rule 115 then the office bearers can be removed only in accordance with Section 38 of the Act.

17. The aforesaid conclusion drawn by the Division Bench, in our opinion, is perfectly in accordance with law and in the absence of any ground to differ from the same we are bound by the said ratio.

Paragraph 7 is extracted hereinunder:

"7. In our opinion respondents 2 to 12 had no jurisdiction acting as members of the Committee of Management to remove petitioner No. 1 from its membership on the ground that he had violated Rule 115. He was an "Officer" of the Society within the meaning of Section 2(o) of the Act. Assuming he had violated Rule 115 he could be removed from his office only in accordance with Section 38 of the Act. The Committee of Management could take action against petitioner No. 1 under Rule 454 only if it found that he had incurred one of the disqualifications mentioned in Rule 453, sub-Rule (1). The impugned resolution contains no such finding. The Committee consequently acted beyond its statutory limitations."

18. To the same effect, we find that the ratio of the decision in the case of Kamil Kidwai (Supra) wherein paragraphs 9 and 10 the law has been categorically stated which is as follows and is extracted hereinunder:

"9. From a perusal of Section 38(1) which has been reproduced above it will appear that Section 38(1) relates to the removal of an office of a co-operative society and applies to a case where any officer of a co-operative society has contravened or omitted to comply with any provisions of the Act or the rules or the bye-laws of the society or has forfeited his right to hold office. When it is proposed to take action against an officer of a co-operative society for his removal on the ground that he has forfeited his right to hold office, the provisions of Section 38(1) which deal directly with the matter are attracted. The grounds on which an officer of a co-operative society may forfeit his right to hold office are not specified and, therefore, the provisions being of a general nature would also apply where the right has been forfeited on account of disqualifications, referred to in rule 453, incurred by an officer making him

ineligible to be or to continue as a Member of the Committee of Management.

10. Rule 454 which is a piece of delegated legislation under Section 130 of the Act defines the procedure to be followed by a Committee of Management regarding the removal of a member subject to disqualification from the Committee of Management. It is a supplemental provision and has to be read alongwith the provisions of Section 38(1) and not independent of it. There is no conflict or inconsistency between the two provisions. It is no doubt true that in Section 38(1) provision is that the Registrar may call upon the society to remove within a specified period the officer concerned and in rule 454 it is provided that it shall be the duty of the Committee of Management of a co-operative society to ensure that no person incurring any of the disqualifications continues to hold office of the Member of Committee of Management. At first sight the use of the word "may" in Section 38(1) may suggest that the Registrar has discretion in the matter of taking action and this may be in conflict with the duty of the Committee of Management mentioned in rule 454. But there is no conflict in reality, for the context in which the power has been conferred on the Registrar by Section 38(1) would envisage that the provisions are mandatory and it is the duty of the Registrar to take action where in his opinion the conditions laid down in the section exist. The failure of the Registrar to take action will amount to permitting the officer of the co-operative society to continue to hold office inspite of the fact that he is guilty of having contravened or to hold office or omitted to comply with the provisions of the Act, rules or bye-laws or he has forfeited his right to hold office. No statutory authority will ever countenance such a situation and will not permit an office-holder to be continued even after infraction of law caused by his own act or omission. In accordance with the dictum of their Lordships in *Pundalik's* case cited above, the provisions of Section 38(1) and rule 454 should be and they are capable of being interpreted harmoniously. Whenever it occurs to the Committee of Management that an officer of the Society has become subject to any disqualification and is ineligible to hold office, the Committee will approach the Registrar, obtain his sanction under S. 38(1) and proceed to take action for the removal of the officer in accordance with rule 454. This procedure may be considered necessary for the protection of the officer as well as for the smooth management of the affairs of the society. If the Registrar omits to perform the statutory duty imposed on him under Section 38(1) or exercise his powers under that section contrary to the settled principles of law, his action or inaction will always be subject to judicial review and appropriate orders or directions may be issued to him under Article 226 of the Constitution, and this aspect of the matter has not been challenged by the counsel for the respondent."

19. In this situation and on the facts of the present case we find that Rule 115 has been clearly invoked and the charges are relatable to the said rule. Consequently, the only conclusion that can be drawn on the facts of the present case, applying the law aforesaid, is that Section 38 ought to have been invoked whereafter the Society could have proceeded to take action after putting the

petitioners to notice on such specific charges that would be in relation to Rule 115 by following the procedure prescribed and not by a circumvented method. The agenda for a meeting of the Committee to take action under Rule 454 cannot amount to a notice as envisaged under Section 38 read with Rule 115, and therefore the entire proceedings on allegations grounded on Rule 115 are clearly without jurisdiction as they do not comply with the procedure prescribed. This method of removal in the present case is malice in law.

20. So far as the second issue relating to the membership and its disqualification as prescribed under Rule 453 is concerned, we find that this action has been mixed up with the allegations in relation to Rule 115 whereas the powers exercisable in both events are through different methods and through different procedures prescribed in law as indicated in Section 38 and Rule 454. The power to disqualify a member is clearly provided in Rule 454 where it is an obligation on the Committee of Management to take action only when the conditions as explained in the above mentioned decisions are fulfilled.

21. The respondents appear to have proceeded without taking into account the aforesaid distinction between the manner and the procedure that is prescribed for exercise of such powers. The impugned action therefore cannot stand the scrutiny of law and if it is without adhering to the procedure prescribed then there is no occasion for this Court to relegate the petitioners to the alternative remedy for seeking arbitration or even otherwise before the Registrar. The exceptions as enumerated in the ratio of M/s Whirlpool (Supra) and even otherwise the facts of this case, do not bar the entertaining of this petition. The impugned action as concluded above, suffers from malice in law and is therefore liable to be struck down on the facts noted above.

22. Since learned counsel for the parties have agreed for final disposal of the writ petition at this stage itself, the writ petition is allowed, the resolution dated 21.8.2014 and the consequential communication dated 22.8.2014 disqualifying the petitioners are hereby quashed leaving it open to the respective authorities to take any action in case so warranted in law in accordance with the rules and procedure as observed hereinabove. The writ petition is accordingly allowed.