

(1966) 01 AHC CK 0017
In the Allahabad High Court
Case No : Writ Petition No. 3637 of 1966

Anand Prakash and Another	Vs	APPELLANT
Assistant Registrar, Co-operative Societies and Others		RESPONDENT

Date of Decision : 27-01-1966

Acts Referred:

Arbitration Act, 1940 — Section 27, 27(2)
Constitution of India, 1950 — Article 226

Citation : AIR 1968 All 22

Hon'ble Judges : Satish Chandra, J

Bench : Single Bench

Advocate : Krishna Chandra Agarwal, for the Appellant; S.N. Kacker and S.K. Suri, for the Respondent

Final Decision : Allowed

Judgement

Satish Chandra, J.—The substantial question of law raised in this petition under Article 226 is whether an arbitrator seized of a reference under the Co-operative Societies Act can grant an order of stay or an injunction during the pendency of the arbitration proceedings.

2. The Board of Directors of the Muzaffarnagar Wholesale and Retail Consumers Cooperative Stores Ltd. (a society which is registered under the Co-operative Societies Act, 1912) resolved to hold the annual general meetings of the Stores on 16th September, 1966. At the commencement of the annual general meeting Sri Vidva Sagar Goel, a delegate, raised an objection that the meeting could not lawfully be held as Sri Kesho Gupta, M. L. A., who was a Government nominee, had not been duly informed. Thereupon Dr. Rakeshwar Dass Jain, respondent No. 4 who was presiding at the meeting declared that the meeting was unlawful and adjourned it. It is alleged that the delegates present did not agree with this ruling. They elected Sri Anand Prakash, the petitioner, to preside at the annual general meeting and continued the proceedings of the annual general meeting. The meeting transacted the business on the agenda and elected 12 members to

the Board of Directors. Sri Anand Prakash, petitioner No. 1, was elected as the Chairman. It is stated that the newly elected Board of Directors assumed charge of their offices on 16th September, 1966 and commenced functioning from that date.

3. On 17th September, 1966 Dr. Rakeshwas Dass Jain filed an arbitration petition before the Assistant Registrar Co-operative Societies, Muzaffarnagar. He alleged that the proceedings conducted at the annual general meeting after it had been declared adjourned were illegal and ultra vires. It prayed that all those proceedings be declared void and the elections held be also declared illegal and void and the Secretary be ordered not to interfere in the working of the petitioner as the President of the Board of Directors and the newly elected Board of Directors be directed to refrain from working. Along with the arbitration petition Sri Jain filed another application praying that the Secretary be ordered not to hold the meeting of the Board of Directors and the newly elected President and the Secretary be directed not to interfere in the working of the petitioner as President. Sri Jain filed an affidavit in support of this application. On September 19th 1966 the arbitrator respondent No 2, passed an ex parte order holding that he was satisfied that there was a prima facie case to grant stay and that it was just to pass a proper stay order. He consequently directed the persons elected as Directors and President at the annual general meeting, not to function as Directors and President. He also directed that the Directors and the President as existing till 16-9-1966 shall continue to function till the disposal of the arbitration case. Copy of this order was forwarded, inter alia, to the Secretary as well as the 12 newly elected Directors and the President.

4. The validity of this order has been challenged by the petitioner. It has also been submitted that the dispute raised by the arbitration petition was not covered by Rule 115 of the rules framed under the Co-operative Societies Act and as such the arbitrator had no jurisdiction to entertain the reference and pass any order thereon. I do not find any merit in this submission. The third explanation to Rule 115 expressly includes matters relating to the election of office bearers of the society within the meaning of the term "business of the society". The arbitration petition challenged the validity of the elections of office bearers held at the annual general meeting. This dispute was, therefore, one touching the business; of the society and was within Rule 115. It has" also been contended that there was no notification conferring the powers of the Registrar on the Assistant Registrar and as such the Assistant Registrar could not lawfully refer the dispute to arbitration. This fact is disputed and in para 19 of the counter-affidavit filed by Sri R. S. Sharma on behalf of the first respondent it is stated that the powers of the Registrar had been duly delegated to the Assistant Registrar by a notification dated December 24, 1936 as well as by Rule 174 of the rules. I, therefore, do not find any illegality in the order referring the dispute to arbitration passed by the Assistant Registrar. Another point taken was that the omission to send notice of the annual general meeting to one of the members did not invalidate the meeting, and that its proceedings, were lawful. This matter will

be decided by the arbitrator. The arbitrator has not yet expressed his views on this question. The petition is, in my opinion, premature on this point. It will not be a sound exercise of discretion to permit the petitioner to circumvent the arbitrator and to come to this Court for an adjudication of this point while the proceedings are still pending before the arbitrator. I am, therefore, not inclined to go into this question.

5. The main point canvassed, however, relates to the jurisdiction of the arbitrator to pass interim orders in the nature of an injunction or stay. It is submitted that an arbitrator is a statutory authority. He has not been conferred any such jurisdiction or power. The impugned injunction order was ultra vires the powers of the arbitrator.

6. In order to consider the submission in its proper perspective it is necessary to see the scope and incidents of the doctrine of ultra vires. The term "ultra vires" simply means "beyond powers" or "lack of power". The term "ultra vires" signifies a concept distinct from "illegality". In the loose or the widest sense every thing that is not warranted by law is illegal but in its proper or strict connotation "illegal" refers to that quality which makes the act itself contrary to law. The term "ultra vires" points to the capacity or power of the person to do that act. It is not necessary that an act to be ultra vires must also be illegal. It may be but it may as well, not be. An act may be illegal because it is prohibited by law or for reasons like fraud, undue influence or because it may be opposed to public policy. These reasons are not occasioned by the absence of any power in the person to do the act. The essence of the doctrine of ultra vires is that the act is done in excess of the powers possessed by the person in law. This doctrine proceeds on the basis that the person has limited powers. In S. R. Das's "Law of Ultra Vires in British India" Tagore Law Lectures. 1903, the law is stated thus at page 12

"In speaking of an ordinary citizen we do not speak of any action being ultra vires. To an ordinary citizen whatever is not expressly forbidden by the law is permitted by the law. It is only when the law has called into existence a person for a particular purpose or has recognised its existence -- such as the holder of an office, a body corporate etc -- that the power is limited to the authority delegated expressly or by implication and to the object for which it was created. In the case of such a creation the ordinary law applicable to an individual is somewhat reversed. Whatever is not permitted, expressly or by implication, by the contesting instrument, is prohibited, not by any express prohibition of the Legislature but by the doctrine of ultra vires."

If a person exists for a limited purpose alone and that purpose is defined by the law whether expressly or by implication, the doctrine of ultra vires governs him and confines him to that purpose. The person can act within the four corners of its contesting instrument. The doctrine prevents him from acting beyond the conferred powers.

7. An arbitrator under the Co-operative Societies Act is a creature of that Act and the rules framed thereunder. Chapter XIV of the Rules deals with arbitration. The various kinds of disputes, that can be referred are mentioned in Rule 115 Under Rules 116 and 117 the matter can be referred to the Registrar or to an arbitrator or to joint arbitrators Rule 118 lays down the procedure to be followed by the arbitrator. He has to fix dates and place for hearing of the dispute He has the power to administer oath and to require by summon (1) the attendance of the parties concerned and of witnesses and (2) the production of books and documents relating to the matter in dispute Under Rule 122 a person or a witness failing to comply with the summon issued by the arbitrator is liable to the penalties prescribed by Paragraph 7(2) of the second schedule to the CPC 1908: that the arbitrator has not been given any power to inflict or enforce those penalties The arbitrator has to bring the matter to the notice of the relevant civil court and the civil court can proceed as if it had issued the summons Under Rule 128, the arbitrator has to make a memorandum of the statements of parties and the witnesses as are examined. He has to give a decision or award upon the evidence so recorded and after consideration of any documentary evidence produced by either party. He is further required to give the decision or award in accordance with justice, equity and good conscience. The powers of the arbitrator in giving a decision or award are circumscribed, by several conditions He has to fix the date and place of hearing the dispute, to afford the parties an opportunity of hearing. He has then to record the evidence adduced by the parties The arbitrator can give his decision or award only upon a consideration of the evidence recorded or produced These rules make it clear that the arbitrator has no power to give a decision or award before fixing a date for hearing the dispute and before recording any evidence In the instant case, the sole arbitrator passed the impugned order soon after the petition for arbitration was instituted. He had not till then fixed any date for the hearing of the dispute nor afforded any opportunity to the parties to adduce any evidence There was no evidence before him upon a consideration of which he could give a decision or award. The impugned order, therefore cannot be treated as a decision or award authorised by Rule 123.

8. It is urged that the arbitrator has inherent powers it is said that an arbitrator acts as a judicial officer because he is under a duty to decide the dispute referred to him judicially, and as a judicial officer he should be deemed to possess the inherent powers of a Judge In American Jurisprudence. 2nd Edition Vol. 5, page 588 paragraph 91 it is stated that.

"Although the nature of the authority conferred upon arbitrators renders their proceedings judicial rather than ministerial, in character, in the constitutional sense arbitrators do not exercise judicial power nor can they be regarded as judges for they lack the authority of courts. Thus at common law an arbitrator has no authority whatever to administer an oath to compel the attendance of witnesses or the production of documents and books of account to insist upon a discovery of facts from the parties under oath or to enforce an award once it is

rendered "

An arbitrator is not the repository of the judicial function of the State. He cannot be likened to a court or a judge. Chapter XIV of the Rules provides the arbitrator many of the trappings of a Court. That does not give him the status of a court. That has been done to prevent him from exercising the powers to decide the referred dispute, arbitrarily. An analogy of an arbitrator with the courts is neither apt nor appropriate. The courts of general jurisdiction have been constituted for administering justice in the State. In respect of the legality of their acts they have been placed on the same level as an ordinary citizen. In *Narsingh Das v. Mangal Dubey*, (ILR 18851 All 163, at p. 172 Mahmood. J observed that the courts are not to act upon the principle that every procedure is not to be taken as prohibited unless it is expressly provided for by the Code; but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. The same view has been expressed in *Mohd Sulaiman Khan v. Mohd Yar Khan*. ILR (1888) All 267 at p 287 (FB). The Co-operative Societies Act and the rules have constituted the arbitrator for a limited purpose, and have conferred well defined powers. He has no general jurisdiction. No inherent powers which properly belong to courts can be recognized in his case. In *Rameshwar Dayal Vs. Sub-Divisional Officer Ghatampur and Others*, a Bench of this Court held that an election tribunal under the U. P. Panchayat Raj Act, 1947 has no inherent powers. The view expressed by the Bench is applicable to an arbitrator. It has been stated that an arbitrator is not a Chancellor and possesses no equitable powers (See *Am Juris* 2nd Ed. Vol. 5 p 620, para 138). In AIR 1941 114 (Privy Council) the Privy Council held that an arbitrator has no inherent powers to award interest. The same view was expressed by the Supreme Court in *The State of Bihar Vs. M. Homi and Another*,

9. It is urged for the respondents that the arbitrator has implied powers and that the power to issue an injunction or stay is one of the implied powers. A power can be implied from the provisions of the contesting instrument or should be properly incidental or consequential. Chapter XIV of the rules contain the provisions relating to arbitration. Learned counsel for the respondents has not invited my attention to any rule or rules which either expressly or by construction can be held to yield such a power to the arbitrator. Under Rule 126 the arbitrator has been conferred the power to make an order as to costs. Under Rule 127 he can award future interest also. These matters have no connection or relevance to the claimed implied power to issue an interim order of stay or an injunction.

10. On behalf of the respondents, it is urged that the power to grant stay or an injunction is an incidental or consequential power and as such it should be deemed an implied power. The question is what are incidental powers? In *Broom's Legal Maxims* 10th Edition page 312 it is stated:

"It is a rule that when the law commands a thing to be done it authorises the performance of whatever may be necessary for executing its command "

Similarly Maxwell on Interpretation of Statutes page 360 says:

"Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary to its execution "

11. Lord Selborne in Attorney General v G. E. Rly. Co. (1880) 5 AC 473 (478) laid down the canon of construction of the doctrine of ultra vires as follows:

"I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires

Referring to these observations of Lord Selborne Jagannath Dass. J. observed: Bishnu Charan Mukherjee and Another Vs. State of Orissa,

"There can, therefore, be no doubt that where the intention of an Act in conferring an express power is frustrated by not construing it as necessarily implying another incidental power of however substantial in nature, the same must be implied in order not to bring about frustration of the express intention."

To the same effect are the observations of Supreme Court in Matajog Dobey Vs. H.C. Bhari, Chandrashekhar Aiyvar J speaking for the Supreme Court held:

"Where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution."

To complete the citations, the same view was expressed by Gajendragadkar C. J. in The Central Bank of India Ltd. Vs. P.S. Rajagopalan etc., these authorities establish that incidental or consequential powers are available in order to enable the statutory authority to achieve the object for which it has been created The tribunal is considered to have power to do all such things as are reasonably incidental to and may properly be done to advance the main purpose, though such powers may not have been literally conferred. He can employ such means and do such acts as are necessary to successfully implement the conferred power These subsidiary powers are known as incidental or consequential powers and are implied in a statutory tribunal by the doctrine of ultra vires

12. The word "execution" in the observations quoted above refers to the achievement of fulfillment of the object and not to the powers of realisation of the award or decision given. It has not been used in the sense in which a decree of a court is executed The Co-operative Societies Act constitutes the arbitrator to decide the disputes mentioned in Rule 115 The incidental or consequential

powers necessary to achieve the object of deciding the dispute can be implied but not powers to execute or enforce the award once it has been given, because enforcement of the award is not the function of the arbitrator. The manner in which his award can be enforced has been specifically dealt with by Rule 137 of the Rules. Under sub-rule (1) of this rule, sums recoverable under the award can be recovered by the Collector on requisition of the Registrar; and under Sub-rule (2), the award can be enforced on an application to the relevant civil court as if the award was a decree of the court. The arbitrator is nowhere in the picture. The parties have to apply to entirely distinct authorities for executing the award. Hence, by a process of construction, the arbitrator cannot be deemed to possess any incidental or consequential powers to enable him to enforce the award. If the arbitrator does not have any incidental power to implement his award, he certainly cannot be deemed to have any such power even before he has decided the dispute. It was urged that if the arbitrator does not have the power to maintain the status quo his decision may become infructuous by reason of the subject-matter of the dispute disappearing or being irretrievably damaged. The arbitrator has the sole power to decide the dispute, for whatever it is worth. It is not his function to preserve the subject-matter of the dispute with a view to enable his ultimate award to be executed.

13. In *Matajog Dobey*'s case mentioned above *Matajog Dobey Vs. H.C. Bhari*, the Supreme Court used this principle to imply that "if in the exercise of the power or the performance of the official duty, improper or unlawful obstruction or resistance is encountered, there must be a right to use reasonable means to remove the" obstruction or overcome the resistance.

14. In *The Central Bank of India Ltd. Vs. P.S. Rajagopalan etc.*, the Supreme Court applied the principle of incidental powers u/s 33C(2) of the Industrial Disputes Act. The Labour Court had the power to compute the benefits claimed by a workman. The question was whether the Labour Court could go into the question of right of the workman to receive the benefit. The Supreme Court held that the Labour Court had this power because such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court. This case also illustrates that incidental powers are only those which enable the authority to effectively attain its main object.

15. In *In re Unione Stearinerie Lanza*, 1917-2 KB 558 Clause (f) of the first schedule of the Arbitration Act, 1889 came up for construction. This clause stated that parties shall produce books, documents etc. and "do all other things which during the proceedings on the reference the arbitrators or umpire may require." It was held that this phrase in Clause (f) does not imply any power to direct the party in the position of a plaintiff to give security for costs or to order stay or proceedings pending the giving of security for costs. Viscount Reading C. J. observed that.

"They are words of general import giving to the arbitrator the power to do any thing which he may require for the purpose of ascertaining the facts or law in

order that he may decide the dispute. It would be a very wide extension of them to construe them as meaning that he has the powers of a judge as to staying the proceedings pending the giving of security for costs "

Similarly here an arbitrator can be deemed to possess powers to order the parties to do all such things as he may require in order to assist him in arriving at a determination of the dispute. In the present case the dispute related mainly to the validity of the election of Directors. That dispute obviously can be determined whether the newly elected Directors continue to function as such or not. The petition for arbitration also prayed that the newly elected Directors be directed not to interfere with the functioning of the Stores. The power to determine these disputes could not become frustrated because they continue to function while the proceedings are pending. The object of the application for an injunction was not to enable the arbitrator to continue with the arbitration proceedings or to ascertain the true position and to decide the dispute.

16. Even the civil courts do not possess the power to stay or grant an injunction as an incidental power. The CPC designates such proceedings as supplemental proceedings. That is how part VI is headed. This part consists of Sections 94 and 95. It can, therefore, be said that the power to issue an order of stay or an injunction is a supplemental power of the civil courts and not an incidental power. Part III of the CPC mentions the incidental proceedings in a court. They relate to issuance of commissions. They are designed to ascertain the correct position in order to enable the court to determine the case before it.

17. It is urged that Section 27 of the Arbitration Act, 1940 which enables an arbitrator to make an interim award is applicable and the impugned order of injunction should be treated as an interim award Prior to the Arbitration Act, 1940 it was settled law that in the absence of any provision in the arbitration agreement an arbitrator had no power to give an award piecemeal. An award has to be entire, complete and final, otherwise it is void. See *Ganga Dhar Vs. Indar Singh*, and the authorities cited in it Section 27 of the Arbitration Act, 1940 permitted an arbitrator to make an interim award. Sub-section (2) thereof states that a reference to award shall include an interim award. In view of the decision of the Division Bench of this Court in *District Co-operative Federation v Registrar. Co-operative Societies*. : AIR1966All489 it is doubtful if S 27 would be applicable to an arbitration under the Co-operative Societies Act. The Bench held that the Co operative Societies Act and the rules are a complete Code so far as arbitration is concerned. They provide exhaustively for every matter relating to arbitration and observed that it is difficult to see as to which provision of the Arbitration Act can be made applicable to an award made under the Act read with the rules. But assuming for the sake of argument, that Section 27 is applicable, it is difficult to see how the respondent's case improves. An interim award is also an award under Sub-section (2) of Section 27 It can, therefore, be made in the same manner as an award. Rule 123 of the rules will equally apply to an interim award. An interim award can, therefore, be made only after hearing the parties and

considering the evidence adduced by them. The impugned order was passed ex parte. It cannot, therefore, be treated as an interim award. By an interim award the arbitrator has to decide a part of the dispute referred to him. He may decide some of the issues or some of the claims referred. He may determine the issue of liability by leaving the question of the amount of damages to be dealt with later. An interim award must determine some part of the dispute referred to the arbitrator, If cannot deal with any other matter. The question of passing an order of stay or an injunction pending the determination of the referred dispute is foreign to the concept of an interim award. The impugned order of injunction cannot be held to be an interim award.

18. In my opinion, an arbitrator acting under the Co-operative Societies Act has no inherent, implied or incidental or consequential power in the exercise of which he could pass an order of stay or in the nature of an injunction. The impugned order was ultra vires his powers. It was in the eye of law null and void.

19. In the result, the petition succeeds. The impugned order dated 19th September, 1966, is quashed. The petitioners will have their costs from Respondent No 4.