
(1996) 07 CAL CK 0020
In the Calcutta High Court
Case No : FMAT No. 755 of 1996

Krishna Chowdhury and others

APPELLANT

Vs

State of West Bengal and others

RESPONDENT

Date of Decision : 10-07-1996

Acts Referred:

Calcutta Metropolitan Development Authority Act, 1972 — Section 97
Constitution of India, 1950 — Article 141, 226

Citation : AIR 1997 Cal 38 : 101 CWN 197 : (1997) 1 ILR (Cal) 419

Hon'ble Judges : Satyabrata Sinha, J; Satya Narayan Chakrabarty, J

Bench : Division Bench

Advocate : Anupam Chatterjee, Srimanta Dutta, Ashit Chakrabarty, Indranil Nandi and Sukumar Sarkar, for the Appellant; Sadananda Gangully, Prahlad Chandra Ghosh, Milan Bhattacharjee, Dr. Indrajit Mondal and Amit Banerjee, for the Respondent

Judgement

Satyabrata Sinha

1. The only question which has been addressed to us and requires our decision is as to whether the provision of Sections 95(5) and 95(6) of the West Bengal Co-operative Societies Act (hereinafter referred to as the said Act) is mandatory or directory.

2. In view of a pure question of law raised in this appeal, it is not necessary to consider the fact of the matter in details, suffice it to say that dispute having been raised by the respondent Nos.6 to 8 (hereinafter referred to as the added respondents) as regards the legality or validity of an annual general meeting held for the purpose of election of office bearers in terms of Sec. 45 of the said Act, the same was referred by the respondent No. 9 to the respondent No. 3 as an Arbitrator. Reference was made on 30-12-94. The respondent No. 3 passed an Award on 23-11-95 which is contained in Annexure "B" to the writ application. The writ petitioners/ appellants who were 8 in number and members of Baharal Fishermen Co-operative Societies Limited, filed a writ petition before the learned

trial Judge and by reason of the impugned order dated 12-3-96 while directing the respondents to file affidavit in opposition, the learned trial Judge asked the Registrar, Co-operative Societies to consider the said Award dated 23-11-95, which according to the writ -- petitioners/appellants amount to virtually dismissing the writ application. Learned counsel for the parties agree that the entries appeal may be heard and the writ petition may also be disposed of on construction of the aforementioned provisions.

3. Mr. Chattopadhyay, learned counsel appearing on behalf of the appellants submitted that a bare perusal of Sections 95(5) and 95(6) of the said Act, would show that the said provisions are mandatory in nature. Learned counsel in support of his aforementioned contention has relied upon a recent Supreme Court decision in the case of Registrar, Cooperative Societies, W.B. Vs. Krishna Kumar Singhania and Others, . It was, however, pointed out that a Division Bench of this Court in the case of Bhagirathi Co-operative Joint Farming Society Ltd. Vs. Howrah Zilla Parishad, while considering the provisions of sub-sections (4) and (5) of Section 87 of the West Bengal Co-operative Societies Act, 1973, held the same to-be directory in nature.

4. Mr. Ganguly appearing for the respondent No. 5 supported the contention of Mr. Chattopadhyay.

5. Mr. Bhattacharya appearing on behalf of the respondent No. 9 on the other hand, submitted that in view of the Division Bench decision of this Court in Bhagirathi Co-operative Joint Farming Society Ltd. Vs. Howrah Zilla Parishad, , this Court must hold that sub-sections (5) and (6) of Section 95 of the said Act are directory in nature. Learned counsel pointed out that the power of the Arbitrator is that of a Civil Court and in view of the fact, that an Award passed by him is executable in Civil Court, time limit fixed for making an Award should not be held to be mandatory. Reliance in this connection has been placed on the decisions in the cases of National Agricultural Co operative Marketing Federation of India Limited v. M/s. Ram Narayan Tech. Chand reported in (1988) 1 CHN 441, Karnal Improvement Trust, Karnal Vs. Parkash Wanti (Smt) (Dead) and Another, and Administrator, Municipal Committee, Charkhi Dadri and another Vs. Ramji Lal Bagla and others, Mr. Bhattacharya further relying on a decision in the case of Beed District Central Co-op. Bank Limited and another Vs. Jagannath S. Shahane and others, submitted that in absence of any penal consequence, a provision should not be held to be mandatory in nature.

6. Dr. Mondal appearing on behalf of respondent Nos. 6 to 8 inter alia, submitted that the writ petition is not maintainable as they were not parties to the said dispute. Learned counsel contended that the said question could have been raised only by the defendants of the said dispute in relation where to another writ petition is pending. Learned counsel has also drawn our attention to the passages of Maxwell on the Interpretation of Statutes, 12th Edition at pages 315 and 318. It was submitted that there can be no doubt that the Arbitrator has a duty to dispose of the matter within 6 weeks which reflects the intention of the

law maker that such award cases should be disposed of as speedily as possible, but according to Dr. Mondal, keeping in view the fact that a decision has been rendered, the same cannot be held to be void, in as much as, the Arbitrator did not become functus officio even after expiry of 6 months.

7. Mr. Chattopadhyay, in reply, had drawn our attention to the Award and submitted that from a perusal thereof it would appear that the names of the petitioners were directed to be excluded from the membership and thus, they are persons aggrieved entitling them to file the writ application and raise all questions, including the aforementioned question of law in the said writ application.

8. Section 95 of the said Act enumerates the dispute to be referred to Registrar as specified therein. Section 96 of the said Act provides for settlement of disputes. Subsection (1) of Section 96 empowers the Registrar, on receipt of a reference subject to the rules:--

(a) to decide the dispute himself; or

(b) transfer the dispute for disposal to any person authorised by the State Government to exercise the powers of the Registrar in this behalf; or

(c) refer the dispute for disposal to one or more arbitrators to be appointed by the Registrar or, in the case of the co-operative societies in the Calcutta Metropolitan Area as defined in the Calcutta Metropolitan Development Authority Act, 1972, to the Court of Arbitrators constituted u/s 97.

9. Sub-section (2) of Section 96 empowers the Registrar to withdraw any dispute transferred or referred under sub-section (1) of Section 95 and decide it himself or transfer or refer it to any other person or arbitrator or Court of Arbitrators for disposal. Sub-section (3) empowers the Registrar to pass any interlocutory order, whereas sub-section (4) empowers a person or an arbitrator or a Court of Arbitrators to pass an interlocutory order on any term, which may be necessary only for preservation of any property or right, which is the subject matter of dispute. Subsections (5) and (6) of Section 96 which are material for the purpose of this appeal read thus :

"(5) A dispute referred to the Registrar under sub-section (1) of Section 95 or transferred or referred to any person or arbitrator or arbitrators or the Court of Arbitrators, as the case may be under sub-section (1) of Section 96 shall be decided within six months from the date of receipt thereof by the Registrar.

(6) If the Registrar or the person or the arbitrator or arbitrators or the Court of Arbitrators fails to decide the dispute within the period specified in sub-section (5), he shall submit a report to his or its appointing authority stating reasons for such failure at least fifteen days before the expiry of the said period and such authority shall allow further time not exceeding six months for disposal of the dispute."

10. The State in exercise of its power conferred upon it u/s 147 of the said Act made Rules known as West Bengal Co-operative Societies Rules. Such Rules made are required to be laid before the Legislature. Chapter XI of the said Rules deal with settlement of disputes. Rules 173, 174 and 178 which are material for the purpose of this appeal read thus :

"173. Disputes and appointment of arbitrators.-- (1) When the Registrar decides to refer a dispute to a board of arbitrators he shall-

(i) call upon each of the parties to nominate one person as arbitrator within such time as he may direct, and where a party consists of more than one person, such persons shall jointly make only one nomination.

(ii) nominate the third arbitrator who shall act as a Chairman.

(2) If a party fails to make a nomination within the appointed time Registrar may himself make the nomination.

(3) Where three arbitrators are appointed, the opinion of the majority shall prevail. 174. Persons qualified to be appointed as arbitrators.-- The Registrar may appoint an arbitrator or arbitrators from

(a) officers and retired officers of any department of the State the Central Government,

(b) officers of apex and central co-operative societies,

(c) members of any local body,

(d) Chartered Accountants and Cost Accountants, and

(e) Advocates."

Rule 178 of the said Rules reads thus :

"178. Withdrawal of reference by the Registrar.-- The Registrar may-

(a) on the application by any party to an arbitration proceeding pending before an arbitrator or arbitrators, or

(b) on the application of an arbitrator, other than a Government officer, or

(c) where a Government officer, is an arbitrator, in case of resignation, transfer, suspension or dismissal of the arbitrator or any of the arbitrators, withdraw the reference from the arbitrator or the board of --arbitrators and may decide the dispute himself by an award or may make fresh appointment of arbitrator or arbitrators."

11. A bare perusal of the aforementioned provisions, clearly shows that the power of appointment of arbitrator vests in the Registrar. The Registrar exercises a plenary power, whereas the arbitrator is required to exercise the power to settle the dispute subject to the limitation laid down under the said Act. There

cannot be any doubt whatsoever that the expression of the word "shall" or "may" is not decisive for interpreting as to whether the provision in question is directory or mandatory. However, it is a trite law that the use of the word "shall" raises a presumption that the particular provision is imperative but the same may be rebutted by other considerations keeping in view the object and scope of the enactment and the consequence flowing from such construction. There are numerous cases where the word "shall" has been held to be directory in nature. It is also well settled that irrespective of the fact as to whether a statutory duty or a statutory power is conferred upon an authority, the statute may expressly or impliedly make the authority functus officio on expiry of the prescribed period. Reference in this connection may be made to *Balasinor Nagrik Cooperative Bank Ltd. Vs. Babubhai Shankerlal Pandya and Others*, and *Municipal Corporation of Greater Bombay Vs. Dr. Hakimwadi Tenants' Association and Others*, .

12. However it is well-known that where a power is conferred upon a statutory authority, he is bound to exercise his power within the four corners of the statute or not at all. Reference in this connection may be made to the case of *Jogendra Chandra Das v. Union of India* reported in (1990) 1 Cal LJ 184 and *Dr. Binata Maitra v. Vice-Chancellor, Rabindra Bharati University* reported in High Court Parlour -- November to December, 1994 and January, 1995 and a latest decision of this Bench in the case of *Panchanan Mondal and others Vs. West Bengal Board of Secondary Education and others*, . Reference in this connection may also be made to *Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others*, and *Morgan Stanley Mutual Fund Vs. Kartick Das*, . In the case of *Bhagirathi Co-operative Joint Farming Society Ltd. Vs. Howrah Zilla Parishad*, the Division Bench of this Court observed that there is no doubt that on the terms of sub-sections (4) and (5) of Section 87 of 1973 Act the time prescribed for making of an award appears to be mandatory but the learned Judge proceeded on the basis that as the statute has not provided for any penal consequences, the same is directory.

13. The learned Judge in support of their aforementioned finding relied on various decisions and treatises on interpretation of statute including Maxwell on the Interpretation of Statute and Craies on Statute Law as well as the decision of the Supreme Court of India in the case of *Jagan Nath Vs. Jaswant Singh and Others*, . The learned Judges in paragraph 7 of the said judgment opined :--

"In our considered opinion, a statutory provision which prescribes a particular manner or time for the performance of any act and goes on further to provide that the breach thereof would render the performance void or without jurisdiction, must necessarily be held to be absolute. But absence of any provision providing for such a penal consequence need not necessarily lead to the contrary conclusion. Whether such a provision would be directory or not would depend upon the nature and effect of the prescription and the intention of the legislature as would appear from the scheme of the Act."

The learned Judge ultimately held in paragraph 11 of the said judgment as

follows:

"Interpreting the particular provision of the statute on the principles so laid down, we cannot but accept the contention of the learned Government Pleader as also that of Mr. Ghosh that though sub-sections (4) and (5) of Section 87 impose a time limit for deciding a dispute which is required to be "strictly complied with otherwise the object of providing for arbitration by way of an early adjudication of the dispute would lose much of its effect yet we are unable to construe the said two provisions to be so absolute in character that any breach thereof would render the arbitrator or the Registrar *functus officio* and consequently make the award made in breach thereof, null and void".

14. In the said decision, it appears that no argument to the effect that the arbitrator is merely a delegatee and thus he exercised his power subject to the statutory delegation as well as limitation prescribed thereunder was neither argued nor considered. The arbitrator, on Mr. Bhattacharjee's own showing, is a high power body and his award is enforceable in Civil Court. It is now well-settled that if statute confers a power to be exercised on certain condition, the conditions prescribed are normally held to be mandatory. It is also well-known that the word "may" also be used in the sense of "shall" or "must" by the legislature while conferring the power on a high dignitary. Reference in this connection may be made to the case reported in *State of Uttar Pradesh Vs. Jogendra Singh*, .

15. The said question, in our opinion, cannot be said to be no longer *res integra* in view of the decision of the Supreme Court in the case of *Registrar, Cooperative Societies, W.B. Vs. Krishna Kumar Singhania and Others*,

16. The Supreme Court interpreting the provisions of the said Act clearly stated as follows (at P. 3825 of AIR SCW) :

"A conjoint reading of Sections 95, 96 and Rule 178 clearly indicates the gamut of the power of the Registrar. As soon as an application for reference is made, the Registrar may decide the dispute himself or may appoint an arbitrator or a panel of Arbitrators to decide the dispute. Under subsection (5) of Section 96, the arbitrator so appointed should decide the dispute within six months from the date of receipt of his appointment order from the Registrar. In case he cannot make the award within six months, she should submit a report to the Registrar at least 15 days before its expiry for further extension giving reasons for his failure to make the award. Thereon, the Registrar is empowered to allow further time not exceeding six months for disposal of the dispute".

17. The Supreme Court thus took notice of the fact that the Arbitrator is to submit a report to the Registrar at least 15 days before its expiry for further extension giving reasons for his failure to make the award, and thereupon the Registrar is empowered to allow further time not exceeding six months for disposal of the dispute. The word used in sub-section (6) of Section 96 as well as the power of the Registrar to extend the time upon filing such report which must

be supported by reasons, in our opinion, go a long way to show that sub-section (6) of Section 96 is a mandatory one. The Apex Court further in paragraph 12 of the said judgment held that a conjoint reading of subsections (5) and (6) of Section 96 shows that the Registrar is left with no power to extend time to make the award beyond one year. The Apex Court however held that however, since the third respondent had not made the award within one year and since the limitation of one year prescribed u/s 96 had expired by efflux of time, he ceased to have power to proceed with the adjudication of the dispute and to make an award.

18. The Apex Court however held that despite expiry of such time the Registrar is not denuded and Rule 178 fills the gap and thus evidently in a case where award is not made within the time prescribed Rule, 178 fills the gap inasmuch as, as has been held by the Apex Court that this scheme is consistent with the right of appeal provided against the award of the arbitrator u/s 136 of the Act read with Schedule 1 thereof and thus if the Tribunal does not dispose of the appeal within time, by operation of the proviso to Section 136, the State Government is empowered to extend the time for its disposal. It is now well-known that where a rule framed by a State is placed before the Legislature, the Rule forms a part of the Act unless it is contrary to or inconsistent with the provisions of the statute. As indicated herein- before, the Registrar in terms of sub-section (2) of Section 96 is entitled to withdraw any dispute transferred or referred under sub-section(f) and may decide it himself or transfer or refer it to any other person or arbitrator or Court of Arbitrators for disposal. In our opinion, the provision of subsection (2) of Section 96 read with Rule 178 of the Rules as interpreted by the Apex Court would come into play and would amount to the Arbitrator's becoming functus officio if a report within the period of six months is not submitted by him. Such report, requires to be supported by reasons. His right to continue as an arbitrator is dependent on his submission of a report and consequent extension of time for making the award by the Registrar. Even in the matter of grant of extension of time, the jurisdiction of the Registrar is limited. It is, therefore, not correct to contend that no consequence is provided for. The statutory authority, as is well known, while exercising his power must keep in view good sense and justice. A report together with reasons only confer a power upon the Registrar to extend the time in terms of sub-section (6) of Section 96 of the Act and thus in a case where no report has been submitted by the arbitrator, the Registrar by necessary implication will also have no jurisdiction to extend the time. It is now well-known that a law laid down by the Apex Court being a law within the meaning of Article 141 of the Constitution of India must be read in its entirety and reasonably. The question which came up for consideration before the Supreme Court was as to whether the arbitrator becomes functus officio on the expiry of one year although the time for making award was extended by the Registrar. The Apex Court held that in such a situation the arbitrator does become functus officio, despite extension of time granted by him and thus in our opinion, it must be held that in a case where no extension has been granted, the

arbitrator would become functus officio and thus the ratio of the Division Bench of this Court in Bhagirathi Co-operative Joint Farming Society Ltd. Vs. Howrah Zilla Parishad, as regard interpretation of Section 95(6) must be held to be contrary to or inconsistent with the latest decision of the Apex Court.

19. In the case of Karnal Improvement Trust, Karnal Vs. Parkash Wanti (Smt) (Dead) and Another, the Apex Court clearly held in paragraph 12 of the said judgment which read as follows:--

"The question thus arises whether the function by the Tribunal as a body is mandatory or directory? The discharge of the duties under the Act are quasi-judicial. The power to determine compensation and other questions involves adjudication. The discharge of the functions by the Tribunal being quasi-judicial cannot be regarded as ministerial. When the statute directs the Tribunal consisting of three members to determine compensation etc. and designates the award as judgment and decree. of a Civil Court, it cannot be held that the quasi-judicial functions of the Tribunal would be considered as directory, defeating the very purpose of the Act. Though inconvenience and delay may occasion in some cases by holding the provisions to be mandatory, but that is an inescapable consequence. In the light of the aforesaid discussion, it must be held that the adjudication by the three-member Tribunal is imperative and mandatory. Determination of the compensation in disregard thereof renders the adjudication void, invalid and inoperative".

20. A decision on the same line has been rendered by one of us in the case reported in (1995) 2 Cal LJ 339.

21. The Apex Court in the case of Karnal Improvement Trust (1995 (5) . SCC 157) (supra) held that normally the decisions which have been followed for a long period of time and have been acted upon by persons in the formulation of contracts or in the disposition of that property or other legal processes should generally be followed afterwards but this rule is not inexorable, inflexible and universally applicable in all situations. The appellate Court will not shirk from overruling the decision or series of decisions which establish a ratio plainly outside the statute or in negation of the object resulting in defeating the purpose of the statute or when the Court is convinced that the view is clearly erroneous or illegal. Perpetration of such an illegal decision would result in grievous wrong.

22. In this connection we may also refer to a decision of a Constitution Bench of the Supreme Court of India reported in A.R. Antulay Vs. R.S. Nayak and Another, . In the case of Administrator, Municipal Committee, Charkhi Dadri and another Vs. Ramji Lal Bagla and others, the Supreme Court was considering the provision of Section 44A of the Punjab Town Improvement Act which provided that any scheme in respect of which a notification has been published u/s 42 shall be executed by the trust within a period of five years from the date of such notification. The Apex Court held that in absence of any provision that non-compliance of the scheme leads to nullification which has already become final;

Section 44A must be held to be directory and not mandatory. In the instant case we are not concerned with the question of implementation of any scheme.

23. In the case of *Amardeep Co-op. Housing Society v. State of West Bengal* reported in (1992) 2 C HN 65 upon which Mr. Bhattacharjee, learned counsel, has placed reliance, the Division Bench was considering the provision of winding up proceeding.

24. In the case of *Beed District Central Co-op. Bank Limited and another Vs. Jagannath S. Shahane and others*, the Apex Court was considering the question as to whether sub-section (2) of Section 73 of Maharashtra Co-operative Societies Act Amendment Act, 1988 is mandatory, in terms whereof, it was incumbent on the part of the Registrar of the Co-operative Societies to prescribe the maximum number of members of the Committee of the Society by issuing a specific order and to publish such order in the official Gazette. The said provision was held mandatory by the High Court. The Apex Court held that the main purpose of introducing proviso to sub-section (3) of Section 27 was to widen and make the scope of voters as broad based while electing members to the committee of a federal society. It was observed in terms of sub-section (2) of Section 73 the Registrar had the discretion to prescribe the maximum number of members of the Committee of the Society or class of Societies. It was also observed that the provision does not compel the Registrar nor makes it obligatory to prescribe maximum number of members even when the Registrar may be satisfied with the maximum number of members already prescribed-in the bye-law of such society. In the instant case, as indicated hereinbefore, the power of the Registrar to extend the time is dependant on submission of a report by the arbitrator seeking for extension and stating reasons therefor.

25. In *Maxwell on the Interpretation of Statutes* upon which Mr. Mandal, learned counsel, has relied, it has been stated at page 315 that in each case subject matter has to be looked, considered the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decided whether the matter is what is called imperative or only directory. At page 318 the learned Author stated that "the Riot Act 1411, which required justice to try rioters "within a month" after the riot, was held not to limit the authority of the justice to that space of time, but only to render them liable to a penalty for neglect". There is no such provision in the said Act that an arbitrator who does not make award would be bound to pay penalty.

26. Keeping in view the decisions of the Supreme Court as well as in view of the fact that several questions raised in this application were not adverted to before the Division Bench in *Bhagirathi Co-operative Joint Farming Society Ltd. Vs. Howrah Zilla Parishad*, and further in view of the latest decision of the Apex Court in the case of *Registrar, Cooperative Societies, W.B. Vs. Krishna Kumar Singhania and Others*, we have no other option but to hold that the provision of sub-sections (5) and (6) of Section 96 are mandatory in nature.

27. It is now well-known that a decision is not an authority on the point which was not argued. Reference in this connection may be made to Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, . Furthermore in the case of Bhagirathi Co-operative Joint Farming Society Ltd. Vs. Howrah Zilla Parishad, this Court did not consider the provisions of sub-section (2) of Section 96 as well as Rule 178 which were material for the purpose of construction of statute. Thus the issue of law was decided without taking into consideration the said provision. Such a decision on a question of law is clearly per incuriam and cannot acquire the status of a binding decision even in between the parties. Reference in this connection may be made to the case of N. Sreekantaiah alias M.N. Sreekantaiah and another Vs. M.N. Mallikarjunaiah, .

28. For the reason aforementioned, we are of the opinion that sub-section (5) of Section 96 is mandatory and in the absence of any report by the Arbitrator, stating reason by the Arbitrator the Registrar cannot extend the period for submission of award and thus became functus officio on the expiry of the period of six months from the date of reference of the dispute. Consequently the said award having been rendered without jurisdiction is a nullity. However it would be open to the Registrar to appoint another Arbitrator or exercise his power in any other manner laid down, u/s 96(2) of the Act read with Rule 178 of the Rules.

29. Keeping in view of the facts and circumstances of this case, the Registrar is hereby requested to see that an early action is taken in this matter so that the dispute between the parties may be resolved once for all. We also cannot agree to the submission made by Mr. Mondal, learned Counsel for the respondent, to the effect that the petitioners are not persons aggrieved, inasmuch as, admittedly, by reason of the said award their membership stands cancelled without giving them an opportunity of hearing. They have therefore, suffered maximum prejudice by reason of the award and thus they are entitled to maintain the writ petition.

30. In view of our findings aforementioned, this appeal and the writ application are disposed of.

31. There will be no order as to costs.

32. Let a plain copy of the operative part of this judgment duly countersigned by the Assistant Registrar (Court) be handed over to the learned Counsel for the Registrar, Cooperative Society.

SATYA NARAYAN CHAKRABARTY, J.

33. I agree.

34. Order accordingly.