

Debate on the Constitutionality of Section 7(1)(c) of

Kerala Co-operative Societies Act: An analysis.

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1. Section 7(1)(c) of the Kerala Co-operative Societies Act (hereafter KCS Act), a simple and straight-forward provision, had its fair share of litigation and precedents are legion explaining this provision¹. Section 7 discusses about registration of a co-operative society, and Section 7(1)(c) reads as follows;

Section 7. Registration. - (1) If the Registrar is satisfied—

(a)*****;

(b) *****;

(c) that the area of operation of the proposed society and the area of operation of another society of similar type do not overlap;

(d) *****;

(e)***** , and

(f) *****;

he may register the society and its bye-laws [within a period of sixty days from the date of receipt of the application.]

To put it pithily, the Registrar may grant registration to a co-operative society, after ensuring that the conditions precedent under Section 7 are complied by the said society, and one amongst them is that the area of operation of the proposed

¹ Pantheerankavu Service Co-operative Bank Ltd & Ors vs State of Kerala & Ors, reported in ILR 2016 (2) Ker.1073.

society and the area of operation of another society of similar type do not overlap. The object behind such a provision is to ensure that there is a healthy relationship amongst the co-operative societies, namely 'Co-operation among Co-operatives' which can be traced to the Co-operative Principles incorporated as Schedule-II of the Kerala Co-operative Societies Act. Clause (eccc) of Section 2 of the KCS Act defines 'co-operative principles' to mean the co-operative principles listed in Schedule II appended to the Act. It is also an admitted fact that 'co-operative society' is a State Subject, as provided under Entry 32 of State List. Time and again Constitutional Courts have taken note of the importance of co-operative movement, and the Hon'ble Supreme Court in **Andhra Pradesh Diary Development Corporation Federation vs Narasimha Reddy**², had observed the following;

"47. The co-operative movement by its very nature, is a form of voluntary association where individuals unite for mutual benefit in the production and distribution of wealth upon principles of equity, reason and common good. So, the basic purpose of forming a co-operative society remains to promote the economic interest of its members in accordance with the well recognised co-operative principles."

(Emphasis Added)

2. The formation of a co-operative society was recognized as a fundamental right under Article 19(1)(c), and Article 43B was included as one of the principles of

² (2011) 9 SCC 286

Directive Principles of State Policy aiming at promotion of co-operative societies, by way of 97th Constitutional amendment. The aforesaid articles read as;

19. Protection of certain rights regarding freedom of speech, etc.

(1) All citizens shall have the right-

(c) to form associations or unions or co-operative societies;

43B. Promotion of cooperative societies

The State shall endeavor to promote voluntary formation, autonomous functioning, democratic control and professional management of co-operative societies.

3. It is to be noted that the Part IXB was added to the Constitution of India, titled as 'cooperative societies', thereby inserting Article 243ZH to Article 243ZT, with respect to the 'co-operative societies', by way of the 97th amendment. The significance of Part IXB was explained by the Hon'ble Supreme Court on multiple instances, namely **Thalappalam Service Co-operative Bank Ltd vs State of Kerala**³ and **Vipulbhai M Chaoudhary vs Gujarat Co-operative Milk Marketing Federation**⁴. In the meanwhile, a Division Bench of Gujarat High Court, by way of judgement in **Rajendra N Shah vs Union of India**⁵, declared that said constitutional amendment inserting Part IXB is ultra vires the Constitution

³ (2013) 16 SCC 82

⁴ (2015) 8 SCC 1

⁵ CDJ 2013 GHC 045 : (2013) 54 (2) GLR 1698.

of India for want of the requisite ratification under Article 368(2) proviso, which however will not impact amendments that have been made in Article 19(1)(c) and in inserting Article 43B in the Constitution of India. The judgement was challenged by the Union of India before the Hon'ble Supreme Court, which was pending there for some time.

4. While the aforesaid challenge was pending, a question came up for consideration before the Hon'ble High Court as to the constitutional validity of Section 7(1)(c) of KCS Act, in a batch of writ petitions. A declaration was sought that Section 7(1)(c) of KCS Act, which impedes the registration of new co-operative societies of similar type in the same area of operation is hit by Article 19(1)(c) of the Constitution of India, and is unconstitutional and illegal. After extensive analysis of the provisions, including that of Part IXB, Article 19(1)(c) and Articles 43B of Constitution of India, the Court in **Kalpetta Co-operative Urban Society Ltd, Wayand vs Joint Registrar of Co-operative Societies**⁶, held that Section 7(1)(c) is ultravires and unconstitutional for it falls foul of Article 19(1)(c) of Constitution of India. It will be apposite to reproduce the relevant paragraphs in **Kalpetta Co-operative Urban Society (supra)**;

"73. Any interpretation of the content of the rights under Article 19(1) (c) would subsume the wide, liberal content of Article 43B. Thus, the concepts of democratic functioning, voluntary formation, etc., in the newly introduced

⁶ ILR 2016(3) Ker.888

Article 43B would transmute themselves into fundamental features of Article 19 (1) (c).

75. ***** To conclude, we may emphatically hold that Parts III and IV are supplementary and complementary to each other. And the fundamental Rights must be construed in the light of the Directive Principles, too. Not to be left is the dictum of a Seven-Judge Bench in State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, in judging the reasonableness of the restriction the court has to bear in mind the directive principles of State Policy.

81. Back to the basics, we may examine whether Section 7 (1) (c) saves itself from invalidation: It is possible if the limitation prescribed in that provision has the attribute of any of the contingencies contemplated in Art.19 (4) of the Constitution. Pure and simple, Section 7 (1) (c) enjoins the establishment of another society of similar type in an existing society's area of operation. Even a fecund mind of excuses and justifications, I think, cannot contrive a connection between the plebeian protective restriction in Section 7 (1) (c) of the Act and the exalted constitutional limitation in Art.19 (4).

83. On the strength of the above discussion, this Court holds that Section 7 (1) (c) of the Kerala Co-operative Societies Act, 1969, is ultra vires and unconstitutional for it falls foul of Article 19 (1) (c) of the Constitution of India. So is the declaration."

(Emphasis Added)

5. As against **Kalpetta Co-operative Urban Society(supra)**, the State Government preferred appeals before the Division Bench, wherein an interim order of stay was granted as against the striking down of Section 7(1)(c) as unconstitutional. While the writ appeals were pending, the Hon'ble Supreme Court considered the challenge of Union of India as against the judgement of Gujarat High Court in **Rajendra N Shah(supra)**. The judgement of the High Court was upheld by the Hon'ble Supreme Court, in **Union of India vs Rajendra N Shah⁷ (hereafter Rajendra N Shah 2)**, by a majority of 2:1, except to the extent that it strikes down the entirety of Part IXB of the Constitution of India. It was clarified that Part IXB of the Constitution of India is operative only insofar as it concerns multi-State co- operative societies both within the various States and in the Union territories of India. The Hon'ble Supreme Court in **Rajendra N Shah 2 (supra)**, reiterated what the Gujarat High Court held, that the striking down of Part IXB will not impact amendments that have been made in Article 19(1)(c) and in inserting Article 43B in the Constitution of India. It will be fruitful to reproduce the relevant portions of judgement of Hon'ble Supreme Court in **Rajendra N Shah 2 (supra)**;

"2. These appeals raise an important question as to the vires of the Constitution (Ninety Seventh Amendment) Act, 2011 [the "Constitution 97th Amendment Act"] which inter alia introduced Part IXB under the chapter heading 'The Co-operative Societies'. The Constitution 97th Amendment Act was passed by the

⁷ 2021 SCC Online SC 74.

requisite majority of the Lok Sabha on 27.12.2011 and the Rajya Sabha on 28.12.2011. The Presidential assent to the aforesaid Amendment followed on 12.01.2012 and the said Amendment was published in the Official Gazette of India on 13.01.2012, coming into force with effect from 15.02.2012. The important question raised in these petitions and decided by a division bench of the Gujarat High Court by the impugned judgment dated 22.04.2013 is whether Part IXB is non est for want of ratification by half of the States under the proviso to Article 368(2). The impugned judgment of the High Court has declared that the said constitutional amendment inserting Part IXB is ultra vires the Constitution of India for want of the requisite ratification under Article 368(2) proviso, which however will not impact amendments that have been made in Article 19(1)(c) and in inserting Article 43B in the Constitution of India.

78. *****Further, on this reasoning, the amendments made in Article 19 and the addition of Article 43B would also have to be struck down, which was not pleaded or argued before either the High Court or before us.

This being the case, we declare that Part IXB of the Constitution of India is operative insofar as multi-State co-operative societies are concerned.

81. The judgment of the High Court is upheld except to the extent that it strikes down the entirety of Part IXB of the Constitution of India. As held by us above, it is declared that Part IXB of the Constitution of India is operative only insofar

as it concerns multi-State co- operative societies both within the various States and in the Union territories of India.”

(Emphasis Added)

Thus, it was clear from the judgement of the Hon’ble Supreme Court that Articles 19(1)(c) and 43B were not struck down and still is very much present in the Constitution of India.

6. The Single Bench judgement in **Kalpetta Co-operative Urban Society(supra)**, was noted by another learned Single Judge in **Karassery Service Co-operative Bank vs. State of Kerala & Ors**⁸, albeit in a different context. The dictum in **Kalpetta Co-operative Urban Society(supra)**, was reiterated in **Karassery Service Co-operative Bank (supra)**, in the following manner;

“90. In Kalpetta Co-operative Urban Society, after holding that establishing a co-operative society is a fundamental right, this Court examined the impact of constitutional limitations under Clauses (2) to (6) of Article 19 of the Constitution of India, on the fundamental rights under Clause (1) of Article 19. This Court observed that forming a co-operative society combines two fundamental freedoms, i.e., right to form associations, etc.; and right to carry on economic activity. But the latter falls short of a right under Article 19(1)(g) of the Constitution, for establishing a co-operative society can hardly be called a profession. Nor can be it called an occupation, trade, or business,

⁸ 2020 KHC 572 : 2020 SCC Online Ker 3196

all of which have the motive of making a living out of it, and, incidentally, the motive of making profit, too. A co-operative society is a collective effort of a given group of people to improve their economic lot collectively. Running the society may be imbued with sound business principles, but that financial prudence does not by itself qualify it to be a trade as has been contemplated under Article 19(1)(g). It is, therefore, essentially a right under Article 19(1)(c). Any interpretation of the content of the rights under Article 19(1)(c) would subsume the wide, liberal content of Article 43B. Thus, the concepts of democratic functioning, voluntary formation, etc., in the newly introduced Article 43B would transmute themselves into fundamental features of Article 19(1)(c). Despite the constitutional amendment, a pre-existing law holds the field if it does not conflict with the amended constitutional mandate. The Legislature has been given the necessary leverage to rein any repugnant piece of legislation out of sync with the constitutional mandate. One year is the period prescribed for that purpose in Article 243ZT of the Constitution of India. As to reasonable restrictions, even in the name of public order and morality, Section 7(1)(c) of the KCS Act offers very little as justification to sustain it in the face of Article 19(1)(c) of the Constitution. Therefore, this Court held that Section 7(1)(c) of the KCS Act is ultra vires and unconstitutional for it falls foul of Article 19(1)(c) of the Constitution of India."

(Emphasis Added)

The dictum in **Karassery Service Co-operative Bank (supra)** was affirmed by the Division Bench in **Karassery Service Co-operative Bank vs State of Kerala & Ors⁹**, by judgement dated 22-05-2024 in W.A. No. 1195 of 2020.

7. The fact that Articles 19(1)(c) and 43B was still present in the Constitution of India, was noticed by another Division Bench of Hon'ble High Court in **K Sivadasan Nair & Anr vs State of Kerala & Ors**, judgement dated 14-03-2022 in W.A. No. 159 of 2022¹⁰. The controversy in **Sivadasan Nair(supra)** was regarding whether the general body can move a motion of no-confidence against the entire managing committee of a co-operative society. It was answered by the Court affirmatively holding that the same is a permissible exercise. While holding so, the Hon'ble Court held that though 97th amendment to the Constitution inserting Part IXB to the Constitution was held to be ultra vires the Constitution for want of requisite ratification in terms of the proviso to Article 368(2) of the Constitution, the observations in **Vipulbhai M Chaoudhary (supra)** will have to be given due importance in wake of the fact that Articles 19(1)(c) and 43B are still very much present in the Constitution of India. The observations of the Hon'ble Court in **Sivadasan Nair (supra)** are as follows;

"9. *****Even though Gujarat High Court has declared the 97th amendment to the Constitution inserting Part IXB to the Constitution to be ultra vires the Constitution for want of requisite ratification in terms of the proviso

⁹ 2024 : KER : 34049 [Neutral Citation]

¹⁰ 2022 : KER : 13011 [Neutral Citation]

to Article 368(2) of the Constitution and even though the said decision of the Gujarat High Court was upheld by the Apex Court in *Union of India v. Rajendra N. Shah*, AIR 2021 SC 4905, except to the extent that it strikes down the entirety of Part IXB of the Constitution and declared that Part IXB of the Constitution is operative only insofar as it concerns multi-state co-operative societies, insofar as the amendment made to Article 19(1)(c) and the amendment made to Part IV of the Constitution inserting Article 43B are still part of the Constitution unaffected by the judgments aforesaid, we are of the view that this court is bound to give due regard to the decision in **Vipulbhai** while considering a matter of this nature. It is all the more so since it is seen that the judgment in **Vipulbhai** was rendered having regard to the provision in Article 43B of the Constitution as well.”

(Emphasis Added)

8. The Hon’ble Supreme Court had an occasion to consider the dictum in **Vipulbhai M Chaoudhary (supra)**, and co-operative principles in **Bengal Secretariat Co-operative Land Mortgage Bank & Housing Society Ltd vs Alope Kumar & Anr¹¹**, wherein the Hon’ble Court was considering the scope of interference of the Court in commercial wisdom of the general body. The Hon’ble Supreme Court observed that the decision in **Vipulbhai M Chaoudhary (supra)** has been rendered per incuriam and that the 97th amendment would not be applicable to

¹¹ 2022 SCC Online SC 1404.

the local co-operative societies (co-operative societies registered under the State enactments). However, the said observation would go against the explicit declaration made in **Rajendra N Shah 2 (supra)**. Moreover, other than merely stating that 97th amendment itself is not applicable to local co-operative societies, there is no mentioning as to whether it would also include Articles 19(1)(c) and 43B. On a wholesome reading the of Hon'ble Supreme Court's judgement, it can be safely interpreted that the aforesaid observation of Apex Court will have to be harmoniously read with the other portions of judgement, which can only lead to the conclusion that the Court was mentioning about Part IXB and not the 97th amendment in general. The said interpretation would be the right interpretation in culling out the ratio decidendi as held by the Hon'ble Apex Court in **BGS SGS Soma JV vs NHPC Ltd**¹², wherein it was observed that a judgment must be read as a whole, so that conflicting parts may be harmonised to reveal the true ratio of the judgment. The relevant observations in **Bengal Secretariat (supra)**, are as follows;

"48. The judgment of the Gujarat High Court referred to above was carried in Appeal by the Union of India being the Civil Appeal Nos. 9108-9109 of 2014 before this Court which upheld, by majority, the view of the Gujarat High Court to the extent it struck down the entire of Part IXB of the Constitution. However, the majority view declared that Part IXB of the Constitution of India would be

¹² (2020) 4 SCC 234

operative only insofar as it concerned the multi-State cooperative societies both within the various States and in the Union territories of India.

49. Thus, the Constitution (97th Amendment) Act, 2011 would not be applicable to the local co-operative societies, whereas the same would be applicable to the multi-State co-operative societies and the societies within the Union territories. We only need to clarify that our judgment is not based on the decision of Vipulbhai M. Chaudhary (supra) which has now been rendered per incuriam. We referred to Vipulbhai M. Chaudhary (supra) only for the limited purpose of highlighting the history of the 'Cooperative Movement' in India and the co-operative principles. *****”

(Emphasis Added)

9. Moving forward, the challenge against the judgement in **Kalpetta Co-operative Urban Society(supra)**, at the instance of the State and the appellants therein, came to be considered by the Division Bench of the Hon’ble High Court in a batch of writ appeals. The Division Bench allowed the appeals upholding the constitutional validity of Section 7(1)(c) of the KCS Act, in **State of Kerala & Ors vs Sulthan Bathery Co-operative Urban Bank Ltd & Ors¹³**, judgment dated 05-06-2024 in W.A. No. 2005 of 2016 and connected matters. On a perusal of the judgment, it can be seen that the Division Bench had allowed the appeals in **Sulthan Bathery Co-operative Urban Bank Ltd (supra)** only on the premise of following **Rajendra N Shah 2 (supra)** and striking down of 97th

¹³ 2024 : KER : 39982 [Neutral Citation]

amendment. The findings in the judgement of the Division Bench in **Sulthan Bathery Co-operative Urban Bank Ltd (supra)** is as follows;

"5. We have perused the judgment of the Supreme Court and are of the considered view that the learned Single Judge had completely erred in declaring Section 7(1)(c) of the Kerala Co-operative Societies Act, 1969 as ultra vires to the 97th amendment to the Constitution of India. Even at the time of consideration of the writ petitions, it was the specific case of the appellant in W.A.No.1680/2016 that the judgment of the Gujarat High Court was holding the field insofar as the 97th amendment to the Constitution of India is concerned.

7. In view of the above, we hereby allow all these Writ Appeals following the judgment of the Supreme Court in Rajendra N. Shah (supra) and set aside the judgment of the learned Single Judge, which are under challenge in these writ appeals, holding Section 7(1)(c) of the Kerala Cooperative Societies Act, 1969 as ultra vires. The challenge to the constitutional validity of Section 7(1)(c) of the Kerala Co-operative Societies Act, 1969 is hereby thus rejected."

(Emphasis Added)

10. On a perusal of the judgement in **Sulthan Bathery Co-operative Urban Bank Ltd (supra)**, it appears that the Division Bench has interfered with the judgement of Learned Single Judge in **Kalpetta Co-operative Urban Society(supra)**, only on the basis of the judgement of the Hon'ble Supreme Court in **Rajendra N Shah 2 (supra)**. However, it is to be noted that the Hon'ble Supreme Court itself in

Rajendra N Shah 2 (supra) and a Division Bench of Hon'ble High Court in **Sivadasan Nair (supra)** had made it clear that Articles 19(1)(c) and 43B are still there in the Constitution of India, and their validity was never challenged. The Division Bench judgement in **Sivadasan Nair (supra)** was not brought to the notice of the Division Bench while deciding **Sulthan Bathery Co-operative Urban Bank Ltd (supra)**. Moreover, the Learned Single Judge in **Kalpetta Co-operative Urban Society(supra)**, had struck down Section 7(1)(c) for falling foul of Article 19(1)(c) of the Constitution of India, which aspect has not been dealt within the Division Bench judgement in **Sulthan Bathery Co-operative Urban Bank Ltd (supra)**. It may not be out of place to point out that High Court of Karnataka in **Uppinangady Co-operative Agricultural Society Limited vs State of Karnataka**¹⁴, had an occasion to consider the effect of 97th amendment, and it was held that the amendment to Article 19(1)(c) and introduction of Article 43-B of Constitution was never under challenge in **Rajendra N Shah 2 (supra)** and those amendments are intact. The Court was considering constitutional validity of Section 128-A of Karnataka Co-operative Societies Act, 1959, which empowered the Registrar to completely take away the right of a co-operative society to recruit, transfer or hold disciplinary enquiry against its employees. The Court struck down the provision as ultra vires the Constitution of India. The relevant portions of the judgement, with respect to the discussion of 97th amendment is reproduced hereunder;

¹⁴ 2024 SCC Online Kar 70

"54. *****Learned Senior counsel placed reliance on the judgment of the Hon'ble Apex Court in the case of Union of India vs. Rajendra N. Shah and urged that the 97th amendment of Constitution of India is declared unconstitutional and the petitioners cannot claim fundamental right to form a co-operative society. The said contention cannot be accepted. The Hon'ble Apex Court has held that part IX-B of Constitution of India introduced in 97th amendment is unconstitutional in so far as the State Co-operative Societies Act. The said Chapter is held to be valid and applicable to Multi State Co-operative Societies Act. The amendment to Article 19(1)(c) and introduction of Article 43-B of Constitution was never under challenge in the said proceeding and those amendments are intact."

(Emphasis Added)

11. Thus, to conclude, the debate around the constitutional validity of Section 7(1)(c) of the KCS Act, though stands formally concluded by way of Division Bench judgement in **Sulthan Bathery Co-operative Urban Bank Ltd (supra)**, the same is still open for academic debate, in the opinion of this author. It can be seen that the Division Bench judgement in **Sivadasan Nair (supra)** was not brought to the notice of the Division Bench while deciding **Sulthan Bathery Co-operative Urban Bank Ltd (supra)** coupled with the fact that there was no examination as to whether Section 7(1)(c) of KCS Act falls foul of Article 19(1)(c) of Constitution of India. The observations of the Hon'ble Supreme Court in **Bengal Secretariat (supra)** can add a further layer to this conundrum, wherein it was

observed that 97th amendment is not applicable to local co-operative societies, warranting a clarification, in the absence of which, there can be an argument that Articles 19(1)(c) and 43B are not applicable to local co-operative societies. In future, a Full Bench may be required to resolve this Gordian knot.