

(2013) 12 KL CK 0068

In the High Court Of Kerala

Case No : Writ Petition (C) No. 16024 of 2013 (C)

A.R. Joseph and Others

APPELLANT

Vs

The Co-Operative Arbitration Court and Others

RESPONDENT

Date of Decision : 04-12-2013

Acts Referred:

Citation : AIR 2014 Ker 22 : (2014) 1 ILR (Ker) 374 : (2014) 1 KLJ 290

Hon'ble Judges : K. Surendra Mohan, J

Bench : Single Bench

Advocate : P.C. Sasidharan, for the Appellant; Rinny Stephen, Sr. Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Surendra Mohan, J.—The petitioners have filed this writ petition challenging the action of the first respondent, the Co-operative Arbitration Court, Kozhikode, declaring them ex parte in ARC 24/13. They lament that the Co-operative Arbitration Court has no power to set aside the order declaring them ex parte. Therefore, they have invoked the jurisdiction of this Court under Art. 226 of the Constitution. The petitioners are elected members of the Board of Directors of the Thekkumkattil Ksheerolpadaka Sahakarana Sangham, the third respondent herein. An election was conducted to the Board of Directors of the Society on 27.3.2013 in which, the petitioners were elected. The fifth respondent is a candidate who was defeated at the election. The fourth respondent is a person who had challenged election notification itself before this Court. The said writ petition was dismissed, reserving his liberty to challenge the election. Respondents 4 and 5 have filed ARC 24/2013 which is pending before the first respondent. The petitioners are respondents in the said case along with the third respondent. In the ARC, the third respondent was served with notice and the society entered appearance through counsel. However, the petitioners have not been served with any notice in the said proceedings. The date of appearance was 21.5.2013. On that date, the matter was adjourned to 14.6.2013, since there

was no sitting. On the said date, it is alleged that, the following order was passed by the Arbitration Court:-

Plaintiff represented by counsel. Summons D1 to D9 returned. D10 filed vakalath. D11 absent. D1 to D9 returned stating that the address is not shown proper. Hence returned. D1 to D9 set ex parte. Adjourned to 28.6.2013.

2. According to Adv. P.C. Sasidharan who appears for the petitioners, despite noticing that summons D1 to D9 was returned stating that "the address is not shown proper", the petitioners were set ex parte. Though the petitioners have submitted Ext. P2, an application for the issue of a copy of the said proceedings, it is alleged that no copy has been issued to them so far. It is contended that the petitioners are not in a position to file a petition for setting aside the order declaring them ex parte, for the reason that the Arbitration Court has no power to grant the said relief. It is also contended that the relevant rule confers power on the first respondent to declare a person ex parte only in cases where summons has been duly served. Therefore, the exercise of power in the present case is absolutely without jurisdiction and liable to be corrected by this Court.

3. According to the Govt. Pleader who appears for respondents 1 and 2, this writ petition is not maintainable for the reason that the remedy of the petitioners is to approach the Arbitration Court itself for setting aside the order declaring them ex parte. A Court that is conferred with the power to declare a person ex parte also has the power to decide whether such an order should be set aside or not. It is contended that the first respondent being a Tribunal has the power to decide disputes, which includes the power to pass all orders that are necessary to do substantial justice between the parties. Therefore, to confine the jurisdiction of the first respondent only to the powers that are enumerated, is fallacious, it is contended. Decisions of this Court have also been relied upon by the learned Govt. Pleader to substantiate his contention that the Arbitration Court has sufficient powers to grant the relief that the petitioners have sought for in this writ petition. It is therefore contended that this writ petition is only to be dismissed.

4. This writ petition had come up before me for admission on 26.6.2013, on which date the Govt. Pleader was directed to take instructions as to whether notice had been served on the petitioners. If not, he was directed to produce the records on the basis of which the order to proceed ex parte was issued. Since the ARC was posted on 28.6.2013, a stay of further proceedings was also granted. The interim order is continuing. Since the issue in this case is essentially a question of law, I do not consider it necessary to issue notice to the party respondents. I have heard the counsel for the petitioners as well as the learned Govt. Pleader. I have also considered the rival contentions anxiously.

5. Rule 67(7)(b) of the Kerala Co-operative Societies Rules, 1969 (the "Rules" for short) is the provision that confers power on the Arbitration Court to declare a person ex parte. Rule 67(7) reads as follows:-

(7)(a) The Co-operative Arbitration Court or the Registrar or the person or the Arbitrator deciding the dispute shall record a brief note in English or in the vernacular language of the evidence of the parties to the disputes and witnesses who attend, and upon the evidence so recorded and after consideration of any documentary evidence produced by the parties a decision or, awarded, as the case may be shall be given in accordance with justice, equity and good conscience. Such decision or award shall be reduced to writing and pronounced at once or on some future date of which due notice shall be given to the parties.

(b) In the absence of any party to the dispute, duly summoned to attend the dispute may be declared ex parte.

A perusal of the above provision leaves no doubt in my mind that the power to declare a person ex parte is available only in cases where, any party to the dispute "duly summoned", is absent. In the present case, admittedly the summons issued to the petitioners have been returned stating that "the address is not shown proper". In the above state of affairs, it is clear that the petitioners have not been duly summoned. In view of the above, the order declaring them ex parte is unsustainable.

6. The second question that arises for consideration is whether the Co-operative Arbitration Court has the power to set aside its own order declaring a person ex parte.

7. The contention of the counsel for the petitioners is that Rule 67 only confers power to declare a person ex parte but does not confer any power to set aside an order declaring a person ex parte. The said contention has to fail for the simple reason that an authority conferred with the power to declare a person ex parte is also by implication, necessarily conferred with the power to set aside such an order, where sufficient cause is shown. Such a power has to be conceded to ensure that the administration of justice is performed smoothly. In the absence of such a power every litigant would have to invoke the jurisdiction of a superior court to correct such orders passed in interlocutory proceedings. It has been held by the Apex Court in a number of decisions that Tribunals and quasi judicial authorities conferred with the power of dispensing justice are clothed with every power that is necessary for the efficient and meaningful discharge of their duties. Therefore, absence of an enumerated power conferring jurisdiction on the Co-operative Arbitration Court to set aside orders declaring a person ex parte does not and cannot leave a person without any remedy, as contended. A litigant can certainly move the Co-operative Arbitration Court for setting aside an ex parte order and on sufficient cause being shown, the first respondent has sufficient powers to set aside such an order.

8. I am supported in the above view by the pronouncements of this Court as well as the Hon'ble Supreme Court in various decisions. In Cheru Ouseph Vs. Kunjipathumma, M.P. Menon, J. has considered a similar issue in the following words:-

12. What, after all, is the inherent power saved by S. 151 of the Code of Civil Procedure? A court is constituted for doing justice and must be deemed to possess all powers as may be necessary to do the right and undo wrongs in the course of administration of justice. Of course, the court must have jurisdiction over the proceedings before it can exercise the inherent power; but when that is granted, its power to advance the cause of justice by relying on unenumerated powers--on inherent or residuary power, as it is often called--cannot be denied to it. And therefore, where a tribunal exercises the same kind of power i.e. part of the judicial power of the State, as the Supreme Court has observed, why should it be denied similar inherent or residuary powers? If you do not like the name, call it by another; but so long as the tribunal is deciding legal disputes and determining the rights of citizens as any other court, you cannot without endangering its efficiency, deny to it all powers which are necessary for the administration of justice. This is not to convert every tribunal into a tyrant, but only to recognise the reality that tribunals have come to stay as instruments of administration of justice, and that occasions may arise where they too will have to step into areas unchartered by the statute and the rules, in the interests of justice. If a tribunal goes out of its way in the fullness of its powers, the superior courts are there to correct it, as noticed by Allen; and as also observed by him, the first adjudication is more important to the litigant than the last.

9. A Division Bench of this Court in Aravindakshan Vs. Raghavan considered the question as to whether a Tribunal has the power to restore an application dismissed for default and has held as follows:-

The position that emerges from these situations is that the Tribunal, if not conferred with specific power to dismiss an application for default and to restore the application dismissed for default, has no power to dismiss an application for default or to restore an application dismissed for default. Naturally, this would pose another question as to what has to be done with an application, which has not been prosecuted by the applicant. This expediency, in our view, should not force the court to boggle or equivocate its interpretive function. We feel that it is irrational for a court to hold in the absence of specific provision in the statutes that the Tribunal has got only the power to dismiss an application for default and has no power to restore an application dismissed for default.

A similar view has been taken by yet another Division Bench in Ebrahim Ismail Kunju and Another Vs. Phasila Beevi, In paragraph 5 of the said judgment it has been held as follows:-

Many areas hitherto occupied by courts, are now the domains of the Tribunals. A liberal approach towards their functioning and a larger view about the powers they need, are the requirements of the times. A Tribunal should be facilitated to do all that a court could do in similar situations; and much more than that. Greater speed and a total liberation from the tentacles of technicalities, give a better look and greater efficiency for effectively manned Tribunals. If there be no statutory prohibition, the Tribunal should therefore normally be in a position to

ordain its affairs and modulate its procedures in such a manner as to best subserve the interest of the public, and in particular the litigant public.

10. The question as to whether an Arbitrator has the power to grant permission to a litigant to withdraw his case was considered by a Division Bench of this Court in Jacob Varkey and Another Vs. The Idukki District Co-operative Bank Ltd. and Others, It has been held that the Arbitrator has such a power though not specifically conferred. After an elaborate consideration of the provisions of the Kerala Co-operative Societies Act, 1969 (the "Act" for short) and the Kerala Cooperative Societies Rules, 1969 (the "Rules" for short) concluded the issue in paragraph 14 in the following words:-

It may be seen that in the instant case also essentially the functions of the Arbitrator under the Act is that of an ordinary civil court in deciding a suit. The decision in a suit does not mean merely the final decision. It takes in also the entire stages leading to the decision. Thus the Arbitrator in the instant case is fully justified in passing the impugned order granting liberty to withdraw the suit and file a fresh suit after impleading necessary parties. It is significant to note that none of the statutory rights of the appellants/defendants is in any way affected in the process.

11. The position that emerges from an analysis of the above binding dicta is that, the power to set aside an order declaring a person ex parte though not specifically enumerated in the Act or the Rules, is inherent in the nature of the functions discharged by the Co-operative Arbitration Court. It is also inherent in the provision conferring power on the first respondent to declare a person ex parte. Therefore, the proper remedy for the petitioners was to have approached the first respondent by preferring an interlocutory application pointing out that summons had not been duly served on them. The first respondent has the power to entertain such an application for setting aside an order declaring a person ex parte. In the present case, the situation is worse for the reason that the first respondent has declared the petitioners ex parte though it has found that summons was not duly served on the petitioners. It is not in dispute that summons issued to the petitioners had been returned for the reason that the address shown was not proper. Therefore, the proper course to have been adopted by the first respondent was to issue fresh summons to the petitioners. Since the order declaring the petitioners ex parte in the present case was one passed without jurisdiction, the same is set aside.

In view of the above this writ petition is allowed. The first respondent is directed to issue fresh summons to the petitioners in their correct addresses and to proceed with the trial of ARC 24/2013 after completing service of summons on them.