

(1985) 11 KAR CK 0036

In the Karnataka High Court

Case No : Writ Petition No. 13552 of 1981

Karnataka State Co-operative Marketing Federation Ltd.

APPELLANT

Vs

Boralingu

RESPONDENT

Date of Decision : 14-11-1985

Acts Referred:

Karnataka Co-operative Societies Act, 1959 — Section 63, 69, 70, 70 A

Citation : (1985) 11 KAR CK 0036

Hon'ble Judges : K.A. Swami, J

Bench : Single Bench

Advocate : Zahedulla Meccai, for the Appellant; Kesvy and Co. for R 1 and B.Y. Somayaji, HCGP for R-2, for the Respondent

Final Decision : Allowed

Judgement

K.A. Swami, J.—In this petition, under Articles 226 and 227 of the Constitution, the petitioner has sought for quashing the order dated 13-2-1981 passed by the Karnataka Appellate Tribunal (hereinafter referred to as the "Tribunal") in Appeal No. 499/ 1980 produced as Annexure-B.

2. The impugned order sets aside the award passed by the Arbitrator in Dispute No. 407/73-74 on the ground that the claim was made by the petitioner on the basis of the shortages of fertiliser noticed by the auditor during the course of audit, hence the only course open to the petitioner was to initiate a surcharge proceeding u/s 69 of the Act and not to raise a dispute u/s 70 of the Karnataka Co-operative Societies Act, 1959, (hereinafter referred to as the "Act") as such the dispute raised u/s 70 of the Act was incompetent. It is the correctness of this order that is challenged in this Writ Petition.

3. It is contended on behalf of the petitioner that there was no statutory audit held as per Section 63 of the Act. It was only the Annual Internal Audit held by the Internal Auditor in the routine course. That even otherwise the dispute was filed on 5-9-1973 immediately on coming to know of it; that the Act came to be

amended by Karnataka Act No. 39/ 75 which came into force on 23-9-1975 extending the period of limitation for raising dispute to 6 years ; that again the Act came to be amended on 20-1-1976 by Karnataka Act No. 19/76 providing for raising a dispute u/s 70 of the Act, in similar matter; that in a matter like this, even if it is held that the audit in question falls u/s 63 of the Act which according to learned Counsel does not fall; the dispute could have been very well raised on 20-1-1976. Hence it is submitted that the Tribunal is not justified in setting-aside the award only on the ground that the dispute was incompetent; that the Tribunal is not right in applying a Division Bench decision of this Court in S. C. Patil v. S. G. Hiremath and Ors., W.A. No. 356 of 1976 date 17.10.1978 as the said decision is not applicable to the facts of the present case.

4. On the contrary, it is contended on behalf of the 1st respondent that as the Tribunal has relied upon a decision of this Court and decided the matter, on the basis of that, even if it is held that the aforesaid decision of this Court in W.A. No. 356 of 1976, W.A. No. 356 of 1076 date 17-10-1978 is not applicable to the case, at the most it amounts to an illegality and such an illegality cannot be corrected under Article 227 of the Constitution in as much as the Tribunal cannot be held to have acted without jurisdiction or committed an error apparent on the face of the record in following a decision of this Court. It is also further contended that nothing is lost to the petitioner because the Tribunal has kept it open to the petitioner to proceed against the 1st respondent u/s 69 of the Act. Therefore, it is not a cause for interference.

5. Having regard to the aforesaid contentions the points that arise for consideration are :-

(i) Whether the Tribunal is justified in setting aside the award on the ground that the dispute raised u/s 70 of the Act was incompetent ?

(ii) Whether it is a case for interference ?

6. Points 1 and 2 :- The facts necessary for the purpose of deciding the aforesaid points, are not in dispute. The 1st respondent was employed by the petitioner as a Depot Manager on 16-3-1971. The 1st respondent was posted as an Officer In-charge of the Central Depot at Kadar on 16-3-1971. He occupied that post from 16-3-1971 to 4-9-1972. The audit was held by the internal auditor and not by the auditor appointed u/s 63 of the Act for the periods from 1-7-1970 to 30-6-1971, 1-7-1971 to 30-5-1972 and 1-6-1972 to 25-10-1972. In the course of this audit, certain shortages were noticed during the period when the 1st respondent was in charge of the aforesaid depot in question. The petitioner raised a dispute against the 1st respondent u/s 70 of the Act on 5-9-1973. The dispute was decided on 23-8-1979. There was no contention raised by the 1st respondent that the dispute was incompetent. The Arbitrator passed an award in favour of the petitioner-Federation. Being aggrieved by the award, there was an appeal preferred by the 1st respondent being Appeal No. 499/1980 before the Tribunal. It is this appeal which is decided by the Tribunal on 13-2-1981. The

Tribunal has accepted the contention raised by the 1st respondent for the first time that surcharge proceeding alone ought to have been initiated against the 1st respondent u/s 69 of the Act having regard to the fact that the claim was based upon the audit report made by the internal auditor and as such the dispute raised u/s 70 of the Act, was not maintainable. Consequently it has allowed the appeal and has set aside the award.

7.1. It is very pertinent to notice that prior to Act No. 19/1976 in respect of the claims arising out of the audit report made u/s 63 of the Act, the only proceeding permissible for recovery of the amount representing the value of shortages was a surcharge proceeding u/s 69 of the Act. It was to overcome the difficulty felt in respect of recovery of the value of shortages, the Act came to be amended by Karnataka Act No. 19 of 1976, which came into force on 20-1-1976, by inserting Clauses (d) and (e) in Subsection (2) of Section 70 of the Act. Clause (e) specifically provides for a claim by a Co-operative Society for any deficiency caused in the assets of the Co-operative Society by a member, past member, deceased member or deceased Officer, past agent or deceased agent or by any servant, past servant or deceased servant or by its Committee, past or present whether such loss be admitted or not. It is this amendment which enables a Co-operative Society to raise a dispute. It is also very pertinent to notice that Act No. 19/1976 simultaneously amended Section 69 of the Act. No doubt, the petitioner did not avail the remedy open to it u/s 69 of the Act, but in view of Clause (e) of Sub-section (2) of Section 70 of the Act, it was open to the petitioner-Federation on the date the Karnataka Act No. 19/1976 came into force i.e., 20-1-1976 to raise a dispute for the purpose of recovery of the amount representing the value of the shortages found during the course of internal audit because on that day, the limitation for raising the dispute had not expired. As per Section 70-A of the Act, limitation for raising a dispute is six years from the date of accrual of action. In a matter like the one on hand, the cause of action arises only on the date the shortages are noticed. The petitioner-Federation came to know of it in the instant case on being pointed out by the internal auditor during the course of his internal audit.

7.2) In addition to this, it is also very relevant to notice that on 20-1-1976 when Karnataka Act 19/76 came into force the dispute was still pending before the Arbitrator. It was decided only on 23-8-1979. Thus, on the date the dispute was decided it was maintainable and the Arbitrator had jurisdiction to decide it. Therefore, the award cannot be held to be without jurisdiction.

7.3) It is also relevant to notice that this Court in *Vasantarao Govind Bijapur v. The Karnataka Appellate Tribunal*, W.A. No. 356 of 1076 date 17-10-1978 under similar circumstances has held as follows :

"3. I do not see any ground to accept both the contentions of the petitioner. The contention of the Learned Counsel based on the provisions contained in Section 69 of the Act, cannot be accepted in view of the coming into force of the Karnataka Act No. 19 of 1976. No doubt, prior to the coming into force of the

Karnataka Act No. 19 of 1976, no dispute u/s 70 of the Act could have been maintained in respect of the matter falling u/s 69 of the Act, but, after the coming into force of the Act No. 19 of 1976, the position has been changed. Earlier to Act No. 19 of 1976, the matter falling u/s 69 of the Act was not included within the ambit of Section 70 of the Act. Act No. 19 of 1976 has introduced Sub-clause (e) in Sub section (2) of Section 70, thereby bringing the matter falling u/s 69 of the Act within the ambit of Section 70 of the Act. Therefore, the matter falling u/s 69 of the Act, can also be the subject matter of dispute u/s 70 of the Act. Further, it is also relevant to note that Section 70 of the Act, as it stood earlier to the parsing of the Act No. 19 of 1976, provided for an appeal against the order passed u/s 69 of the Act to other authorities other than the Tribunal. The amendment Act 19 of 1976 has deleted that provision relating to appeal and has in turn provided an appeal to the Tribunal u/s 105 of the Act against an order passed by the Registrar u/s 69 of the Act. If these amendments effected by Act 19 of 1976 are read together) the same go to establish that the matter falling u/s 69 of the Act, can now be the subject matter of the dispute u/s 70 of the Act also. Therefore, the contention of the Learned Counsel that the dispute cannot be entertained by the Registrar cannot at all be accepted in view of the aforesaid amendments and also in view of the fact that the dispute is at the initial stage as such it is open for the Registrar either to deal it himself or to refer it to the Arbitrator ; therefore, the first contention of the Learned Counsel cannot be accepted."

The view expressed by me in the preceding paragraph is in conformity with the view expressed in the aforesaid Vasantarao Govind Bijapur's case, WP No. 4532 of 1980 dated 14-3-1980.

7.4) To this connection, it is also pertinent to notice that Section 69 is attracted only when the audit is done by the Chief Auditor or caused to be audited by a person authorised by him by general or special order in writing in this behalf, the accounts of every Co-operative Society at least once in each year. Section 69 is not attracted when there is an audit made by the internal auditor and any shortage is noticed is a result of such internal audit. At this stage, I may also refer to a decision of this Court in Shivappa v. Kunimellali Doddapramanda Pattin Vyavasaya Sahakari Sangh Ltd. & Ors., W. P. No. 2112 of 1973 dated 27-2-1975 in which this Court has held as follows :

"7. In order to take up surcharge proceedings u/s 69 of the Act, the loss caused to the society or deficiency in the assets of the society must have discovered in the course of an audit, inquiry, inspection or the winding of a Co-operative Society. The audit referred to therein is an audit which is required to be made u/s 63 of the Act. Inquiry contemplated therein is an enquiry u/s 64 of the Act. Inspection stated therein is provided u/s 65 of the Act. The winding up of a Co-operative Society is as per Section 72 of the Act, it is only in such statutory actions, if it is found that a person who is or was entrusted with the organisation or management of a society has committed any wrong or committed any breach

of trust or wilful negligence, the Registrar may take proceedings u/s 69. In the instant case, the deficiency complained of against the petitioner was not discovered in audit, inquiry or inspection. It was in the course of official business, the management came to know that the petitioner has not accounted for the value of 37 bags of fertilisers. In such a case, it seems to me that the right of the society to raise a dispute u/s 70 of the Act, is not taken away. I, therefore, reject the contention urged for the petitioner."

In addition to this, a Division Bench of this Court in *Gopal Krishna v. Yellapur TAPCMS* 1979 (1) KarLJ 185 has on consideration of Section 69 of the Act, held as follows :

"..... It is further contended that the special law contained in Section 69 excluded the application of the general law u/s 70. Reliance is placed by the appellants on the decision of this Court in *K. Ranga v. Katpadi Service Co-operative Society* (W.P. 2155/72 dated 5 11 1974). There is no merit in this contention of the appellants. Section 69 is attracted only when in the course of an audit, inquiry, inspection or the winding up of a co operative society it is found out that a person in charge of the management of the affairs of the society, has misspent or misappropriated the money belonging to it. The said section does not apply to other cases or disputes which can legitimately be raised u/s 70 of the Act. The dispute in question clearly falls u/s 70(1)(c) of the Act in so far as the appellants and respondents 5 and 6 are concerned. This is clear from the decision of the Supreme Court in *Pentakota Srirakulu Vs. The Co-Operative Marketing Society Ltd.*,

XX XX XX XX XX Sections 63, 61 and 65 of the Act provide for an audit, inquiry and inspection of a co operative Society. They correspond to Sections 37 to 39 of the Madras Act referred to in the decision of the Supreme Court. The irregularity committed by the appellants and Respondents 5 and 6 was not found out in any such proceeding under Sections 63 to 65 of the Act or in the course of the winding up of Respondent-1 Society. The decision in *Ranga's case* (W.P. 2155/72) is of no avail to the appellants as that was a case where the irregularity had been noticed in the course of audit. Hence the contention based on Section 69 of the Act has to fail."

In the instant case, the audit was not done by the Chief Auditor nor it was caused to be done by a person authorised by him u/s 63 of the Act. The audit has been made only by the internal auditor. Such internal audit does not attract Section 69 of the Act. That being so, the Tribunal was not justified in holding Section 69 was attracted, therefore, the dispute raised by the petitioner-Federation was incompetent.

7.5) The decision of this Court in *S. C. Patil v. S. G. Hiremath and Ors.*, W.A. No. 356 of 1076 date 17-10-1978 relied upon by the Tribunal does not touch the point in question. That case related to the claim which arose out of the audit made u/s 63 of the Act, prior to the coming into force of Karnataka Act No.

19/1976. In S.C.Patil's case, W.A. No. 356 of 1076 date 17-10-1978 the dispute was raised and the award was passed when the Karnataka Act No. 19/1976 had not come into force. It was only during the pendency of the Writ Petition filed before this Court, the Karnataka Act No. 19/1976 came into force. Thus, in Writ Appeal No. 356/76, the Division Bench of this Court was not concerned with the consequences flowing from the Karnataka Act No. 19/1976. It was concerned only with the position that was obtaining prior to 20-1-1976. Hence, the said decision is not applicable to the facts of the present case. Thus, from what is stated above, it follows that the Tribunal is not justified in law in setting aside the award by holding that the dispute raised u/s 70 of the Act, was incompetent and as such, the award passed by the Arbitrator was without jurisdiction.

8. The next question that arises for consideration is as to whether it is a case for interference. When the Arbitrator has found that the shortages alleged by the petitioner-Federation are proved and the 1st respondent is liable to pay a sum of Rs. 11,500-71 being the value of the shortages and the Tribunal has not considered the appeal on merits on the ground that the dispute raised u/s 70 of the Act, was not competent and as such, it was not maintainable, an irreparable loss and injury will be caused to the petitioner-Federation if the order passed by the Tribunal is allowed to stand, that too when the Tribunal has on a wrong conception of law set-aside the award. Therefore, I am of the view that interference is called for, failing which justice will suffer. As the Tribunal has not decided the appeal on merits, it is necessary to remit the appeal to the Tribunal with a direction to decide the same on merits and in accordance with law.

9. For the reasons stated above, Point No. (i) is answered in the negative and in favour of the petitioner and point No. (ii) is answered in the affirmative.

10. The result is the Writ Petition is allowed. The order dated 13-2-1981 passed in Appeal No. 499/1980 by the Karnataka Appellate Tribunal, Bangalore, produced as Annexure-E is hereby quashed. The appeal now stands remitted to the Karnataka Appellate Tribunal, Bangalore, with a direction to decide the same afresh on merits and in accordance with law. No order as to costs.