

E. Justus Daniel and ors. Vs. State of Kerala and ors.

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Court : Kerala

Decided On : Apr-07-1992

Reported in : [1994]79CompCas716(Ker)

Judge : T.L. Viswanatha Iyer, J.

Acts : Kerala Co-operative Societies Rules, 1969 - Rule 44, 44(1) and 44(2);
[Constitution of India](#) - Article 226

Appeal No. : Original Petition No. 1727 of 1992-E

Appellant : E. Justus Daniel and ors.

Respondent : State of Kerala and ors.

Advocate for Def. : Cyriac Joseph, Additional Adv. General and;Government
Pleader

Advocate for Pet/Ap. : C.K.S. Panicker, Adv.

Judgement :

T.L. Viswanatha Iyer, J.

1. The five petitioners were members of the managing committee of the Thirupuram Service Co-operative Bank. Admittedly the managing committee had its term up to June 30, 1992, as per the provisions of the Kerala Co-operative

Societies Act, 1969, as amended by the Ordinance 3 of 1992. The strength of the managing committee is nine and the quorum for the committee to function is five.

2. The petitioners challenge the order, exhibit P-11, by which they were disqualified from membership of the managing committee under Rule 44(3) of the Kerala Co-operative Societies Rules read with Rule 44(2)(a) and Rule 44(1)(c)(i). The reason alleged is that they were defaulters to this society or to some other societies as mentioned in the order, exhibit P-11.

3. A notice, exhibit P-1, dated October 4, 1991, was issued to these five petitioners pointing out their defaults. The first petitioner was a subscriber for a chitty for Rs. 15,000 which he had bid. The instalments from March 15, 1991, were in arrears despite the registered notices issued to him by the society on April 27, 1991, July 18, 1991, and July 27, 1991. The second petitioner had taken a loan of Rs. 5,000 from the Neyyattinkara Government Servants Co-operative Society in which the repayments were in arrears from March 4, 1991. He had also stood surety for two loans taken by K. Velappan Nair and C. Devarajan, both of whom defaulted in payment of the amounts. He was, therefore, a defaulter under Rule 44(1)(c)(i). The third petitioner had taken a loan from the Neyyattinkara Co-operative Agricultural Development Bank in which the instalments were in arrears from September 1, 1990. He was, therefore, a defaulter. The fourth petitioner had taken loans from the Neyyattinkara Primary Co-operative Agricultural Development Bank for Rs. 25,000 and 75,000. In respect of the first loan he was in arrears from March 1, 1991, and in respect of the second loan from November 1, 1990. He was also, therefore, a defaulter. The fifth petitioner had taken a loan with one Vincent from the Neyyattinkara Primary Co-operative Agricultural Development Bank which was in arrears from March 1, 1989. She was also, therefore, a defaulter. The first petitioner had paid off the amounts due from him on September 30, 1991. The second petitioner paid the amount due from him on October 21, 1991, and the third petitioner on September 19, 1991. So far as the other two petitioners are concerned there was no remittance. The respective petitioners mentioned the facts pertaining to them in their replies. Inter alia, petitioners Nos. 2 to 5 also mentioned that they had not been served with any notice of either their default or that of the principal debtors. Service of notice was a condition precedent for

treating a person as a defaulter under the proviso to Rule 44(2)(a) read with Rule 44(1)(c)(i). They could not, therefore, be treated as defaulters. The only case set up by the first petitioner was that he had paid the amounts due and, therefore, he could not be treated as a defaulter.

4. The second respondent-Joint Registrar passed the order, exhibit P-11, in which he did not deal with the case of absence of notice put forward by petitioners Nos. 2 to 5 and of their not being defaulters under the proviso mentioned earlier. He did not choose to deal with the explanation in any detail but simply treated the various petitioners as defaulters for the simple reason that they owed amounts on the date on which exhibit P-1 was sent. Since five of the nine directors were thus disqualified, the committee lost its quorum and accordingly the managing committee was superseded under Section 33 of the Kerala Co-operative Societies Act, 1969, and an administrator was appointed in its place. The petitioners challenge the order, exhibit P-11.

5. So far as petitioners Nos. 2 to 5 are concerned the order, exhibit P-11, is defective in that it has not considered the specific point raised by the petitioners that they cannot be treated as defaulters in view of the proviso to Rule 44(2). This proviso which was introduced in the year 1989 lays down that a person can be treated as a defaulter in payment of amounts due to a society only after the expiry of a period of one month from the date of receipt by him of a notice from the society demanding that he clear off the defaulted amount specified therein and if he fails to remit the amount within the said period. As a quasi-judicial authority the Joint Registrar was bound to consider this specific point raised by the petitioners inasmuch as they can be treated as defaulters only if such a notice was served on them and they failed to remit the amount within the period granted after receipt thereof. Exhibit P-11 is not a proper order in law because of the failure of the second respondent to deal with this point pointedly raised by petitioners Nos. 2 to 5.

6. Notice, exhibit P-1, does not state anywhere that any notice envisaged by the aforesaid proviso had been served on petitioners Nos. 2 to 5 and that they had defaulted in remitting the amounts within a period of one month thereafter. It was

incumbent on the second respondent to have recited the issue of such a notice, if really such notice had been issued, as that constitutes the foundation for the proceedings under Rule 44(2) read with Rule 44(1)(c)(i). A person cannot be a defaulter unless and until such a notice is served and he fails to remit such payment within a period of one month thereafter. Exhibit P-1 is silent about any such notice so far as petitioners Nos. 2 to 5 are concerned, while it recites such notice expressly with regard to the first petitioner. In the absence of any such mention in exhibit P-1, this court has to proceed on the basis that these petitioners had not been issued any notice by the respective societies of the nature envisaged by the proviso to Rule 44(2). The petitioners have made a specific point about it in their reply. The second respondent has chosen to slur over the same. He did not render any finding that any such notice had been served on them. In the original petition the petitioners have specifically raised the point of non-service of such notice on petitioners Nos. 2 to 5. The counter-affidavit is significantly silent about the service of such notice on petitioners Nos. 2 to 5. Therefore, it has to be held that no notice of the nature provided under the proviso to Rule 44(2) was served on petitioners Nos. 2 to 5. In that event they cannot be held defaulters under Rule 44(1)(c)(i) for the purpose of Rule 44(2) as they become defaulters only on their failure to remit the amounts within a period of one month after receipt of the notice from the society calling upon them to make payment of the amounts in default. The disqualification of petitioners Nos. 2 to 5 by the proceedings, exhibit P-11 is, therefore, illegal.

7. It is true that the payment of amounts subsequent to the period prescribed in the proviso by itself will not absolve the member from his default. But then when the notice itself is not served, the position is different and no liability as a defaulter attaches to the member concerned. That is the position so far as petitioners Nos. 2 to 5 are concerned.

8. Petitioners Nos. 2 and 3 have paid their dues, but not petitioners Nos. 4 and 5. They are still in default. Normally, I would not have been inclined to invoke article 226 in favour of persons like petitioners Nos. 4 and 5 who occupy a position of trust as members of the managing committee of the society, but do not keep up the trust by making prompt payment of amounts due from them. But when the

statute itself condones such default and treats them as non-defaulters unless and until the notice is served and they make the default for a further period of one month, this court need not sit in judgment over the wisdom of the statute and refuse to grant relief to them, in view of their continued default.

9. So far as the first petitioner is concerned, he is not entitled to any relief. Notice had been issued to him as recited in exhibit P-1. He did not make payment within the time prescribed in the notice. The default occurred on' March 15, 1991, and the first notice was sent on April 27, 1991, and the last on July 27, 1991. He made payment of the amount only beyond the period of thirty days envisaged by the proviso to Rule 44(2). This court had held in a series of decisions culminating in Vasudevan v. State of Kerala [1987] 1 KLT 26 that the factum of payment of the amount of the debt before the issue of notice is irrelevant in a case falling under Rule 44(2). This is all the more so after the introduction of the proviso which treats him as a defaulter after thirty days of the receipt of the notice for payment, if the amount is not paid in the meanwhile. The first petitioner has, therefore, become a defaulter on the expiry of thirty days from April 27, 1991, when the first notice was issued to him from the society calling upon him to make payment of the amount due and he did not make payment thereof within the said period of thirty days. Subsequent payment will not obliterate the default already committed as also the disqualification which had occurred under Rule 44(2). Therefore, the first petitioner is not entitled to any relief.

10. The learned Government Pleader who appears for the respondents raised a plea that the petitioners have an alternate remedy of appeal under Section 83(1)(j) of the Act and, therefore, this writ petition ought not to be entertained. I am not accepting this submission though normally I would have been inclined to relegate the petitioners to that remedy of appeal. A perusal of the order, exhibit P-11, will show that there is total abdication of his functions by the second respondent and a total refusal by him to understand and appreciate the contentions raised by the petitioners. There is total non-application of the mind. Exhibit P-11 is in effect null and void and cannot in law be termed as an exercise of his quasi-judicial functions by the second respondent. When the illegality is patent on the face of it, it will not be proper for this court to abnegate its jurisdiction and relegate the parties to the

appellate remedy.

11. An administrator was appointed to the society only because the five petitioners were disqualified. There were four other directors, who were not disqualified. If the disqualification of petitioners Nos. 2 to 5 is found to be illegal necessarily the society has got eight directors, who could function legally. Since the appointment of the administrator was only a direct consequence of the disqualification of the petitioners, that has got to be quashed on the petition being allowed so far as petitioners Nos. 2 to 5 are concerned and the managing committee other than the first petitioner should be reinstated in office without any delay. They have a term up to June 30, 1992, in the normal course.

12. The original petition is therefore allowed. Exhibit P-11 is quashed in so far as it disqualifies petitioners Nos. 2 to 5 and directs appointment of an administrator to the Thirupuram Service Co-operative Bank. Exhibit P-11 is sustained in so far as the disqualification of the first petitioner is concerned. The respondents are directed to put the erstwhile managing committee other than the first petitioner in office without any further delay hereafter. The managing committee will take steps to hold elections before June 30, 1992, so as to enable the new managing committee to assume office from July 1, 1992. The first petitioner who is disqualified shall not be entitled to function as a member of the managing committee. There will be no order as to costs.