

Section 101: The Henry VIII Clause of Kerala Co-operative Societies Act.

Has the Court Conferred the Government with a Greater Power than what was Contemplated by the Legislature?

(By Arjun Raghavan, Advocate, High Court of Kerala)

The term ‘Henry VIII Clause’ is an oft-used term in the realm of administrative law. The meaning of ‘Henry VIII Clause’ was explained by the Hon’ble Apex Court in **Central Inland Water Transport Corporation vs Brojo Nath Ganguly and Anr⁽¹⁾**, in the following words;

“97. As all lawyers may not be familiar with administrative law, we may as well explain that “the Henry VIII clause” is a provision occasionally found in legislation conferring delegated legislative power, giving the delegate the power to amend the delegating Act in order to bring that Act into full operation or otherwise by Order to remove any difficulty, and at times giving power to modify the provisions of other Acts also. The Committee on Ministers’ Powers in its report submitted in 1932 (Cmd. 4060) pointed out that such a provision had been nicknamed “the Henry VIII clause” because “that King is regarded popularly as the impersonation of executive autocracy”.

A further detailed explanation of ‘Henry VIII clause’ can be found in the article titled as “Henry VIII Clause in India” authored by Squadron Leader Sri N A K Sharma⁽²⁾, wherein the author succinctly states it as an executive autocracy in the modern times, and the same is reproduced herewith;

“Henry VIII was the monarch of England from 1509 to 1547 and during his regime he encountered numerous “difficulties” in enforcing his will. Some of the difficulties were purely personal and were creations of the prevailing laws of the church which prevented him from marrying women of his choice. A study of the English history of his period will clearly reveal how Henry VIII succeeded in” removing the difficulties” that came in his way by using the instrumentalities of the Parliament and the church. In so doing he of tenacted ruthlessly and much against the then prevailing religious and political concepts. It appeared that only the end mattered to him and not the means. It is, therefore, not strange that the” removal of difficulties clause” has been named after that monarch in his respectful commemoration of his tendency

(1) (1986) 3 S.C.C. 156

(2) Sarma, N. A. K. “ ‘Henry VIII Clause’ in India.” *Journal of the Indian Law Institute* , vol. 15, no. 3, 1973, pp. 460-486.
JSTOR, <http://www.jstor.org/stable/43950219>. Accessed 19 Apr. 2024.



to absolutism.’ Thus, in modern times the” Henry VIII clause” personifies executive autocracy.”

The usual denotation given to a Henry VIII clause in a statute is in the nature of a ‘power to remove difficulties clause’, which can be invoked by the Executive on account of arising of any difficulty while implementing the provisions of the statute. Though the resultant order issued therein is by the Executive, said order is usually given the status of a delegated legislation. The importance of existence of such clauses was recognized/approved by the Hon’ble Apex Court in **Madeva Upendra Sinai & Ors vs Union of India & Ors**⁽³⁾, wherein the Apex Court held that in order to obviate the necessity of approaching the Legislature for removal of difficulties encountered in the enforcement of a statute through the time-consuming amendatory process, ‘power to remove difficulty clauses’ are a practical necessity. The discussion made by the Apex Court is reproduced hereunder; -

“39. To keep pace with the rapidly increasing responsibilities of a Welfare democratic, State, the legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme pressure, with heavy demands on the time of the legislature and the endurance and skill of the draftsman, it is well nigh impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or even a local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socioeconomic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of India. In order to obviate the necessity of approaching the legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the “removal, of difficulty clause”, once frowned upon and nick-named us “Henry VIII Clause” in scornful commemoration of the absolutist ways in which that English King got the “difficulties” in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of post independence era.”

(3) (1975) 3 S.C.C. 765



The dictum in **Madeva Upendra Sinai (supra)** was noticed by the Apex Court in **State of West Bengal vs Anindya Sundar Das & Ors**⁽⁴⁾. Interestingly, a ‘power to remove difficulty clause’ can be found in the Constitution⁽⁵⁾ also. The power of the Government/Executive to exempt an entity from any of the provision of the parent statute was also termed as a ‘Henry VIII Clause’ by the Hon’ble Apex Court in **Registrar of Co-operative Societies vs K Kunjambu**⁽⁶⁾, in the context of Section 60 of Madras Co-operative Societies Act, 1932, wherein the Court negated the challenge against the said provision under the ground of excessive delegation. However, order issued thereunder can be always subjected to judicial review, as explained by the Hon’ble Apex Court in **Consumer Action Group vs State of Tamil Nadu**⁽⁷⁾. The further discussion in this article is based on the foundational aspects elucidated above.

It is to be noted that Section 101 of the Kerala Co-operative Societies Act, 1969, also contains a similar provision, which is in *pari materia* with Section 60 of the Madras Act. For a quick reference, both the provisions are extracted hereunder;

“60. **Power to exempt registered societies from provisions of the Act:** - The State Government may, by general or special order, exempt any registered society from any of the provisions of this Act or may direct that such provisions shall apply to such society with such modifications as may be specified in the order.”

“101. **Power to exempt societies:** - The Government may, if they are satisfied that it is necessary so to do in the public interest, by general or special order for reasons to be recorded, exempt any society or any class of societies from any of the provisions of this Act or direct that such provisions shall apply to such society or class of societies subject to such modifications as may be specified in the order.”

The corresponding rule to Section 101, i.e, Rule 181 of Kerala Co-operative Societies Rules, 1969, is also extracted herewith for reference; -

(4) 2022 SCC Online SC 1382

(5) Article 392 of Constitution of India, which reads as;

392. Power of the President to remove difficulties :- (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by any of modification, addition or omission, as he may deem to be necessary or expedient: Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

(6) (1980) 1 SCC 340

(7) (2000) 7 SCC 425



“181. Power to exempt from Rules: - The State Government may, by general or special order and subject to such conditions as they deem fit, exempt any registered society or class of such societies from any of the provisions of these rules or may direct that such provisions shall apply to such society or class of societies with such modifications as may be specified in the order.”

A perusal of Section 60 of Madras Act and Section 101 of Kerala Act would show that the provisions are almost identically worded, except the fact that Section 60 specifically provides exemption for a registered society whereas the use of word ‘registered’ is not there in Section 101, but the said word finds a place in Rule 181.

Moving further, the constitutional validity of Section 101 was upheld by the Hon’ble High Court in **Pampady Rural Co-operative Housing Society vs Joint Registrar**⁽⁸⁾, wherein it was also observed that the requirement of providing reasons with the element of public interest are sufficient safeguards, which would keep a check on the exercise of power by the Government. A Division Bench of High Court in **Feroke Service Co-operative Bank vs State of Kerala**⁽⁹⁾, while upholding the power under Section 101 cautioned that the said power cannot be exercised in an arbitrary or whimsical manner, and can only be exercised where public interest demands the same. Interestingly, a Single Bench judgement in **Quilon Taluk LC & T Cooperative Society vs State of Kerala**⁽¹⁰⁾, had declared that private interest of a particular society cannot be regarded as a public interest as stipulated under Section 101. It was observed in **Quilon Taluk (supra)** that a condition precedent for the registration/existence of a co-operative society cannot be got over by invoking powers under Section 101. However, the judgement in **Quilon Taluk (supra)** does not find a place in the judgement of **Feroke Service Co-operative Bank (supra)**. Subsequently, in **Pantheerankavu Service Co-operative Bank & Ors vs State of Kerala & Ors**⁽¹¹⁾, a Division Bench held that the powers wielded by the Government under Section 101 is having wide latitude and that there is no prohibition in issuing orders exempting a cooperative society even from the rigour under Section 7(1)(c) which stipulates that area of operation of a society should not overlap with the area of operation of any other society. It was also observed in **Pantheerankavu Service Co-operative Bank (supra)** that the observation made in **Quilon Taluk (supra)** is not in conformity with the earlier Division Bench judgement in **Feroke Service Co-operative Bank (supra)**. While stating so, the Court omitted to note that **Quilon Taluk (supra)** was decided first in

(8) 1986 KLT 921

(9) 1995 (2) KLT 404

(10) 1989 (1) KLT 350

(11) ILR 2016 (2) Ker 1073



the place of **Feroke Service Co-operative Bank (supra)**, and not vice-versa. The power under Section 101 received an altogether different dimension with the judgement of a Full Bench of High Court in **Rigi G Nair (Dr) vs State of Kerala & Ors**⁽¹²⁾, wherein it was held that the Government can even issue an order of exemption with retrospective effect in procedural matters, however with a rider that vested right accrued upon a person cannot be taken away with such invocation of powers. It was also held in **Rigi G Nair (supra)** that the time limit of one year for inquiry stipulated under Section 65(5) can be exempted by the Government thereby exempting the society from the rigour of Section 65(5). A perusal of the aforesaid precedents coupled with the definite language of Section 101, would make it clear that the Government has got wide latitude in issuing orders under Section 101 exempting a society from the provisions of the statute, provided that the order therein reflects the reasoning of the Government coupled with the factor of 'public interest'.

At the same time, whether the Government has got any power to exempt a society from the rigour of any provision under the Act, wherein the obligation is not cast upon the society to perform but upon another person/official, is a question worthy of a serious discussion. By way of an order under Section 101, can the Government/ Department or the Registrar tide over a statutory interdiction which is not imposed upon the society but upon others, under the guise that since the society stands exempted from the rigour of the provision the statutory interdiction is no longer in force?. An answer to this question would determine as to whether the Court has conferred more power upon the Government than what was contemplated by the Legislature. The correctness of **Rigi G Nair (supra)** is also an incidental question which arises during the course of this discussion.

The Hon'ble Apex Court had an occasion to consider the scope of an exemption provision under Section 99 of the Multi-State Co-operative Societies Act, 1984⁽¹³⁾, in **Indian Labour Co-operative Society Ltd and Anr vs Union of India & Ors**⁽¹⁴⁾, wherein the Central Government was conferred with the power to exempt a multi-state co-operative society from any of the provisions of the statute. Section 99 is reproduced here for a quick reference;

99. **Power to Exempt Multi-State Cooperative Societies from Conditions as to Registration.** - (1) Notwithstanding anything contained in this Act the Central Government may, by general or special order, for reasons to be recorded therein, and subject to such conditions, if any, as may be specified therein exempt any multi-State co-operative society or

(12) ILR 2021 (1) Ker 1

(13) Stands repealed in wake of Multi State Co-operative Societies Act, 2002

(14) (1999) 6 SCC 141



class of such societies from any of the requirements of this Act relating to registration.

(2)(a) The Central Government may, by general or special order and for reasons to be recorded therein, -

(i) exempt any multi-State co-operative society or any class of such societies from any of the provisions of this Act or of the rules: or

(ii) direct that such provisions shall apply to such society or class of societies with such modifications not affecting the substance thereof as may be specified in the order:

Provided that no order shall be made under sub-clause (ii) so as to prejudice the interests of such society or class of such societies without a reasonable opportunity being given to make representation in the matter.

(b) Every order made under clause (a) shall be published in the Official Gazette.

It can be seen that Section 99(2)(a) of Multi State Co-operative Societies Act, 1984, is almost worded identically to that of Section 101 of Kerala Co-operative Societies Act, with an exception that the 1984 Act had contained a further rider that orders therein shall be passed only after providing a reasonable opportunity of making representation to such society or societies who are being affected. The fact situation in **Indian Labour Cooperative Society (supra)** was that the 4th respondent therein was functioning as President of 3rd respondent society and another multi-state co-operative society in violation Section 36 (which restricts an individual from holding of the office of Chairman/Vice-Chairman, President/Vice-President of more than one multi-state co-operative society) and Section 37 (which restricts a person from hold the office of a president or chairman or vice-president or vice-chairman of a multi-state co-operative society, after he has held the office as aforesaid during two consecutive terms, whether full or part). The Central Government by invoking powers under Section 99(2)(a) of the Act exempted the 3rd respondent as well as the other society from the rigour of Sections 36 and 37, which paved way for the continuation of the 4th respondent as office-bearer for both the societies. On consideration, the Apex Court held that Sections 36 and 37 deal with disqualification of individuals, which could not have been exempted by the Central Government by resorting to Section 99 of the Act thereby exempting the societies. It was further held that the power of exemption can only be invoked to grant exemption to a society where the society is required to comply with any of the provisions or the rules. The relevant portion of **Indian Labour Cooperative Society (supra)** is reproduced hereunder;



“9. As we read Section 99(2)(a) it appears to us that the power of the Central Government under the said provision is to exempt a multi-State co-operative society or any class of such societies from any of the provisions of the Act or the rules and this provisions does not contemplate given exemption to anyone else. In other words, if the society is required to comply with any of the provisions or the rules and a case is made out for granting exemption then the Central Government can, in the manner provided by the said section, grant exemption.

10. What is contended before us is that under Section 99(2) it is the society which is granted exemption from complying with the provisions of Section 36 and Section 37.

11. Section 36 and Section 37 are provisions which inter alia create a bar or an impediment on a person holding office of more than one society as the president at the same time or for continuing to hold such office for more than two consecutive terms. The rigour of these two provisions is qua an individual and not qua the society. Section 99(2) enables the Government to give relief to the society from the operation of any provisions of the Act but what has now been done is to give relief to an individual, namely, respondent No. 4 from the operation of Section 36 and Section 37. That certainly is not the intention nor the letter of the law.”

Thus, the answer to the question as to whether the power of exemption provided under Section 101 is also available in such cases wherein obligation is not cast upon the societies but on other persons/department officials and whether such statutory interdiction can be got over by exempting the society as such, should be in negative, and is squarely answered by virtue of the aforesaid declaration in **Indian Labour Cooperative Society (supra)**, which unfortunately was not brought to the notice of the Full Bench while considering **Rigi G Nair (supra)**. As stated earlier, the language in Section 101 of the Co-operative Societies Act, 1969, is in *pari materia* with Section 99(2)(a) of Multi-state Co-operative Societies Act, 1984. It is trite that when provisions are found to be in *pari materia*, then there cannot be different interpretations as held by the Hon’ble Apex Court in **KA Annamma vs Secretary, Cochin Co-operative Hospital**⁽¹⁵⁾. The dictum in **Indian Labour Cooperative Society (supra)** was followed by a Division Bench of Bombay High Court in **Dnyadeo Mohan Salunke & Anr vs State of Maharashtra & Ors**⁽¹⁶⁾, wherein the question was regarding the exercising of power of exemption by the Government

(15) (2018) 2 SCC 729

(16) 2013 SCC Online Bom 665



under Section 157 of Maharashtra Co-operative Societies Act, 1961, with respect to extension of term of a managing committee, which was answered in the negative.

Continuing in the same vein, it has also become necessary to examine the ratio of **Rigi G Nair (supra)** in detail. Before adverting to **Rigi G Nair (supra)**, it will be fruitful to refer to the pre-existing legal position as well as factual aspects leading to the reference in **Rigi G Nair (supra)**. A Single Bench of High Court in **Benny Peruvanthanam vs Kerala State Co-operative Consumer's Federation Ltd, Kochi & Ors**⁽¹⁷⁾, had declared that the Government has got no power to exempt a society from the rigour of provisions of Kerala Co-operative Societies Act, in a retrospective manner. The judgement of Learned Single Judge to the extent of Government not having a power to retrospectively exempt a society from the provisions of the Act was affirmed by the Division Bench in **Sudarsanan N vs Benny Peruvanthanam & Ors**⁽¹⁸⁾. The same line of thought was followed by another Learned Single Judge in **Jose V J & Ors vs State of Kerala & Ors**⁽¹⁹⁾. An earlier Division Bench also, in **Sankaranarayanan vs Kunhikrishnan**⁽²⁰⁾, under the context of Section 60 of Madras Co-operative Societies Act, had held that the Government does not have any power to retrospectively exempt a society from the provisions of the Act. The dictum in **Benny Peruvanthanam (supra)** and **Sankaranarayanan (supra)** was doubted by another Division Bench wherein the question was regarding the exemption order issued by the Government retrospectively exempting a society from the rigour of Section 65(5) of the Kerala Co-operative Societies Act, 1969. Section 65(5) provides that the inquiry initiated under Section 65 of the Kerala Co-operative Societies Act with respect to the affairs of a society, shall not extend an aggregate period of one year. The Division Bench while referring the question to Full Bench relied upon the dictum by Hon'ble Apex Court in **Government of Andhra Pradesh & Ors vs D Janardhana Rao & Anr**⁽²¹⁾, wherein the power of Government to issue an order with retrospective effect under the domain of Rule 47 of Andhra Pradesh State and Subordinate Service Rules was upheld. The fact that dictum in **Benny Peruvanthanam (supra)** was upheld by the Division Bench in **Sudarsanan N (supra)**, was omitted to be noted while the matter was being referred. Before further delving into the topic, it would be profitable to extract Section 65 of the Kerala Co-operative Societies Act;

65. **Inquiry by the Registrar.** -(1) The Registrar may, -

(a) on his own motion; or

(17) 2013 (4) KLT 987

(18) 2014:Ker:10501 (neutral citation)

(19) 2015 KHC 7071

(20) 1965 KLT 740

(21) (1976) 4 SCC 226



(b) on an inquiry report of the Vigilance Officer appointed under section 68A; or

(c) on a report of the Director of Co-operative Audit appointed under section 63; or

(d) on an application by the majority of the members of the committee of the society, or by not less than one third of the quorum for the general body meeting, whichever is less; or

(e) on an application by the apex society or financing bank of which such society is a member; or

(f) on an application of a society to which the society concerned is affiliated; hold an enquiry by himself or by a person authorized by order in writing, into the constitution, working and financial condition of the society, if he is satisfied that it is necessary so to do.

(2) The Registrar or the person authorized by him under sub-section (1) shall, for the purpose of an inquiry under this section, have the following powers, namely:-

(a) he shall, at all reasonable times, have free access to the books, accounts, documents, securities, cash and other properties belonging to, or in the custody of the society and may summon any person in possession of or responsible for the custody of any such books, accounts, documents, securities, cash or other properties, to produce the same at any place at the headquarters of the society or at any branch thereof or where there is no working office for the society, at the office of the Registrar or at the office of any of his subordinate officers;

(b) he may summon any person who, he has reason to believe, has knowledge of any of the affairs of the society, to appear before him at any place at the headquarters of the society or any branch thereof and may examine such person on oath; and

(c)(i) he may, notwithstanding any rule or bye-law specifying the period of notice for a general body meeting of the society, himself call a general body meeting or require the President or Secretary of the society to call a general body meeting at such time and place at the headquarters of the society or any branch thereof, to determine such matters as may be directed by him;



(ii) any meeting called under sub-clause (i), shall have all the powers of a general body meeting called under the bye-laws of the society.

(5) The inquiry under this section shall be completed within a period of six months [which period may at the discretion of the Registrar and for reasons to be recorded in writing, be extended from time to time, so however that the aggregate period shall not in any way, exceed one year.]

Rule 47 of the of Andhra Pradesh State and Subordinate Service Rules, is also required to be extracted at this stage, which reads as;

47. **Relaxation of rules by the Governor** :- No rule made under the proviso to Article 309 of the Constitution of India or continued under Article 313 of the Constitution shall be construed to limit or abridge the power of the Governor to deal with the case of any class or category of person for being appointed to any civil post, or of any person serving in a civil capacity under the Government of Andhra Pradesh in such manner as may appear to him to be just and equitable:

Provided that, where any such rule is applicable to the case of any person or a class of persons, the cases shall not be dealt with in, any manner less favourable to the person or class of persons than that provided by that rule.

On a comparative reading of the aforesaid rule along with Section 101 of Kerala Co-operative Societies Act, it can be seen that neither Rule 47 can be termed as a Henry VIII clause nor the two provisions therein are *pari materia* in nature. It can only be said that the reliance placed upon Rule 47 is misplaced, and that the ratio in **D Janardhana Rao (supra)** was also not applicable to the case at hand. At any rate, the aforesaid aspects do not acquire much significance in wake of the declaration in **Rigi G Nair (supra)**.

On a careful examination of **Rigi G Nair (supra)**, four things weighed in the mind of Full Bench to come to conclusion that Government has got power to retrospectively exempt a society from the provisions of the Act, which are as follows;

- (i) The power of Government to issue orders of exemption with retrospective effect under Section 101 is implicit, as Government has got power to frame rules with retrospective effect under Section 109;
- (ii) If the inquiry ordered under Section 65 could not be completed within the one-year period stipulated under Section 65(5), Government



will not be in a position to monitor the accounts of the society, which is not the scheme of the statute;

(iii) There is no vested right accrued to any managing committee members/persons with the expiry of the time period stipulated under Section 65(5), and a person would get a right to defend only when subsequent proceedings are initiated under Section 32 (Supersession) or under Section 68 (Surcharge) of the Act, with a further finding that time limit stipulated under Section 65(5) is only procedural in nature; and

(iv) The Government and statutory authorities are having control over the societies, though not expressly stated under the Act.

The factors stated afore can be found in paragraphs 34-37 of **Rigi G Nair (supra)**, which are reproduced herewith for a quick reference;

“34. No doubt, the time specified to conduct enquiry as contemplated under Section 65, is part of a procedure under the statutory scheme. However, the Registrar has been authorised to complete the enquiry within a specified time and at any rate it shall not exceed one year. By virtue of the order aforesaid, Government had exempted the society from the operation of Section 65(5) until completion of the enquiry. The Government order is issued after, expiry of the period prescribed for enquiry and has the effect of extending the time retrospectively. Apparently the enquiry by the Registrar does not create any vested right on any member of the managing committee. After the enquiry only if it is found that there has been a major defect, he may initiate further action as contemplated under section 65(6) of the Act, in which event alone a right to defend arises to an individual. The short question, therefore, is whether the Government can exercise the said power, which has a retrospective effect.

35. In fact, Section 101 of the Act, empowers the Government with wide powers, to ensure smooth functioning of the societies as envisaged under the statute. At times, there might be difficulty faced by a society or societies in complying with the provisions of the statute, in which event, the statute itself has provided a machinery to set right such deficiencies. Such power can be exercised only in public interest, which of course is a matter to be considered on a case-to-case basis. Therefore, the power to be exercised under Section 101 of the Act, can occur in some cases only after the event had occurred. For example, in the case on hand, the Registrar could not complete the enquiry within the time limit specified under Section 65(5), on account of the fact that voluminous documents had to be verified to prepare



a report. Is it that the enquiry should be stopped or should he ask the Government to exempt the society from the limitation of time specified to complete the report. If the enquiry is stopped after the specified time, the Government will not have the advantage of monitoring the accounts of the society, which is not the purport of the statutory scheme. The Registrar could ask for exemption from the provision under Section 65(5) only after the time limit has expired. Therefore, taking into account the statutory scheme in which Government and the statutory authorities have control over the functioning of the societies, though not expressly stated, Government's power to issue orders of exemption under Section 101 retrospectively is implicit.

36. ***** The words "either prospectively or retrospectively" is a power granted to the Government for the purpose of framing rules. Therefore, when the Government has the power to frame rules retrospectively, while exercising power under Section 101 also, the Government can retrospectively issue orders.

37. Section 101 of the Act, is intended to subserve public interest and therefore, in public interest, if it is felt by the Government that exemption has to be given to any society from the provisions of the Act retrospectively, the said power is not taken away in any manner. However, each case will have to be considered on its own merits in order to evaluate whether the power of exemption had been exercised in public interest. There might be instances where a vested right had been created in favour of any person on account of the statutory mandate. In such circumstances, the State Government cannot exercise the power of exemption retrospectively, but in respect of procedural matters, there is absolutely no restriction on the part of the Government in granting exemption retrospectively."

It is to be noted that the conclusion drawn by the Full Bench in **Rigi G Nair (supra)** is without noting the amendment carried out to Section 109 of the Kerala Co-operative Societies Act, as also against the precedents laid down by the Hon'ble Apex Court. As stated earlier, **Rigi G Nair (supra)** was decided without noticing the dictum of the Hon'ble Apex Court in **Indian Labour Co-operative Society Ltd(supra)** which held that the exemption provision cannot be invoked for such circumstances wherein obligation is not cast upon the society. Section 65(5) is an obligation cast upon the Registrar/Enquiry Officer therein to conclude the inquiry within a span of one year, and such a statutory interdiction cannot be evaded by invoking powers under Section 101. It is also to be noted that the word 'retrospectively' was incorporated in Sections 80 and 109 of Kerala Co-operative Societies Act, 1969, pursuant to an amendment carried out by way of Kerala Co-



operative Societies (Amendment) Act, 1988⁽²²⁾, before which the word ‘retrospectively’ was not there in Section 109. When the legislature employs the term ‘retrospectively’ specifically to a rule making provision, can the Court interpret it as an implied power of the Government while exercising powers under a ‘Henry VIII’ Clause? The answer can only be in the negative. The Hon’ble Apex Court in **Premanand and others v. B.Mohan Koikal and others**⁽²³⁾ had held that the first and foremost principle of interpretation of statute in every system of interpretation is the literal rule of interpretation, and other rules of interpretation can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. The UK Supreme Court (Supreme Court of United Kingdom) in **R (The Public Law Project) vs Lord Chancellor**⁽²⁴⁾, while discussing the question of interpretation of ‘Henry VIII Clause’, in clear terms held that natural meaning of the words in question is an important factor in an issue of statutory interpretation. The Court therein relied upon an observation by Lord Donaldson MR in **Mckiernon vs Secretary of State for Social Security**⁽²⁵⁾, which stands approved by House of Lords in **R vs Secretary for Social Security, Ex p Britnell**⁽²⁶⁾, and **R vs Secretary for the Environment, Transport and the Regions, Ex p Spath Holme Ltd**⁽²⁷⁾, wherein it was observed that delegation to the Executive of power to modify primary legislation must be an exceptional course, and when there is any doubt about the scope of power, a restricted approach should be adopted therein. The exact words of Lord Donaldson MR in **Mckiernon (supra)** are as follows;

“Whether subject to the negative or affirmative resolution procedure, [subordinate legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.”

The dictum in **Public Law Project (supra)** was noted in **R (Miller) v Secretary of State for Exiting the European Union**⁽²⁸⁾, which was regarding the Brexit Process. The Court in **Miller (supra)** ruled that the British Government (the executive)

(22) Published in the Kerala Gazette (Extraordinary) Vol XXXII, dated 21-04-1988.

(23) (2011) 4 SCC 266

(24) (2016) UKSC 39 (neutral citation)

(25) Court of Appeal (Civil Division) Transcript No 1017 of 1989

(26) (1991) 1 WLR 198

(27) (2001) 2 AC 349

(28) (2017) UKSC 5 (neutral citation)



might not initiate withdrawal from the European Union by formal notification to the Council of the European Union as prescribed by Article 50 of the Treaty on European Union without an Act of Parliament giving the government Parliament's permission to do so.

Interestingly, the Hon'ble Apex Court in **Pratap Singh vs State of Jharkhand & Anr**⁽²⁹⁾, albeit in a different context, had laid down in unequivocal terms that rule-making power is a separate power which has got nothing to do with the power to remove difficulty. The relevant portion in **Pratap Singh (supra)** is reproduced herewith;

“107. *****Rule-making power is a separate power which has got nothing to do with the power to remove difficulty. By reason of the power to remove difficulty or doubt, the Central Government has not been conferred with any legislative power. The power to remove doubt or difficulty although is a statutory power but the same is not akin to a legislative power and, thus, thereby the provisions of the Act cannot be altered.”

The same line of thought was again reiterated by the Hon'ble Apex Court in **Anindya Sunder Das (supra)**, wherein it was held that the Government cannot misuse the 'removal of difficulty clause' to remove all obstacles in its path which arise due to statutory restrictions. The exact words of the Apex Court are reproduced herewith;

“49. A government cannot misuse the “removal of difficulty clause” to remove all obstacles in its path which arise due to statutory restrictions. Allowing such actions would be antithetical to the rule of law. Misusing the limited power granted to make minor adaptations and peripheral adjustments in a statute for making its implementation effective, to side-step the provisions of the statute altogether would defeat the purpose of the legislation.”

The Hon'ble Apex Court in **Bharat Sanchar Nigam Ltd vs Tata Communications Ltd**⁽³⁰⁾ held that administrative orders/executive orders or circulars cannot be given retrospective effect without there being any legislative competence, and it was held in **Assistant Excise Commissioner & Ors vs Esthappan Cherian & Anr**⁽³¹⁾, that delegated legislation cannot operate retrospectively in the absence of express statutory authorization. Moreover, it is trite that what cannot be done directly, is not permissible to be done indirectly also, as declared by the Hon'ble Apex Court in **Santa Lal Gupta & Ors vs Modern Co-operative Group Housing Society Ltd & Ors**⁽³²⁾, wherein it was observed that “what cannot be done directly, is not

(29) (2005) 3 SCC 551

(30) 2022 SCC Online SC 1280

(31) (2021) 10 SCC 210

(32) (2010) 13 SCC 336



permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of 'quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.'" Thus, it can be seen that point (i) was arrived at by the Full Bench in **Rigi G Nair (supra)** without noticing the aforesaid aspects.

Moving on to point (ii), it was held in **Rigi G Nair (supra)**, that if the enquiry is lapsed in wake of passage of one year as stipulated in Section 65(5) and fresh enquiry has to be ordered, the Government will not be in a position to monitor the accounts of the society. At the outset, it is to be kept in mind that the Government has got no role in the administration of a co-operative society and the same was declared by a Full Bench in Aji & Ors vs State of Kerala⁽³³⁾. It is to be noted that an inquiry under Section 65 cannot be ordered at the drop of a hat, and the same has to be preceded by a subjective satisfaction by the Registrar as discernible from the enquiry order itself. A Division Bench of the High Court in **President, Vennoor Service Co-operative Bank vs State of Kerala & Ors⁽³⁴⁾**, has dilated in detail that such subjective satisfaction cannot be a mere rhetoric. Moreover, a perusal of Section 65(2) would show that the enquiry officer/Registrar is conferred with wide powers which cannot be permitted to operate beyond the period stipulated under Section 65(5). As held in Aji (supra), it cannot be forgotten that the co-operative society is an autonomous institution, the supreme authority of which is the general body as stipulated under Section 27 of the Act⁽³⁵⁾. The power to monitor the society is thus vest with the Registrar who can definitely do that however by remaining within the four corners of the statute. Further, the Full Bench in **Rigi G Nair (supra)** omitted to note that the performance of a co-operative society can be tracked through the audit reports, which is a mandatory document for every co-operative society, prepared by the department auditors as stipulated under Section 63 of the Kerala Co-operative Societies Act, and for which Section 65 inquiry need not be initiated.

The conclusion drawn by the Full Bench in **Rigi G Nair (supra)**, as far as point (iii) is concerned, cannot be faulted with respect to the 'right to defend', but erred in treating Section 65(5) as a mere procedural provision. It is to be noted that an inquiry under Section 65 can only be conducted in tune with the stipulations provided under Rule 66 of Kerala Cooperative Societies Rules, and the said rule was held to be mandatory by the High Court in Ellakkal Service Co-operative Bank vs

(33) 1995 (1) KLT 363 (FB)

(34) ILR 2023 (1) Ker 1001

(35) 27. **Final authority in a society.**-(1) Subject to the provisions of this Act, the rules and the bye-laws, the final authority of a society shall vest in the general body of its members: Provided that nothing contained in this sub-section shall affect the exercise by the committee or any officer of a society of any power conferred on such committee or such officer by this Act or the rules or the bye-laws.



State of Kerala⁽³⁶⁾, and the said position is still governing the filed. If Section 65(5) is treated as merely a procedural provision, then that would be giving a leeway to the Government to exempt the requirements under Rule 66 thereby invoking the power under Rule 181, which cannot be the intention of the Legislature or the Rule-making authority. Section 65 (5) can only be interpreted as a measure by the Legislature to ensure that a society's functioning not brought to standstill thereby continuing with an enquiry in a perennial manner, and such a provision cannot be undermined by merely stating it as a procedural provision. At this juncture, it is fruitful to note that a similar exemption provision provided under Delhi Co-operative Societies Act, 1972, came up for consideration before a Division Bench of High Court of Delhi, in **Vaish Co-operative Adarsh Bank vs Registrar of Co-operative Societies**⁽³⁷⁾. Section 59 of the Delhi Act provides for 'surcharge', with a further rider that no inquiry can be initiated therein after the expiry of six years from the date of alleged act of omission. The said limitation was sought to be get over by issuing an order with retrospective effect by the authority under Section 88, whereby the society was exempted from the rigour of Section 59. His Lordships Justice S B Sinha (Late) (while being Chief Justice of Delhi High Court), penned the judgement after holding that there was no power/authority for the authority to issue such an order with retrospective effect. It was further declared that once the debt stands statutorily removed with the passage of time, the same cannot be revived and in such circumstances the society would get a statutory right to take a defence on the basis of the limitation stipulated under Section 59. Thus, the society or the committee members can definitely challenge the inquiry proceedings once it is found that the same is in violation of provisions of Kerala Co-operative Societies Act. As held in in **Anindya Sunder Das (supra)**, a 'Henry VIII Clause' cannot be permitted to use in a casual manner, which would enable the departmental authorities to seek an exemption from provisions/rules whenever they are finding it impossible to conclude an inquiry within the stipulated time frame. The aforesaid aspects were not brought to the notice of Full Bench while **Rigi G Nair (supra)** was being considered.

The conclusion drawn by the Full Bench in **Rigi G Nair (supra)** in point (iv) that the Government and statutory authorities are having control over the societies, though not expressly stated under the Act, is an erroneous conclusion without taking note of the law declared by the Hon'ble Apex Court, as also without advertent to Section 27 of the Kerala Co-operative Societies Act. The Hon'ble Apex Court in **Thalappalam Service Co-operative Bank & Ors vs State of Kerala & Ors**⁽³⁸⁾, had clearly held that final authority of a co-operative society would be the general

(36) 1997 (2) KLT 85

(37) 2002 (65) DRJ 420 (DB)

(38) (2013) 16 SCC 82



body and the control of Government/Registrar cannot be regarded as an all-pervasive control. The relevant portion in **Thalappalam Service Co-operative Bank (supra)** is reproduced herewith for reference;

“18. *****Section 27 of the Societies Act categorically states that the final authority of a society vests in the general body of its members and every society is managed by the managing committee constituted in terms of the bye-laws as provided under Section 28 of the Societies Act. Final authority so far as such types of Societies are concerned, as Statute says, is the general body and not the Registrar of Cooperative Societies or State Government.

20. Societies are, of course, subject to the control of the statutory authorities like Registrar, Joint Registrar, the Government, etc. but cannot be said that the State exercises any direct or indirect control over the affairs of the society which is deep and all pervasive.”

Thus, it can only be concluded that neither Government nor Registrar has got anything to do with the day-to-day functioning of the co-operative societies, and this significant aspect was omitted by the Full Bench while answering the reference in **Rigi G Nair (supra)**.

The power of the Government while issuing an order under Section 101 of the Kerala Co-operative Societies Act, can only be considered as an exception and not the rule, as noted by the Hon’ble High Court in **Paduppu Ksheerolpadaka Sahakarana Sangam Ltd vs Dairy Extension Officer & Ors**⁽³⁹⁾. As stated in **Public Law Project (supra)**, what is required is a restrictive approach while interpreting a ‘Henry VIII Clause’ and expansive reading of the same would only result in granting unrestrained powers to the Government, which is not the scheme of the statute. The question of unbridled political interference in the administration of co-operative societies, were taken note by the High Court in **A K Mani vs Joint Registrar & Ors**,⁽⁴⁰⁾ **Vallappuzha Service Co-operative Bank vs Joint Registrar**⁽⁴¹⁾, and **Board of Directors of Thrissur District Police Co-operative Society & Anr vs Kerala State Co-operative Election Commission & Ors**⁽⁴²⁾. Thus, neither the Government could have been conferred with a power to retrospectively exempt a society from the provisions of the act, nor the exemption provision could have been invoked to grant exemption wherein the obligation is not cast upon the society but upon other persons such as Registrar/enquiry officers deputed therein etc.

(39) 2023:KER:65340 (neutral citation)

(40) 2007: KER:10123 (neutral citation)

(41) 2009 (3) KLT 838

(42) 2014: KER:4631 (neutral citation)



In the opinion of the author, it can only be concluded that the Full Bench judgement in **Rigi G Nair (supra)** declaring that the Government is having powers to retrospectively exempt a co-operative society from the provisions of the Act by invoking powers under Section 101, with respect to procedural aspects, requires a reconsideration as the same has resulted in conferring a greater power upon the Government than what was contemplated by the Legislature.

