

**Contours of Section 68 (1) of Kerala Co-operative Societies Act,
in the light of law laid down in Mulavoor Urban Co-operative
Society Ltd. & ors. v. Joint Registrar & anr.⁽¹⁾ : An analysis**

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

1. Can a Single Bench declare the law in a different perspective without following the law laid down by another co-ordinate Bench? Can the statutory authorities be permitted to function or issue orders in violation of mandatory provisions of law? Whether Section 68(1) of Kerala Co-operative Societies Act be termed as an innocuous provision, merely enabling the Registrar to order an enquiry? These questions come into the forefront while analysing the aforesaid judgment in **Mulavoor Co-operative Urban Society** (supra).

2. The factual scenario in **Mulavoor Co-operative Urban Society** (supra) was that Managing Committee of a co-operative society approaches High Court challenging the order issued by the Joint Registrar under Section 68 (1) of the Kerala Co-operative Societies Act (hereafter KCS Act), whereby an enquiry is ordered to ascertain the conduct of persons who caused loss to the society, wherein the loss being unearthed in the enquiry conducted under Section 65 of the Act. The writ petition was dismissed by the Hon'ble Court after holding that an order under Section 68(1) need not refer to any of the ingredients stated under Section 68 with respect to imposing surcharge, as also without reference to the persons responsible for such loss. It was also held by the Court that name of the concerned persons who caused loss need not be stated, if they could be identified by way of description. While coming to the said conclusion, the learned Single Judge watered down the precedential position held by another co-ordinate bench in **Y. R. Vincent v. Joint Registrar**⁽²⁾, which stands affirmed by the Division Bench, after agreeing with the same. The exercise sought to be undertaken in this article is whether the law laid down by the learned Single Judge endorses the correct legal position, coupled with the question whether the learned Single Judge could have distinguished or watered down the precedential position?

⁽¹⁾ 2024:KER: 51051

⁽²⁾ ILR 2024 (1) Ker. 344, affirmed by Division Bench by way of judgment dated 18-1-2024 in W.A. 95 of 2024.

3. Section 68 of KCS Act deals with the question of imposing surcharge upon the persons who are responsible for the loss caused to the society which is unearthed in an audit under Section 63, or inquiry under Section 65 or inspection under Section 66. It was held by the Hon'ble Court on multiple instances that mere wrongful payment does not attract surcharge, for which there has to be an element of deliberate/willful negligence or mens rea, as discernible from **A. K. Francis v. Joint Registrar**⁽³⁾ and **T. H. Mustaffa v. State of Kerala & ors.**⁽⁴⁾. The precedential position set in **A. K. Francis** (supra) was approved by a Full Bench in **Anil, M. S. v. Joint Registrar of Co-operative Societies & ors.**⁽⁵⁾.

Later, a learned Single Judge in **Y. R. Vincent** (supra), after taking survey of entire precedents on the subject, declared that word 'person' in Section 68 would not include 'committee, and for the purpose of surcharging individuals, there has to be a finding regarding involvement/conduct of such persons mentioned in the provision, in the manner provided under Section 68, without which surcharge order cannot be imposed. The dictum in **Y. R. Vincent** (supra) was affirmed by the Division Bench in W.A. 95 of 2024. It would be apt to reproduce the relevant portions of **Y. R. Vincent** (supra):

“14. A reading of the Section would show that it refers to ‘any person’ and not to a ‘Committee’. If the intention was only to take action against the members of the . Committee, the Section need not have referred to ‘any person entrusted with organisation or management of society’ or ‘who is or has at any time been an officer or employee of the society’. The Section, in its plain meaning, does not permit an interpretation suggested by the Government Pleader. It refers to the conduct of individuals and not the collective conduct of the Committee. In contrast, there are provisions in the Act, which deal with the collective conduct of the Committee. As such, the contention of the Government Pleader that the word ‘persons’ would also include the Committee cannot be sustained.”

*“16. *****Applying the law laid down in the judgments referred to in the above paragraphs, I find that there is no specific finding regarding the involvement of the petitioners as is required*

⁽³⁾ 1990 (2) KLT 470

⁽⁴⁾ ILR 2021 (4) Ker. 74

⁽⁵⁾ ILR 2021 (4) Ker. 5 (FB)

under the statutory provisions, as explained in the decisions of this Court. It is evident from a reading of Section 68 and the manner in which the provision has been explained by this Court that what is required is not a finding which would justify a supersession of a Committee as provided for in Section 32 but a finding regarding the involvement of the persons mentioned in the provision, in the manner provided therein, for the purpose of surcharging them.”

“18. *****After rendering findings regarding the aspects that were the subject-matter of inspection, suggestions are made in the report that for the financial discrepancies noted, action can be taken against the members of the Committee. Ext. P-2, which is the Section 68(1) report, says that the Committee intentionally caused a loss to the Society and that the same has to be recovered from the members who constituted the Committee during the relevant period. While fixing the liability, what has been done is to show amounts under seven heads, which are the same in the case of all the persons who are found liable. There are absolutely no findings as to how each of them has been found liable on the different heads by either their presence during any decision taken or otherwise.”

4. Before proceeding further, it will be profitable to reproduce Section 68 of KCS Act and relevant portions of Rule 66 (7) of Kerala Co-operative Societies Rules (hereafter KCS Rules), which deals with surcharge.

“68. Surcharge:—(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 organization or management of such society or who is or has, at any time been an officer or an employee of the society, has made any payment contrary to the Act and the rules or the bye-laws, or has caused to any loss or damage in the assets of the society by breach of trust, or wilful negligence or mismanagement 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.

(3) Where the money, property, interest, cost or compensation is not repaid or restored as per sub-section (2), the Registrar shall take urgent steps to recover such amounts from the concerned persons as arrears of public revenue due on land as specified in Section 79 of the Act.”

“Rule 66. Procedure for the conduct of inquiry and inspection:

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7(ii) On getting the inquiry report, the Registrar shall give the person or persons concerned an opportunity of being heard before issuing an order of surcharge. The order for surcharge shall be in writing and shall be sent under registered post with acknowledgment due. The order shall among things contain the following:

(a) * * * * *

(b) name/names of person/persons responsible to repay or restore the money or any property or part thereof, by mentioning clearly the total amount involved due from each;”

5. Following **Y. R. Vincent** (supra), another co-ordinate bench in **Managing Committee of Mala Block Town Co-operative Society Ltd. v. Joint Registrar of Co-operative Societies⁽⁶⁾**, held that an enquiry order under Section 68 (1) cannot be issued without identifying conduct of specific individual. It was also held that an inquiry under Section 68(1) of the KCS Act must focus on pinpointing the loss attributable to the actions of specific individuals rather than a broad assessment of the Committee’s collective conduct. To put it pithily, what is necessary to identify is the conduct of an individual who caused loss to the society, and Rule 66 (7)(ii)(b) makes this aspect clear that the identification of such persons by their names is also essential. In other words, invoking of Section 68(1) was held to be not a mechanical exercise.

6. Both the aforesaid judgments are seen cited in **Mulavoor Co-operative Urban Society** (supra), of which **Y. R. Vincent** (supra) was discussed, however nothing was discussed with respect to **Mala Block Town Co-operative Society** (supra), which held that before issuing an order of enquiry under Section 68(1), the conduct of the specific individual

⁽⁶⁾ ILR 2024 (3) Ker. 131

has to be ascertained. As stated in the 2nd paragraph of the article, the writ petition was dismissed after holding that an order under Section 68(1) need not refer to any of the ingredients stated under Section 68 with respect to imposing surcharge, and also without reference to the persons responsible for such loss. It was further held by the Court that name of the concerned persons who caused loss need not be stated, if they could be identified by way of description.

7. It is an admitted fact that Registrar is a creature of the statute and he has to scrupulously abide by the specifications provided under Rule 66, whether with respect to an enquiry under Section 65 or inspection under Section 66 or inquiry under Section 68(1). The legal position in this regard stands settled by the Hon'ble Court in **Cheranallor Co-operative Society Ltd. v. Deputy Registrar**⁽⁷⁾, **Ellakkal Service Co-operative Bank v. State of Kerala**⁽⁸⁾, and **Wayanad District Wholesale Consumers Stores Ltd. v. Joint Registrar of Co-operative Societies (General)**⁽⁹⁾. The Hon'ble Apex Court in **Rajeev Hitendra Pathak v. Achyut Kashinath**⁽¹⁰⁾, and **Transcore v. Union of India**⁽¹¹⁾ held that “Creatures of the Statute derive their power from express provisions of the Statute.” Though the context was different, the declaration applies in full force in the present case also. The jurisdictional fact required to invoke Section 68 itself is payment made contrary to the stipulations of act/byelaws or causing loss to the society by person/persons who is/was entrusted with the management/organization of such co-operative society, and the same was declared by a Division Bench in E. T. Abdul Jabbar v. Joint Registrar & ors.⁽¹²⁾. It will be apposite to quote the relevant portion of Division Bench judgment in **E. T. Jabbar** (supra);

7. A reading of Sec. 68 would make it clear that the jurisdictional facts required for the invocation of the proceedings thereunder is that, if in the course of an audit, inquiry, inspection or winding up of a Society, it is found that any person, who is or was entrusted with the organization or management of such society or who is or has at any time been an officer or an employee of a Society has made any payment contrary to the Act and Rules or the bye-laws or has caused

(7) 1976 KHC 318

(8) 1997 (2) KLT 85

(9) 2018 (5) KHC 341

(10) (2011) 9 SCC 541

(11) (2008) 1 SCC 125

(12) 2022: KER: 39729

any loss or damage to the assets of the Society, by breach of trust or willful negligence or mismanagement, or has misappropriated or fraudulently retained any money or other property belonging to such Co-operative Society or has destroyed or caused the destruction of records, then the Registrar may, on his own motion, or on the application of the Committee, liquidator of any creditor inquire himself or direct any person authorized by him, by an order in writing in his behalf, to inquire into the conduct of such person.

Thus, there could not have been a finding in **Mulavoor Co-operative Urban Society** (supra), that an order under Section 68(1) need not refer to any of the ingredients stated under Section 68 with respect to imposing surcharge, especially when such a power cannot be invoked without ascertaining the jurisdictional fact. It is trite that existence of jurisdictional fact is sine qua non or condition precedent for the exercise of power by an authority, as held by the Hon'ble Apex Court in **Arun Kumar v. Union of India**.⁽¹³⁾

8. "If the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all" is a well-settled principle of law. When the final order issued under Section 68 (2) will have to definitely show the name of persons and their liability, as stipulated under Rule 66(7)(ii)(b), it is not clear as to how the preceding reports can dispense such a requirement and how a finding can be rendered in **Mulavoor Co-operative Urban Society** (supra) that name of the concerned persons who caused loss need not be stated, if they could be identified by way of description. When final order specifically provides for naming the guilty/responsible persons, the preceding reports should definitely state the action of such individuals along with their names explaining how the liability has arisen, failing which the final order would be in violation of Section 68 as well as Rule 66. The Hon'ble Apex Court in **Opto Circuit India Ltd. v. Axis Bank**⁽¹⁴⁾, has held that if an authority exercises his power not in the manner provided under the procedure, then such exercise of power would fall foul of the requirement of complying due process of law. The Hon'ble Court declared in **Opto Circuit India** (supra) that "*Therefore, if the salutary principle is kept in perspective, in the instant case, though the Authorised Officer is vested with sufficient power; such power is circumscribed by a procedure laid down under*

⁽¹³⁾ (2007) 1 SCC 732

⁽¹⁴⁾ (2021) 6 SCC 707

the statute. As such the power is to be exercised in that manner alone, failing which it would fall foul of the requirement of complying due process under law.”

9. The final aspect with respect to **Mulavoor Co-operative Urban Society** (supra), is that two judgments of co-ordinate benches, namely **Y. R. Vincent** (supra) and **Mala Block Town Co-operative Society** (supra), was not followed by the learned Single Judge therein. In fact, **Mala Block Town Co-operative Society** (supra) was rendered almost on identical circumstances, and was holding the field when **Mulavoor Co-operative Urban Society** (supra) was rendered. It is trite that one coordinate bench cannot refuse to follow another coordinate bench, and if the latter coordinate bench is of the view that the earlier decision was not correct in law, the only option available to it was to refer the matter to a larger Bench. The said principle was declared by the Hon’ble Apex Court in **Sant Lal Gupta v. Modern Co-operative Group Housing Society Ltd**⁽¹⁵⁾. Thereafter, the Hon’ble Apex Court in **Shabna Abdulla v. Union of India & ors.**⁽¹⁶⁾, reiterated the legal position in the following words:

“We are of the considered opinion that the Division Bench of the High Court while passing the impugned judgment and order should have followed the view taken by another Division Bench of the same High Court specifically when the grounds of detention and the grounds of challenge were identical in both the cases. In the event, the Division Bench of the High Court was of the view that the earlier decision of the Coordinate Bench of the same High Court was not correct in law, the only option available to it was to refer the matter to a larger Bench.”

10. There is also an incidental factor that is to be taken note of. In **Mulavoor Co-operative Urban Society** (supra), it was held that the writ petition at the instance of the co-operative society is not maintainable, challenging an order under Section 68(1). A long line of precedents starting from **Cheranalloor Co-operative Society Ltd.** (supra), **Ellakkal Service Co-operative Bank** (supra), **Wayanad District Wholesale Consumers Stores Ltd.** (supra), **Melukara Service Co-operative Bank & anr. v. Joint Registrar & anr.**⁽¹⁷⁾ and **Board of Directors, Perumpazhuthoor**

⁽¹⁵⁾ (2010) 13 SCC 336

⁽¹⁶⁾ (2024) 18 S.C.R. 460.

⁽¹⁷⁾ 2018 (2) KLT 640

Service Co-operative Bank & anr. v. Shaibu & ors.⁽¹⁸⁾, would show that the Hon'ble Court has interfered with the actions of Registrar at the instance of the co-operative society or its managing committee, wherein the impugned orders/actions were not in accordance with the statutory stipulations. A similar line of thought can be seen in the Division Bench judgment of High Court of Delhi in **Vaish Co-operative Adarsh Bank v. Registrar of Co-operative Societies**⁽¹⁹⁾, wherein challenge was against a notification issued with retrospective effect seeking to get over the limitation period provided under the statute. The conclusion that writ petition is not maintainable at the instance of co-operative society, is thus may not be correct in the light of aforesaid precedents. To put it pithily, when the action of the Registrar is not in accordance with the statutory stipulations, the same can definitely be challenged by the co-operative society or its managing committee under Article 226 of Constitution of India.

11. Thus, to conclude, the decision in **Mulavoor Co-operative Urban Society** (supra) holding that an order under Section 68(1) need not refer to any of the ingredients stated under Section 68 with respect to imposing surcharge, and without reference to the persons responsible for such loss, requires reconsideration in the opinion of this author. The further finding that name of the concerned persons who caused loss need not be stated, if they could be identified by way of description, is also liable to be re-looked in wake of the fact that Rule 66 (7)(ii)(b) itself provides for stating names of persons who are liable under Section 68.

⁽¹⁸⁾ 2022: KER : 16560

⁽¹⁹⁾ 2002 (65) DRJ 420 (DB)