

(2014) 11 KL CK 0233
In the High Court Of Kerala
Case No : W.P. (C) No. 31645 of 2014

Abdulla K.H. and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 26-11-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 254

Kerala Co-operative Societies Act, 1969 — Section 67(7)(b), 69, 98

Citation : (2015) 1 KHC 433

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : Praveen K. Joy, Advocates for the Appellant; Biju Meenattoor, Government Pleader, Advocates for the Respondent

Judgement

K. Vinod Chandran, J.—The petitioners are aggrieved with the order passed at Exts. P6 and P7, by the Assistant Registrar (General), who is appointed as the Arbitrator under Section 69 of the Kerala Co-operative Societies Act, 1969 [for brevity "KCS Act"]. Admittedly each of the petitioners were borrowers from the 5th respondent-Bank. Default in the loans is also admitted. The claim raised before this Court is only with respect to the interest liability of the petitioners. The petitioners contend that the same is excessive.

2. In any event, there were awards, as evidenced at Ext. P1 and P2 as early as on 23/05/2012. The petitioners do not have a case that they were not issued with notice by the Arbitrator; nor do the petitioners have a case that they were not served with a copy of the award under Rule 68 of the KCS Rules. The 1st petitioner admits in Ext. P3 that he had initially appeared and submitted objections and then absented himself. Ext. P4 application filed by the 2nd petitioner does not disclose any reasons for the non-appearance before the Arbitrator.

3. Petitioners admittedly did not file any appeal from the award passed. Only

when recovery proceedings were initiated, the petitioners filed applications before the Arbitrator seeking setting aside of the ex parte order. The petitioners were also before this Court and this Court by Ext. P5 directed consideration of the applications filed before the Arbitrator. The Arbitrator having considered the same, dismissed the applications by Exts. P6 and P7, holding that the petitioners ought to have approached higher Courts, meaning the Tribunal, before which an appellate remedy is provided.

4. It is to be noticed that there is no specific provision under the KCS Act or the Rules framed thereunder, granting power to the Arbitrator to set aside an award on the ground that the defendant was declared ex parte. The Code of Civil Procedure has been adopted to a limited extent, in Section 98 of the KCS Act. This adoption does not provide for power to set aside an award on the ground that the defendants were set ex parte in the proceedings.

5. The learned counsel for the petitioners, however, would contend that under Section 67(7)(b) of the KCS Act, there is a power to declare a person ex parte and, hence, there should be a power found, to set aside such orders also. There could be no quarrel with respect to such proposition. The Arbitration Court, which has the power to declare a person ex parte, would also have the power to set aside such order and permit a person set ex parte, to be participated in the proceedings. But, that would have to be invoked before an award is passed.

6. When an award is passed as such, after declaring a party ex parte, then necessarily an appeal would have to be preferred. The said position is supported by a decision of this Court reported in P.C Poulouse Vs. K.P. Sukumaran Nair, Circle Officer of Co-operative Societies and Others, . The learned counsel for the petitioner would place reliance on two decisions of this Court in Commissioner of Income Tax Vs. Income Tax Appellate Tribunal and Another, and Dr. P.M.K. Mohammed Vs. Chakkappan, , to further buttress his contention.

7. A dismissal of an application under Section 69 made by a Bank, for reason of non-appearance of the Bank was restored by the Arbitrator in Poulouse (supra). This Court held that the Arbitrator has "no jurisdiction to entertain an application to set aside an ex parte award, and restore the case for hearing". But, however, interference under Article 226 was declined since it was found that the attempt of the defendant/borrower was to wriggle out of the liability on the ground of default without a proper adjudication. It was also found that an appeal would have resulted in the setting aside of the award.

8. 1979 KLT 7082 (supra) was a decision in which a Division Bench of this Court found that an Appellate Authority under the Income Tax Act, 1961 has jurisdiction to set aside an ex parte order. However, that power was traced to sub-section (1) of Section 254 of the IT Act, which enabled the Appellate Tribunal to stay proceedings for recovery of amounts due from the assessee, even in the absence of any other provision, in the Act or the Rules, expressly conferring such power to set aside ex parte orders. This Court does not find any such provision in

the KCS Act or the Rules framed thereunder. Further, the Division Bench in that case also found that the Tribunal had by the impugned order only set aside the ex parte order to afford a hearing to the party, which need not be interfered with under Article 226 even if there is an irregularity or technical error in so doing.

9. 1983 KLT 8543 (supra) also dealt with a similar matter, in which the Appellate Authority's power to set aside an order under the Kerala Land Reforms Act, 1964 (Kerala), was considered. Therein, the Statute having not conferred any specific power on the Appellate Authority but insofar as the provisions of the C.P.C.; having been specifically made applicable to the Appellate Authority in deciding appeals by Section 102 of the KLR Act, the authority was found to have power to set aside an ex parte order.

10. In the present case, on the other hand, the petitioners invoke the extraordinary discretionary remedy to set aside an order rejecting the prayer for setting aside an award, which allegedly was one rendered after declaring the defendant ex parte. The petitioners/defendants had appeared before the authority and filed objections and then later chose to remain absent. No reason is stated for the absence and the petitioners" merely seek a review of the award, which definitely the Arbitrator has no power to. This Court is not inclined to exercise discretion under Article 226 of the Constitution to come to the aid of the petitioners for want of any compelling reason, so to do.

11. Under the KCS Act and the Rules framed thereunder C.P.C. is specifically adopted to the matters enumerated under Section 98 of the Act and Rule 67 of the KCS Rules, 1969. In this context, it would be worthwhile to refer to the decision of a Division Bench in Jacob Varkey and Another Vs. The Idukki District Co-operative Bank Ltd. and Others, . The Division Bench considered the issue whether the jurisdiction of the Arbitrator invoking the powers of the Civil Court under Section 98 is confined to the specific instances provided therein. That was a case in which an application was filed by the respondent-Bank without impleading the necessary parties. On an objection being filed by the defendants on that count, the plaintiff-Bank sought to withdraw the ARC, so as to file a fresh suit on the same cause of action after impleading the necessary parties. The Division Bench of this Court found that the very purpose of dispute redressal contemplated under the Act would be defeated, if a narrow interpretation is given to Section 98. It was held that the Arbitrator, functioning under the Act, is a quasi-judicial adjudicatory body. The application filed to withdraw the case with leave to file a fresh case, impleading the necessary parties, was found to be one maintainable and one which could be considered by the Arbitrator even under the general adjudicatory powers conferred on a Court, Tribunal or Arbitrator. What sets apart the present case is the fact that it is not the mere setting aside of the ex parte order which is sought for herein. The petitioner would seek to set aside an order passed by the Arbitrator on the ground that, he was set ex parte in the course of the proceedings. It has to be reiterated that despite no specific power having been conferred on the Arbitrator, to set aside an ex parte order, definitely

the same could have been done; if the application was filed when the proceedings were pending. However, when the award is passed, the defendants cannot invoke the adjudicatory power of the Arbitrator, for the simple reason that the Arbitrator becomes functus officio. The Arbitration Court had passed the order and had communicated the same to parties; the plaintiff-Bank and the defendants-borrowers. Setting aside the same would amount to review, for which, it is trite, there should be specific power conferred by the Statute. It is not as if the petitioners have no other remedy, since an appeal is provided, wherein the said contention could have been agitated. This Court has also found that there is no sustainable ground stated in the petition, in which event an Appellate Court could have found valid reason to send back the case for adjudication by the Arbitrator. Exercise of discretion has to be declined.

The writ petition is found to be without merit and the same is dismissed.