

**(1997) 09 KL CK 0044**

**High Court Of Kerala**

**Case No:** R.P. No. 276/97 in W.A. No. 1583/96

Naveen Kumar and Others

APPELLANT

Vs

The Joint Registrar of  
Co-operative Societies and  
Others

RESPONDENT

**Date of Decision:** Sept. 4, 1997

**Acts Referred:**

- Kerala Co-operative Societies Act, 1969 - Section 63, 65, 66, 68, 68(1)

**Hon'ble Judges:** K.G. Balakrishnan, J; B.N. Patnaik, J

**Bench:** Division Bench

**Advocate:** Mathai M. Paikeday and K.B. Gangesh, for the Appellant; K.K. Ravindranath, Government Pleader, for the Respondent

**Final Decision:** Dismissed

**Judgement**

B.N. Patnaik. J.

1. The Appellants in W.A. No. 1583 of 1996 of which judgment was delivered on 16th July 1997, have filed this review petition on the ground that the contention raised by the learned Counsel that the surcharge proceedings initiated u/s 68(2) of the Kerala Co-operative Societies Act, 1969 (for short ~~the Act~~) against them to recover a sum of Rs. 1,43,643 is illegal, was not considered on a proper interpretation of that section.

2. The Petitioners filed O.P. No. 15697/96 praying to quash the notice issued u/s 68(2) of the Act by the Respondents (Exts. P-1 and P-2) by which they were called upon to refund the aforesaid amount which they had received as sitting fee in the capacity of Directors of the Board of the Mattancherry Sarvajanik Co-operative Bank during the period from 27th October 1986 to 31st December 1994. Such a challenge was held to be unfounded by the learned Single Judge. They preferred an appeal against the judgment. By the impugned judgment, this Court dismissed the appeal

and upheld the legality of the notices. It was found by this Court that in the absence of a bye-law entitling the Petitioners to receive sitting fees as Directors of the Board, payment made to them on that account is illegal. The direction of the Registrar of Co-operative Societies to refund the same is justified. But this Court did not discuss the property of initiating surcharge proceedings u/s 68(2) of the Act in the event of the failure of the Petitioners to refund the amount though a contention was raised to that effect in the appeal memo.

It is contended by the learned Counsel for the Petitioners in this R.P. that there is no allegation of breach of trust, misappropriation, fraud or wilful negligence against the Petitioners in making the payment or receiving the fees by them. In the absence of any such allegation the action of the first Respondent in initiating surcharge proceedings against them u/s 68(2) of the Act is illegal and unsustainable. As such, it is contended that the impugned judgment has resulted in a miscarriage of justice and requires to be reviewed.

3. The only point for consideration is whether the surcharge proceedings u/s 68(2) of the Act is maintainable on the facts and in the circumstances of this case.

4. Section 68 of the Kerala Co-operative Societies Act, 1969 reads as follows:

(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 organisation or management of such society or who is or has at any time been an officer of an employee of the society, has made any payment contrary to this Act and the rules or the bye-laws, or has caused any deficiency in the assets of the society by breach of trust or wilful negligence 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.

A learned Single Judge of this Court in A.K. Francis v. Joint Registrar 1990 (2) KLT 470 held as follows:

The first requirement of the section, which constitutes the condition precedent for its operation, is that the payment contemplated or the deficiency in the assets of the society should have been found in the course of audit, inquiry, inspection or the winding-up of the society. The section can be invoked by the Registrar only if the

finding was made in this manner, and not otherwise. The facts giving rise to the charge have to be disclosed in the course of an audit u/s 63, inquiry u/s 65, inspection u/s 66 or on the winding-up of the society.

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The further requirement of Section 68 is that the payment or deficiency in the assets of the society was made or caused by breach of trust or wilful negligence or misappropriation or fraudulent retention of money. It is not the mere wrongful payment or causing of deficiency in the assets that attracts Section 68, but the further fact that such payment or deficiency was made or caused by the breach of trust, wilful negligence, misappropriation or fraud of the person concerned. Unless the latter ingredient is found to exist, action u/s 68 is ruled out.

The aforesaid observations were made in the peculiar circumstances of that case. In that case no enquiry was held u/s 65 of the Act before the surcharge proceeding was initiated u/s 68 of the Act.

5. That apart, in our opinion, a narrow interpretation has been given to Section 68 in the aforesaid decision. On a proper analysis of Section 68 of the Act, it appears to lay down thus. The Registrar is empowered to take action under Sub-section (2) of Section 68, 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 organisation or management of such society or who is or who has at any time been an officer or an employee of the society, (1) has made any payment contrary to this Act and the rules or the bye-laws, or (2) has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has misappropriated or fraudulently retained any money or other property belonging to such society, or (3) has destroyed or caused the destruction of the records. Sub-section (1) of Section 68 enumerates three distinct kinds of wrong and further envisages that a surcharge proceeding may be initiated if any one of the three kinds of wrong is committed. None of them qualifies the other. It cannot be said that the action is contemplated only on the occurrence of the aforesaid second kind of wrong. If any other interpretation is given, then the Registrar would not be in a position to take appropriate action against a person who without even wilful negligence makes illegal payment of the funds of the society to others because strictly speaking it would not amount to misappropriation or fraudulent retention of money. This cannot be the intention of the legislature.

6. It appears from Ext. P-4 proceedings of the Joint Registrar of Co-operative Societies, Ernakulam in C.R.B. No. 3653/94, dated 26th October 1996 that on receipt of a complaint against the Mattancherry Sarvajanik Co-operative Bank, the Assistant Registrar of Co-operative Societies was directed to make an enquiry u/s 65 of the Act. He submitted a report dated 15th February 1995 after making an enquiry. The enquiry Officer has reported that there is no provision in the bye-laws of the Bank

for payment of sitting fee to the committee members. Therefore, the sitting fee drawn from 27th October 1986 to 31st December 1994 is irregular and hence it should be recovered from them. The contention of the learned Counsel that no enquiry was made u/s 65 of the Act does not therefore, appear to be correct.

Merely because there was no wilful negligence etc. in making payment, it does, not follow that provisions of Section 68(2) is not attracted. In the instant case, the Petitioners as the members of the Board of Directors were entrusted with the management of the society and its funds.

They paid the money of the society to themselves contrary to the bye-law of the society. In this view of the matter, we find that the contention of the learned Counsel that Section 68(2) of the Act is not applicable to the facts of this case is not sustainable. We hold that the impugned surcharge proceeding is maintainable.

For the reasons stated above, the review petition is dismissed. No costs.