

(2023) 12 KL CK 0183

In the High Court Of Kerala

Case No : Writ Petition (C) Nos.14402, 17689, 20803 Of 2022

Y.R.Vincent

APPELLANT

Vs

Joint Registrar Of Co Operative Societies

RESPONDENT

Date of Decision : 19-12-2023

Acts Referred:

Kerala Co operative Societies Act, 1969 — Section 32, 34, 63, 65, 66, 66(1), 68, 68(1), 68(2), 79, 83(1)(e)

Kerala Co Operative Societies Rules 1969 — Rule 66, 66(5), 66(7)

Citation : (2023) 12 KL CK 0183

Hon'ble Judges : T.R. Ravi, J

Bench : Single Bench

Advocate : P.N.Mohanan, Srim.Sasindran, R.T.Pradeep, M.Bindudas, K.C.Harish, C.S.Sheeja

Final Decision : Disposed Of

Judgement

T.R. Ravi, J.

1. The issues involved in the above three writ petitions are intrinsically connected, and the writ petitions are heard and disposed of together. The petitioners were elected to the Managing Committee of the Arayoor Service Co-operative Bank Limited in an election that was held on 04.11.2018. The term of office is for five years. In 2021, proceedings were initiated for surcharging the Committee. The surcharge order was issued under Section 68(2) of the Kerala Co-operative Societies Act, 1969 (KCS Act) on 16.6.2021. An order of surcharge is a disqualification to the Committee to continue in office. The Unit Inspector was hence appointed as an Administrator to manage the Society. The order imposing the surcharge and the order appointing the Administrator was the subject matter of challenge before this Court in W.P.(C)No.12783 of 2021. This Court set aside the order by judgment dated 21.02.2022. Pending the litigation, the term of the Administrator has been extended. The Court directed the Joint Registrar of Co-operative Societies to pass fresh orders based on the findings

entered by the Court after affording an opportunity of hearing to the parties. Regarding the appointment of the Administrator, this Court held that since the Administrator had been in management from 18.6.2021, he shall continue in office subject to the outcome of the proceedings.

2. The judgment of the learned Single Judge was challenged in appeal by the petitioners as well as the respondents by filing W.A.No.300 and 443 of 2022. The appeals were heard together and disposed of by judgment dated 6.4.2022 upholding the direction of the learned Single Judge permitting the Administrator to continue in office subject to the outcome of the proceedings. On 25.3.2022, pending the decision, the Joint Registrar passed two separate orders, one directing the Committee members to remit the amount determined and the other surcharging the petitioners and ordering recovery from their assets. The above two orders are challenged in W.P.(C)No.14402 of 2022. The challenge is on the ground that surcharge proceedings are confined to the petitioners alone, excluding the legal heirs of one deceased former Managing Committee member and one former President, though they would also be liable based on the judgment of the learned Single Judge. Another reason is that the earlier quantification had already been found to be not legal and set aside, and hence, without a fresh quantification, apportionment of liability cannot be done. The third reason is that surcharge proceedings cannot be issued in the name of deceased persons without hearing the legal heirs of the deceased. On 10.5.2022, this Court passed an interim order staying the orders dated 25.3.2022. According to the petitioners, once orders have been issued, the term of the Administrator will come to an end, going by the judgment of this court in W.P.(C)No.12783 of 2021, as affirmed in the judgment in W.A.No.300 of 2022. It is submitted that the petitioners assumed office by recording a resolution on 30.5.2022 in the minutes book.

3. There were issues regarding the assumption of office since records were not handed over to the petitioners. It is submitted that the records were taken custody of by the Police. The Joint Registrar issued proceedings dated 30.5.2022, authorising the Assistant Registrar to initiate Section 34 proceedings to secure the possession of the minutes book and to take further action. The petitioners thereafter filed W.P.(C)No.17689 of 2022 seeking to quash the order dated 30.5.2022 issued by the Joint Registrar and praying for a direction to the Circle Inspector of Police who had taken possession of the minutes book of the Society to hand over the same to the Managing Committee members. On 1.6.2022, this Court issued an interim order staying the further proceedings pursuant to the order of the Joint Registrar dated 30.5.2022.

4. The Joint Registrar took a stand that the term of the Administrator is till 20.6.2022. When the said period was also over, the petitioners filed W.P.(C)No.20803 of 2022, praying for a direction to hand over the administration of the bank to the petitioners as the term of Administrator was over on 20.6.2022. I shall first consider W.P.(C)No. 14402 of 2022.

5. The challenge in this writ petition is against Exts.P9 and P10 surcharge orders issued under Section 68(2) of the KCS Act. The petitioners have challenged the above orders on the following four grounds.

(a) There is no finding in the Section 66 enquiry report that the alleged loss is caused due to wilful negligence/breach of trust/mismanagement, etc. required for initiating surcharge proceedings, and hence the Joint Registrar ought to have issued directions to rectify the defects, if any, under Section 66(5).

(b). There is no finding in Ext.P2 report under Section 68(1) regarding the "conduct of the petitioners" and that the loss was caused due to negligence of the petitioners and hence the surcharge proceedings will not be liable.

(c) Out of six heads on which surcharge has been found in Ext.P10, four are not issues that were gone into in Ext.P1 enquiry report, and hence the order is bad for want of jurisdiction. The said four items are the increase in the difference between the assets and liabilities which caused loss to the Society, the loss caused due to delayed action on recovery of debts, loss caused by payment of higher interest than what is permitted under the circulars issued by the Registrar and loss caused due to conduct of MDS without departmental permission.

(d) Ext.P10 surcharge order does not show how the amount was quantified and how the amount was arrived at without collecting any materials under Rule 66(5) of the Kerala Co-operative Societies (KCS Rules) on the four points mentioned in (c) above. There is also no finding in Ext.P10 order that loss was caused due to wilful negligence of the petitioners/mismanagement.

Ground (a)

6. The counsel for the petitioners submitted that Section 66(1) enquiry which has resulted in Ext.P1 report, was initiated on five aspects viz., appointments in the bank, grant of membership, grant of loans, recovery of overdue amounts, and net loss (???? ?). It is submitted that Rule 66 (1) (c) of the KCS Rules requires that specific points on which the enquiry is to be conducted be an essential requirement to initiate surcharge proceedings. (Cheranellur Co-operative Society Limited vs. Deputy Registrar [1976 KLT 353]). The counsel submits that a reading of Ext.P1 report would show that there is no finding against any person of the Committee that he/she made any payment contrary to the Act or Rules or bye-law or caused any loss or damages in the assets of the Society by breach of trust or wilful negligence, mismanagement or misappropriation or fraudulently retaining any money or property belonging to the Society or destroying or causing destruction of records. It is hence submitted that without specific findings on the above, no surcharge proceedings can be maintained. Another aspect pointed out is that the Section 66 enquiry is to be conducted in the manner provided in Rule 66 of KCS Rules, and under Rule 66(5) of the KCS Rules, the report should invariably contain the latest balance sheet and the

findings and reasons, supported by such documentary evidence or other evidence as recorded by the Enquiry Officer during the course of the enquiry.

7. It is submitted that the above aspects are absent in Ext.P1 report. It is submitted that in the absence of a finding that the loss was caused due to a breach of trust or wilful negligence, surcharge proceedings cannot be initiated. It is also submitted that the materials in support of such allegations should be collected in the manner provided in Rule 66(5) of the KCS Rules, and the said procedure has not been followed. It is submitted that the conclusions and reasons on the basis of the records are significant, and such findings are absent in the report. Reliance is placed on the decisions in *Ellakkal Service Co-operative Bank v. State of Kerala* [1997(2) KLT 85], *A.K.Francis v. Joint Registrar* [1990(2)KLT 470], *Musthafa T.H & Ors. v. State of Kerala & Ors.* [ILR 2021 (4) Kerala 74].

Ground No.(b)

8. It is submitted that under Section 68(1), there should be an enquiry and a finding regarding the "conduct of the persons." It is submitted that in Ext.P2 report, there are no findings regarding the negligence, mismanagement, or misappropriation of any of the petitioners i.e., regarding the conduct of the petitioners. No such findings are available in Ext.P1 also. It is submitted that in the Ext.P2 report, there cannot be such findings, since there has been no fresh collection of any materials as provided under Section 68(1). It is submitted that Section 68(1) enquiry can be conducted as provided for Rule 66(7) of the KCS Rules, wherein there is no collection of materials as provided in Rule 66(5).

Ground No.(c)

9. It is submitted by the counsel that earlier, the petitioners were surcharged as per Ext.P6 order, which had been quashed by this Court in Ext.P7 judgment. It is submitted that the petitioners had filed WA No.300 of 2022 challenging the judgment to the extent of the continuance of the Arbitrator, since Ext.P6 order had already been set aside as regards surcharge. Against setting aside the order of surcharge, the official respondents had filed WA No.443 of 2023. A Division Bench of this Court heard these appeals together and disposed of the appeals by common judgment dated 21.02.2022, permitting the Administrator to continue in the office till the outcome of the proceedings. Ext.P7 judgment was thus confirmed. It is thereafter that Exts.P9 and P10 orders were issued.

Ground No.(d)

10. The counsel for the petitioner submits that the surcharge order is based on the findings on 6 heads in Exts.P6 and P10. It is contended that there is no difference in the findings on the heads 1, 4, and 6 between Exts.P6 and P10. Regarding heads 2, 3, and 5, there is a considerable decrease of Rs.64,87,118/- in Ext.P10 from the amount quantified in Ext.P6. It is submitted that four of the points on which surcharge has been ordered are not matters which are covered

in Ext.P1 report, and as far as the said items are concerned, there is a violation of principles of natural justice since the petitioners are not given any opportunity to reply and challenge the said allegations. It is submitted that the first aspect on which there is no finding in the Section 66 report is in the head relating to the increase in the difference between the assets and liabilities. It is submitted that the remittance of Rs.64,87,118/- has not been taken into account, and if the same was taken into account, there can be no finding that there is a huge increase between the difference in value of the assets and liabilities. It is contended that Ext.P10 order is a verbatim reproduction of the Ext.P6 order and does not even mention any reason as to how the amount was reduced on some of the items of surcharge. It is hence submitted that if there is a difference in the amount quantified for the purpose of surcharge between Exts.P6 and P10, the same has to be explained and the calculations made known to the petitioners, particularly since penal consequences are involved.

11. The Government Pleader, in answer, submitted that most of the issues have been concluded in Ext.P7 judgment, which has been confirmed in appeal. It is submitted that in Ext.P7, the learned Judge had raised five points for decision and held that the contention that the inspection related to the period from 01.04.2013 to 2018 and the proceedings under Section 68 included a period beyond 31.03.2018 cannot be sustained. On the contention that persons who came into management after the period of the inspection under Section 66, that is, 31.03.2018, have been surcharged under Section 68(2), the learned Judge found that the order of surcharge in so far as it related to the fastening of liability on petitioners 9 to 11 and 14 therein, is unsustainable since it was for a period subsequent to the period of enquiry. On the contention whether persons who were not in management for the entire period in respect of the Section 66 inspection was conducted, but only for some persons thereof have also been mulcted with liability for the entire period, the Court found that the matter requires reconsideration on both its correctness as well as on the apportionment. On the contention regarding liability being fastened on persons who were in management during the period for Section 66 inspection but had died by the time of Section 68 proceedings, this Court held that as far as the loss caused to the Society by persons who are deceased, appropriate steps are to be taken in accordance with law and the surcharge order in so far as it burdens the surviving members with the liability of the deceased members, cannot be sustained. On the contention that no opportunity was afforded to pay off the liability and avoid an order of surcharge, this Court held that Section 68(2) contemplates only the passing of an order of surcharge and not any preliminary order. The court held that the contention of the petitioners that the proceedings are bad for lack of opportunities to pay of the amount fails. In paragraph 17 of Ext.P7 judgment, the Court ordered that Ext.P11 order of surcharge and consequential orders of disqualification and appointment of Administrator are quashed. A direction was issued to the 1st respondent therein to pass orders in the light of the findings entered in the judgment after affording an opportunity of hearing to the parties.

The Government Pleader hence contended that this Court is not called upon to decide on the aspects that have already been decided in Ext.P7 judgment since the findings have become final. It is contended that "any person entrusted with management," contemplated in Section 68, will include the entire Committee. It is contended that against the order of surcharge, there is a remedy of appeal under Section 83(1)(e), and the petitioners ought to have resorted to the said remedy.

12. In reply, the counsel for the petitioners submitted that a reading of Exts.P9 and P10 would show that there has been no reconsideration of the issue. It is pointed out that the first 24 pages of Ext.P10 are the same as in Ext.P6. The order thereafter states about the writ petition, which resulted in Ext.P7 judgment. The counsel referred to Ext.P10 and submitted that even as per Ext.P10, what has been done is only a reassessment (???? ??? ???) of the liability which is not what was contemplated in Ext.P7 judgment. The order states that a notice was issued to the parties for a hearing on the above aspect, for which a reply which was against facts had been received. It is stated in the order that the contention taken by the petitioner that the surcharge order and Section 68(1) report have been set aside by the High Court is not correct and that the same is only a misinterpretation of the judgment. It is also stated that the petitioners have not been able to raise any contention against the reassessment of the liability as directed in the judgment of the High Court. It is also seen that liability has been fixed on deceased persons without hearing the legal representative of the deceased and without any notice to the legal representatives. In fact, the report does not even state the legal representatives and only the name of the deceased Sri. Sundaran Nadar has been included in the proceedings. So also, with regard to the deceased T.R.Jayan, who was a former President of the Society, what has been done is to fix the liability till the date of the death. In the case of the said person also, it is seen that no proceedings had been initiated against the legal representatives.

Consideration:

13. Section 68 of the Co-operative Societies Act reads thus:

"68. Surcharge:- (1) If in the course of an audit, inquiry, inspection or the winding up of a society, it is found that any person, who is or was entrusted with the organization or management of such society or who is or has, at any time been an officer or an employee of the society, has made any payment contrary to the Act and the rules or the bye-laws, or has caused to any loss or damage in the assets of the society by breach of trust, or wilful negligence or mismanagement or has misappropriated or fraudulently retained any money or other property belonging to such society or has destroyed or caused the destruction of the records, the Registrar may, of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorised by him by an order in writing in this behalf, to inquire into the conduct of such person. (2) Where an inquiry is made under sub-section

(1), the Registrar may, after giving the person concerned, an opportunity of being heard, by order in writing, require him to repay or restore the money or other property or any part thereof, with interest at such rate, or to pay contribution and costs or compensation to such extent, as the Registrar may consider just and equitable.

(3)Where the money, property, interest, cost or compensation is not repaid or restored as per sub-section (2), the Registrar shall take urgent steps to recover such amounts from the concerned persons as arrears of public revenue due on land as specified in Section 79 of the Act.”

14. A reading of the Section would show that it refers to “any person” and not to a 'Committee'. If the intention was only to take action against the members of the Committee, the Section need not have referred to “any person entrusted with organisation or management of society” or “who is or has at any time been an officer or an employee of the society.” The Section, in its plain meaning, does not permit an interpretation suggested by the Government Pleader. It refers to the conduct of individuals and not the collective conduct of the Committee. In contrast, there are provisions in the Act, which deal with the collective conduct of the Committee. As such, the contention of the Government Pleader that the word “persons” would also include the Committee cannot be sustained. In *Shabin Antony v. Gireesh Kumar M.S & Ors.* [2018(1) KHC 115], a Division Bench of this Court considered Sections 32 and 68 of the KCS Act and held that the area of operation of the two provisions are completely different and independent of each other. It was held that while Section 32 relates to the performance of duties by the Committee and action being taken against the Committee, Section 68 relates to the action being taken against any person who is entrusted with the organization or management of the Society. In *Varghese M.D. v. The Joint Registrar of Co-operative Societies (General), Kakkanad and others* [2022(2) KLT 659], a learned Single Judge of this Court has held that surcharge proceedings can only be against a member who was party to the decision which ultimately led to the supersession and not against a member who had either ceased to be a member at the time the decision was taken or who became a member at a later point of time. What is contemplated is the involvement of an individual in the decision making or in the action, which resulted in the supersession, for which a specific finding is necessary. In *Joint Registrar (General) of Co-operative Societies, Thrissur and another v. Charley Panthallookaran & Ors.* [2022 (2) KHC 70], a Division Bench of this Court while considering the scope of Sections 66 to 68 of the KCS Act, held that the Act does not confer any authority on the Registrar to straight away require any person to repay or restore any money to the Society based on the materials disclosed in an enquiry and that it is required to order another inquiry to find out if any persons referred to in the provision has caused loss to the Society by any one of the conducts mentioned therein. The Bench held that the inquiry contemplated in the provision is an investigation and not a mere seeking of information.

15. In *A.K.Francis* (supra), a learned Single Judge held that to attract Section 68, facts giving rise to the charge have to be disclosed in the course of the audit under Section 63, inquiry under Section 65, inspection under Section 66 or winding up of a Society. The above judgment has been quoted with approval by a Full Bench of this Court in the decision in *Anil M.S. v. Joint Registrar (General) of Co-operative Societies, Thiruvananthapuram & Ors.* [2021(4) KHC 119(FB)] and also referred to by a learned Single Judge in the decision in *Musthafa T.H & Ors. v. State of Kerala & Ors.* [ILR 2021 (4) Kerala 74]. In *Musthafa* (supra), the learned Judge held that an element of criminal intention in the action of the person mentioned in the provision is necessary to initiate proceedings under Section 68.

16. In *Ext.P7* judgment, *Ext.P6* surcharge order has been quashed. The above judgment was not interfered with by the Division Bench in the appeal preferred by the respondents. Necessarily, a fresh order has to be issued, which has to comply with the statutory requirements. What is ordered is not a mere reassessment of the liability as is sought to be made out in *Ext.P10* order. The question then is whether there is any finding in *Exts.P9 & P10* regarding the conduct of "any person," i.e., such person had made any payment contrary to the Act and the Rules or the Bye-laws or caused any loss or damage to the assets of the Society by breach of trust or wilful negligence or its mismanagement or has misappropriated or fraudulently retained any money or other property belonging to such Society or has destroyed or caused the destruction of the records of the Society. Applying the law laid down in the judgments referred to in the above paragraphs, I find that there is no specific finding regarding the involvement of the petitioners as is required under the statutory provisions, as explained in the decisions of this Court. It is evident from a reading of Section 68 and the manner in which the provision has been explained by this Court that what is required is not a finding which would justify a supersession of a Committee as provided for in Section 32 but a finding regarding the involvement of the persons mentioned in the provision, in the manner provided therein, for the purpose of surcharging them.

17. Coming to the manner in which the liability is fixed on the petitioners, in *Ext.P10*, what has been done is only a re-assessment of the liability. As far as the fixation of liability on individuals is concerned, *Ext.P1*, which is the Section 66 enquiry report, does not specify any person individually and instead only makes mention of the Committee as a whole. After rendering findings regarding the aspects that were the subject matter of inspection, suggestions are made in the report that for the financial discrepancies noted, action can be taken against the members of the Committee. *Ext.P2*, which is the Section 68(1) report, says that the Committee intentionally caused a loss to the Society and that the same has to be recovered from the members who constituted the Committee during the relevant period. While fixing the liability, what has been done is to show amounts under seven heads, which are the same in the case of all the persons who are found liable. There are absolutely no findings as to how each of them has been

found liable on the different heads by either their presence during any decision taken or otherwise.

18. In Ext.P7 judgment, this Court has specifically said that as regards loss caused to the Society by the deceased office bearers, appropriate steps have to be taken in accordance with the law. Necessarily, when liability is to be fixed on deceased persons, their legal representatives will have to be put on notice, and liabilities can be fixed only to the extent of the assets that they have inherited from the deceased. This Court had specifically held in Ext.P7 that the liability is not joint and several as between the members of the Committee. As such, the liability if any of the deceased cannot be fastened to the other members of the Committee. Exts.P9 and P10, hence, to the extent they do not proceed to fix the liability of the deceased persons in accordance with the law, cannot be sustained.

19. Another aspect that is relevant is with regard to the findings on the difference between the value of the assets and liabilities. The amounts were fixed in the surcharge proceedings in Ext.P6 based on a finding that there is an increase in the difference between assets and liabilities to the extent of Rs.22,75,590/-. It is not known how the very same amount has formed the basis for fixing the surcharge in Exts.P9 and P10, while admittedly, a sum of Rs.64,87,118/- has been remitted, thus causing a considerable decrease in the liabilities. It does not stand to reason that after the liabilities have reduced considerably, the increase in the difference between the assets and liabilities will remain the same in Ext.P6 and Exts.P9 and 10. Apparently, the remittance of the amount has not even been considered while fixing the liability in Exts.P9 and P10. This is only one glaring example of the discrepancies in the reconsideration, which is claimed to have been done after the judgment of this Court. As contended by the petitioners and as is evident from the Exts. P9 and P10 report, there has only been a re-assessment of the liabilities of each person based on their period in Office, and there has not been any reconsideration of the issue of whether the surcharge proceedings are to be initiated based on the findings in the inquiry. When fresh orders are directed to be issued after quashing the order of surcharge issued earlier, what is required is not a mere quantification based on the materials collected in the enquiry. Nor could the respondents have taken into account the very same amount in Ext.P6, which is already set aside, and apportion the said amount differently between members, based on their period in the Committee alone. That was not what was directed in Ext.P7. A surcharge proceeding necessarily has civil consequences, and after rendering a finding regarding the liability of petitioners individually, the amount of liability is to be quantified based on the actual loss that has been sustained by the Society. Such an actual loss has to be calculated on the basis of the materials which are available. When Ext.P10 itself gives credit to amounts that have been repaid, it was necessary that the heads of liabilities for surcharge are also subjected to necessary changes. It would appear from a reading of Exts.P9 and P10 that the author of the order has only understood the directions in the judgment of this Court to mean a re-assessment of the individual liabilities of the members by

including persons who have died and excluding persons who are not in office. I am hence of the opinion that Exts.P9 and P10 cannot be sustained since they are not in accordance with the law laid down in the decisions referred to above or in accordance with the directions issued in Ext.P7 and are also not sustainable on the facts revealed in the enquiry. They are bad for the reason that they have not considered amounts which have been received by the Society, admittedly. They are also bad for the reason that they proceed on the basis of the liability of the Committee rather than on individual liability, which needs to be assessed in terms of Section 68. Exts.P9 and P10 are hence set aside. There will be a direction to the 1st respondent to pass fresh orders in accordance with the direction contained in Ext.P7 judgment as affirmed by the Division Bench and based on the observations made above, if they intend to continue with proceedings pursuant to Exts.P1 and P2.

WP(C) No.17689 of 2022

20. The prayer in the writ petition is to quash Ext.P10 order produced therein and for a direction to the 2nd respondent to hand over the minutes of the Society taken by him as evidenced by Ext.P9 receipt and to give necessary aid for the discharge of duties to the Managing Committee members as and when required. Ext.P10 proceeds on the basis that the petitioners had forcefully taken possession of the minutes book of the Society and the same is to be retrieved by means of proceedings under Section 34 of the KCS Act. It can be seen from Ext.P9 that the minutes book had been taken custody of by the 2nd respondent, and hence, the basis of Ext.P10 order does not exist. Ext.P10 cannot hence be sustained and is hence quashed. Regarding the prayer for a direction to the 2nd respondent to hand over the minutes book to the petitioner and to provide aid for the functioning of the Committee, since the period of the Committee has expired on 4.11.2023, the prayer is no longer relevant, and hence no further orders are necessary. The writ petition is disposed of as above.

WP(C)No. 20803 of 2022

21. The prayer in the writ petition is for a direction to respondents 1 and 3 to hand over the administration of the bank to the petitioners as the term of the Administrator was over on 20.06.2022 and in view of Exts.P6 and P7 orders issued pursuant to Exts.P4 and P5 judgments. In the judgment in W.P. (C)No.14402 of 2022, Exts.P4 and P5, which have been produced as Exts.P9 and P10 therein, have been quashed. The term of the Committee constituted by the petitioners also expired on 4.11.2023. What is hence required is a proper election to the Committee and handing over charge to the newly elected Committee. In the above circumstances, this writ petition is disposed of directing the respondents to take steps to conduct the election to the Committee of the 2nd respondent Bank at the earliest.