

**Saseendran Vs. the Kerala State Co-operative Election Commission**

**Saseendran Vs. the Kerala State Co-operative Election Commission**

**SooperKanoon Citation :** [sooperkanoon.com/728969](http://sooperkanoon.com/728969)

**Court :** Kerala

**Decided On :** Apr-11-2003

**Reported in :** 2003(3)KLT908

**Judge :** R. Rajendra Babu, J.

**Acts :** Kerala Co-operative Societies Rules, 1969 - Rules 2 and 44(1)

**Appeal No. :** O.P. Nos. 25795, 26244 and 26399 of 2002

**Appellant :** Saseendran

**Respondent :** The Kerala State Co-operative Election Commission

**Advocate for Def. :** B.S. Krishnan, Sr. Adv.,; B.S. Swathikumar,; K. Anand

**Advocate for Pet/Ap. :** M.K. Damodaran, P.K. Vijayamohanan,; R.T. Pradeep and; V

**Disposition :** Petition allowed

**Judgement :**

**R. Rajendra Babu, J.**

1. The Electoral Officer of the Kerala State Co-operative Election Commission issued notification dated 19th August, 2002 (Ext.PI in O.P. 27295/02) for holding election to the Managing Committee to the Kerala State Co-operative Federation

for Fisheries Development Limited (MATSYAFED). As per the notification, 15 members were to be elected, viz., 13 members from the general seat, one member from SC/ST and one lady member. Election was scheduled to be held on 18th September, 2002. Nominations had to be filed on 5th September, 2002 and its scrutiny was scheduled on 6th September, 2002. The Returning Officer, MATSYAFED, accepted the nomination papers and rejected some of the nomination papers on the ground that the societies represented by those persons who filed the nominations were defaulters or in default to the apex society-the MATSYAFED. The President of the Pulluvila Fisherman Development Welfare Co-operative Society Ltd. No. F(T) 28 Sri. Lordan filed nomination as the nominee of the above society and his nomination was rejected. He filed O.P. No. 25795/02 on 10th September, 2002. Sri. V.V. Saseendran, who was the former Chairman of the MATSYAFED filed nomination as the nominee representing the Maruthoorkulangara Kulasekharapuram Fisherman Development Welfare Cooperative Society Ltd. No. F(Q) 16, and his nomination also was rejected. Accordingly he filed O.P. No. 26244/2002 on 13th September, 2002 challenging the above order. Sri. V.P. Babu, President of the Madappally Azhiyoor Fisherman Development Welfare Co-operative Society Ltd. No. E(K) 20, filed nomination representing the Society and his nomination also was rejected. Accordingly he filed O.P. 26399/02 on 16th September, 2002 challenging the order.

2. Heard the learned Counsel for the petitioners, Standing Counsel for the Returning Officer, MATSYAFED and also the learned Government Pleader.

3. The nominations filed by the petitioners were rejected by the Returning Officer (the 3rd respondent in O.P. 25795/2002 and the 2nd respondent in the other 2 cases) on the ground that the societies which nominated the petitioners were in default in making payments due to the apex society and as such the societies were disqualified to be members of the committee in view of Rule 44 of the Co-operative Societies Rules (hereafter referred to as 'the Rules'). One of the main contentions put forward by the petitioners was that the societies which nominated them were not defaulters or in default in making payment of any amount due to the apex society. The learned counsel for the petitioner in O.P. 25795/02 submitted that the loans advanced to the Society and the amount due to the apex society

had to be remitted in instalments and there was a schedule prescribing the mode and the time or date of payments and such payments had already been paid within the prescribed time and when such payments were made, they were not defaulters or in default in making the payments. Reliance was placed on Ext.P5, the D.C.B. statement issued by the apex society as on August, 2002. The same statement had been produced in the same O.P. by the MATSYAFED as Ext.R4(a). Ext.P5 document would reveal that the required percentage of payment was not achieved, so far as N.C.D.C. payments shown as items 1 to 3 were concerned, whereas the repayment in respect of N.C.D.C. SPL ASST., FDP 99, FDP 99 IS in item 4 to 6 were concerned the repayments were more than 100 per cent and in FDP Co. in item 7 it was 98.27 per cent.

4. The learned Counsel appearing for the petitioner in O.P. 26244/02 also submitted that the Society which nominated the petitioner was not a defaulter or in default to the apex society. It was further submitted that the repayment schedule issued by the apex society itself would reveal that the repayment made was in excess of the schedule of payments. Ext.P2(4), DCB statement as on 31st August, 2002 issued by the apex society would reveal that the percentage of repayment was exceeding 100 per cent. The other statement namely Ext.P3(2) would reveal that percentage of payment in respect of N.C.D.C. loans was below the required percentage.

5. The learned Counsel appearing for the petitioner in O.P. 26399/02 also submitted that the Society which nominated the Petitioner as a candidate was not in default or a defaulter to the apex society. Ext.P3 is a certificate issued by the District Officer, MATSYAFED on 13th September, 2002 stating that the primary society represented by the petitioner was not a defaulter in respect of any loan transaction between the apex society and the primary society except the amount due under N.C.D.C. project. This certificate would reveal that the primary society was not at all a defaulter in except the amounts advanced by the N.C.D.C. projects. Thus the evidence let in by the petitioners would reveal that the primary societies were not in default in paying the amount in accordance with the payment schedule to the apex society except the amount due as per the N.C.D.C. project.

6. The learned counsel appearing for the petitioners submitted that the apex society had advanced loans to the members of the primary society directly under N.C.D.C. programmes and the recovery also had been made directly by the apex society. Ext.R4(b) (Pages 11, 12 and 13) in O.P. 25795/2002 are copies of the applications made by the members of the primary society directly before the apex society and those applications were produced by the apex society itself. Ext.R4(b) (pages 1 to 10) was an agreement executed by the members of the society, in fact in favour of the apex society. In the above agreement the apex society as well as the primary society were mentioned as party No. 1 and the members who obtained the loan were shown as party No. 2. It is true that a liability was cast upon the primary society to collect the amount from the members and to remit the same before the apex society. But the documents would reveal that coercive steps for recovery had been taken by the apex society itself. Ext.P5(3) in O.P. 26244/02 is a notice issued by the MATSYAFED to the members demanding the recovery. In fact, in all the three cases N.C.D.C. loans were given by the MATSYAFED to the members directly by executing similar agreements wherein the MATSYAFED and the primary societies were mentioned as party No. 1 and the members (as a group) as party No. 2.

7. The learned counsel for the petitioners submitted that any default in making the payments to the apex society in respect of N.C.D.C. loans cannot be a disqualification under Rule 44(1)(c) of the co-operative Societies Rules and the disqualification under Rule 44(1)(c) would incur only if there was default in repaying the loan or loans taken by the society or in respect of any loan or loans for which the society stood as a surety. The relevant portion of Rule 44 (1) reads:

'(1) No member of the society shall be eligible for being elected, or appointed as a member of the committee of the society under Section 28 if he:

(a) is disqualified under Section 28; or

(b) is a near relative of a paid employee of the Society; or

(c) (i) is in default to the society or to any other society in respect of any loan or loans taken by him or loan in which he had stood surety, for such period, as is

prescribed in the bye-laws of the society concerned or in any case for a period exceeding three months or is a defaulter to the society or to any other society; or

(ii) \*\* \*\* \*\* \*\*

(iii) \*\* \*\* \*\* \*\*

The disqualification under Rule 44(1)(c) in fact would apply in the case of the petitioners defaulting in repaying any loan or loans taken by them or the loan or loans in respect of which they had stood as sureties. Even if we substitute the word society at the place of 'he' in the rules the disqualification would incur only if the primary society had taken any loan or loans and defaulted in repaying or stood as sureties in respect of any loan or loans and committed default. So far as the loans advanced under N.C.D.C. projects were concerned, those were loans advanced not to the primary societies but to the members directly. The primary societies cannot be said to be sureties in respect of those loans granted to the members but they joined with the apex society as party No. 1 which granted the loan. By joining in the above agreements, the primary societies had not obtained any loan from the apex society or stood as surety to the loans advanced to the members directly by the apex society. Hence by no stretch of imagination can it be held that the primary societies by joining in executing the agreement with the apex societies as party No. 1 had obtained a loan from the apex society or stood as a surety'. In view of the liability shown in the D.C.B. statements regarding the payment of the N.C.D.C. loans, the primary societies cannot be said to be in default as contemplated under Rule 44(1)(c). The disqualification contemplated under Rule 44(1)(c) would apply to defaults committed by the society in respect of loan or loans taken by such society or loan or loans in respect of which society stood as surety and it did not take in any other liability due from the society.

#### 8. Rule 2(d) of the Rules defines 'default'

'Default means failure on the part of any person to repay to the financing bank or to any ether society a loan or any other amount due to it within the time fixed for repayment or to return to the society within the time fixed the finished goods in respect of raw materials advanced or to keep any other obligation for the fulfilment

of which a time-limit has been specified in the bye-laws.'

The above definition would reveal that when time is fixed for the repayment of any loan or any other amount due and if the amount was not paid within that time then only the above person could be said to be in default. Rule (2)(h) of the Rules says that the person would include Government and a Co-operative Society. Though the definition of default would taken in a 'loan or any other amount due', Rule 44(1)(c) would take in only the loans taken by the society and in respect of other loans the society stood as sureties. Rule 44(1)(c) does not take in any other dues. Admittedly, the loans were granted with conditions of repayment within specified time. The amount would become due only when the time stipulated as per the agreement expire. The documents viz., the D.C.B. statements issued by the MATSYAFED itself would reveal that the repayments were made in respect of all loans except the N.C.D.C. loans, in accordance with the time schedule prescribed by the apex society and in fact the repayments were in excess of 100 per cent. The balance amount if any, becomes due only when there was failure in the repayment within the time prescribed. So far as O.P. 26399/02 was concerned, the N.C.D.C. loan was granted in 1999 and the amount was paid to the members only in December 2000. Ext.PI in O.P. 26399/02 is the agreement executed by the parties on 1st December, 1999. The loan was granted as per Ext.P2 order on 13th December, 2000, that also was granted to Group No. 101 of the primary society. The agreement would show that the repayment will have to be made within three years as per the payment schedule. The above repayment schedule was not produced. Even if the liability was with the primary society, as the payment was made only in December 2000, and the period of repayment would be complete only by the end of 2003. But even without considering all those aspects, the above society also was treated as in default to the apex society.

9. A defaulter is defined is Rule 2(e) as:

'Defaulter means any Co-operative Society against which or any person against whom a decree has been obtained.'

When there is a decree against the society or a person then only he or the society would become a defaulter as defined under Rule 2(e) of the Rules. There was no

case for the apex society that the societies or the petitioners who filed the nominations were defaulters. There was absolutely no case that the petitioners were in default in repaying any loan obtained by them or that they were sureties in respect of any loan which the principal debtor had defaulted. The societies represented by the petitioners cannot be said to be in default in respect of any loans obtained by those societies. The Returning Officer did not consider any of these aspects but had acted in a mechanical way rejecting the nominations relying solely the report or a statement filed by the apex society.

10. The learned counsel appearing for the respondents submitted that the Returning Officer was not expected to make a roaming enquiry into the liability of the Societies before nominations are rejected and he need only consider the records available. The counter-affidavit filed on behalf of the Returning Officer would reveal that the Returning Officer called for a statement from the MATSYAFED and accordingly the MATSYAFED furnished a statement showing the list of defaulters. Accordingly on the basis of the above statement, the nominations of the petitioners were rejected by the Returning Officer. The counter-affidavit filed by the Returning Officer would make it clear that he did not make any enquiry or any verification of the records before rejecting the nominations. The learned counsel for the Returning Officer was placing reliance on the decision of the Division Bench of this Court in Writ Appeal Nos. 169, 170, 208 and 211 of 2000 dated, 22nd October, 2001 wherein it was held:

'He can only go by the records kept or maintained by the apex society. The statute contemplates that records must be regularly kept by the apex society and in that situation, the Returning Officer is entitled to proceed on the basis of those records. Therefore, if the records of the apex society showed that a member society was in default to it, or amounts were outstanding from that member society which could be considered as loan, the representatives of the member society can be held to be disqualified on the ground that they are representing societies in default and the nominations filed by them could be rejected.' (emphasis given).

It is true that the Returning Officer is not expected to make a detailed enquiry regarding the contentions put forward by the candidates before the nominations

are rejected. But the above decision would reveal that the Returning Officer had to verify the records maintained by the apex society. In the present case, no such verification of records had been made. In the counter-affidavit filed by the Returning Officer, the above portion of the Judgment from the Writ Appeal had been extracted in para 5. But instead of the word 'records' the word 'reports' had been mentioned in para 5 of the counter-affidavit. It is a clear indication that the Returning Officer had relied only on the report of the apex society without verifying the records maintained by the apex society. If the Returning Officer had verified the records, the loans advanced under the N.C.D.C. programme should not have been considered in fixing the liability of the society. Hence the above arguments advanced by the learned counsel for the Returning Officer cannot be accepted. The Returning Officer should have verified the records maintained by the apex society before rejecting the application and he was acting only on the report filed by the apex society and he was only endorsing to the decision of the MATSYAFED. The order of rejecting the nominations of the petitioners was only a mechanical act without verifying the records and applying his mind and hence the above orders are liable to be set aside.

11. Another argument advanced by the learned counsel for the petitioners was that the disqualification contemplated under Rule 44(1)(e) would apply only to persons and not to societies. The above argument cannot be brushed aside in view of Ext.P1 notification issued by the Election Commission. As per Ext.P1, 15 members were to be elected out of which 13 members were to be elected from the General Category, one member from SC/ST and one lady member. There is a note attached to Ext.P1. Clause 5 in the note says that the candidates contesting for the election should not incur disqualification under Section 28 and Rule 44 of the Rules. Clause 4 says that a candidate contesting for the reservation seat to the SC/ST should produce a certificate showing his caste. Further, Clause 7 says that a candidate cannot contest for more than one seat. The learned counsel for the Returning Officer as well as the apex society could not let in any evidence and convince as to how the societies were classified as SC/ST societies or Women societies and how the above reservation was being worked out. A consideration of the above clauses in the note attached to Ext.P1 might indicate that the disqualification referred to was in respect of the contesting candidate not the



society. As the original petitions have to be allowed on other grounds, the above contention is left open, and is not decided in this proceedings.

12. The learned counsel for the respondents advanced an argument that an Original Petition under Article 226 of the Constitution of India cannot be maintained when there is an effective, alternate remedy available even as per the provisions in the Statute. It was further argued that the petitioners can challenge the order rejecting the nomination in accordance with Section 69 of the Co-operative Societies Act. Reliance was also placed on a decision of the Division Bench of this Court in Andoorkonam Service Co-operative Bank v. Co-operative Election Commission (2002 (3) KLT SN 93 Page 68). There it was held:

'It is not the function of this Court to assume for itself what is the legitimate function of the authority under the provisions of the Kerala Co-operative Societies Act. Article 226 of the Constitution of India is an extraordinary remedy and, like all extraordinary remedies, liable to lose its efficacy if invoked too often and for frivolous reasons. It is the bounden duty of this Court to maintain the cutting edge of its jurisdiction under Article 226 of the Constitution of India by restricting its invocation to occasion where in justice cannot be otherwise remedied. In our view, neither by an order in O.P. 6021/2002 nor because of O.P.No. 5927/2002, was the election liable to be interfered with by this Court in exercise of writ jurisdiction. Whatever be the grievances, the original petitioners ought to have pursued remedy under S .69(2)(c) of the Kerala Co-operative Societies Act. We therefore, see no reason why the writ jurisdiction of this Court should be invoked in such matters. As a matter of prudence, it would be necessary to keep intact the election results and leave the parties to their normal remedies.'

From the above order the facts and circumstances leading to such a decision are known to us and as such I do not think that the above decision can be accepted. The learned Counsel for the petitioner placed reliance on a decision of the Division Bench of this Court in Pankajaksha Panicker and Ors. v. N. Venugopalan Nair and Ors. (1994 (2) KLJ 8). That was a case where the nomination filed by the party had been rejected and the same had been Challenged before this Court invoking Article 226 of the Constitution of India. There it was held that this Court can

interfere with the order of rejection of the nomination under Article 226 of the Constitution of India. It was held:

'While it is true that, as a general principle, this Court, while exercising jurisdiction under Article 226 of the Constitution of India, does not normally set aside any election, there may indeed be rare cases where even if the resultant election is not directly set aside, the quashing of some other anterior proceedings of the Returning Officer might result, as a matter of operation of the law, in the setting aside of a resultant election. This happens not because the High Court is treating the Writ Petition as an election petition but because the exercise of its powers under Article 226 to set aside arbitrary and patent illegal orders of the Returning Officers in regard to rejection of nomination papers might incidentally result in the consequential election falling to the ground or becoming nugatory.'

Another Division Bench of this Court had taken the same view in *Anthrayose P.K. v. The Senior Inspector of Co-operative Societies and Ors.* (AIR 1993 Kerala 39). In view of the above decisions a writ under Article 226 would lie challenging the order of the Returning Officer rejecting the nomination. Existence of an alternative remedy is not always a bar for approaching this Court under Article 226 of the Constitution of India. As a general principle a writ may not lie when an order was passed in an effective alternative remedy. But when there is gross violation of the provisions of law and the order appears to be *prima facie* arbitrary and illegal, this Court can interfere with the order under Article 226 of the Constitution of India. Hence, all the original petitions filed by the petitioners challenging the impugned order rejecting the nominations are maintainable.

13. In the counter-affidavit filed by the Returning Officer it was admitted that only 11 members were elected and the remaining places are lying vacant. But it was submitted before court that three places were lying vacant. In view of the above submission this Court passed interim orders in C.M.P. 43795/02 in O.P. 25795/02, in C.M.P. 44644/02 in O.P. 26244/03 and in C.M.P. 44899/02 in O.P. 26399/02 directing the respondents not to conduct elections to the three seats without obtaining orders from this Court. Thus, three seats are now lying vacant. The nomination filed by the petitioners were rejected in an arbitrary and illegal manner

without considering the records maintained by the apex society and though those societies were not in default as provided in Rule 44(1)(c) of the Rules. Hence all these three original petitions are to be allowed.

14. The main relief prayed for in all the three original petitions was to direct the respondents to accept the nomination and to declare that the nominations are valid. In view of the above findings, the above reliefs are to be allowed.

In the result, these three original petitions viz., O.P. 25795, 26244 and 26399/2002 are allowed. The order of the Returning Officer rejecting their nominations are set aside and it is declared that their nominations are valid. The Returning Officer shall dispose of the matter treating their nominations as valid nominations and consequential orders also shall be passed.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**