

(1990) 11 KL CK 0038
In the High Court Of Kerala
Case No : O.P. No. 883 of 1989

Nalumakkal Service Co-operative Bank Ltd.

APPELLANT

Vs

P.V. John and Another

RESPONDENT

Date of Decision : 08-11-1990

Acts Referred:

Citation : (1992) 75 CompCas 247

Hon'ble Judges : K.T. Thomas, J

Bench : Single Bench

Advocate : Cyriac Joseph, for the Appellant; S. Venkitasubramonia Iyer and M.P. Vinod, for the Respondent

Judgement

K.T. Thomas, J.—The petitioner is a co-operative bank (for short "the bank"). A claim was made by the bank against respondents Nos. 1 to 3, principally against the first respondent, for a certain sum of money. An award was passed by the Deputy Registrar (Audit) who was appointed as the arbitrator to decide the dispute raised u/s 69 of the Kerala Co-operative Societies Act, 1969 (for short "the Act"), allowing the bank to realise the sum claimed with interest at 12 per cent. per annum. The respondents filed a revision before the Kerala Co-operative Tribunal (for short "the Tribunal") u/s 84 of the Act, challenging the award. The Tribunal set aside the award by exhibit P-1 order which is challenged by the bank in this original petition filed under article 226 of the Constitution.

2. The first respondent was holding the post of an attender in the bank. He was placed in charge of the sales section for a while. When stock verification was made, deficit to the tune of Rs. 83,293.87 was detected. The secretary of the bank called upon the first respondent to explain the deficit which was specifically noted in the audit report. According to the bank, the first respondent gave a written undertaking owning responsibility for the entire stock and agreeing to indemnify the deficit. The second respondent who is the first respondent's father executed a written guarantee for replenishment of the deficit attributed to the malfunctioning of his son. The third respondent is the brother of the first

respondent. According to the bank, respondents Nos. 2 and 3 were beneficiaries of the misappropriation committed by the first respondent and hence they too are responsible to make good the amount to the bank. As the undertaking was not honoured by the respondents, a case was filed before the Joint Registrar of Co-operative Societies, Kottayam, who referred the dispute to the arbitrator appointed by him. An award was passed by the arbitrator on March 18, 1986, after considering the oral and documentary evidence adduced in this case, allowing the bank to realise the sum of Rs. 83,293.87 jointly or severally from respondents Nos. 1 to 3 with interest at 12 per cent. per annum.

3. The Tribunal, instead of considering the merits of the case and without advertent to the evidence, disallowed the claim on account of two shortcomings. The first is that respondents Nos. 2 and 3 were made parties to the case only as beneficiaries and hence a dispute involving them would not fall within the ambit of section 69 of the Act. The second is that the failure of the bank to produce a certified copy of the resolution of the board of directors of the bank deciding to proceed against the respondents was in violation of the mandatory requirement envisaged in rule 67(1) of the Kerala Co-operative Societies Rules, 1969 (for short "the Rules").

4. Learned counsel for the bank contended that the Tribunal has committed a serious jurisdictional error in dismissing the claim on the aforesaid two grounds. However, it is admitted that no claim as against the third respondent would lie since he did not give any undertaking to indemnify the loss caused by his brother. As against the second respondent, the contention is that since he gave a guarantee to the bank to indemnify the loss caused by the first respondent, the bank has the right to proceed against the second respondent as well, besides the first respondent.

5. It must be pointed out at the outset that there is no case for the bank that the second respondent gave any guarantee to the bank at any time prior to the detection of the deficit. On the other hand, the bank's case is that the second respondent gave the guarantee when the first respondent was called upon to explain the deficit. Though a contention has been raised on behalf of the second respondent that no such guarantee can be enforced in law since the same was not supported by consideration, I need consider at this stage only the larger contention that such a claim cannot be made against the second respondent u/s 69 of the Act. The second respondent is made a party to the claim on account of his twin capacities, one on the allegation that he is the beneficiary of the misappropriation committed by the first respondent, and the second that he is a surety or guarantor for the principal debtor. The Tribunal was correct in holding that a claim made against a person merely as beneficiary of the misappropriation committed by the employee does not fall within Section 69 of the Act. Regarding the next limb of the contention, reference was made to Section 69 (1)(g) of the Act which reads thus :

"Notwithstanding anything contained in any law for the time being in force, if a

dispute arises ...

(g) between the society and a surety of a member, past member, deceased member, or employee or a person other than a member who has been granted a loan by the society whether such a society is or is not a member of the society."

6. If the dispute between the bank and a surety has to be brought within the purview of Section 69, the suretyship must have been for a loan granted by the bank. The second respondent has not stood surety for any loan granted by the bank. Therefore, it has to be held that the dispute between the second respondent and the bank does not fall within the purview of Section 69 of the Act.

7. Non-production of a copy of the resolution of the committee of the bank has been treated by the Tribunal as fatal to the maintainability of the claim. The Tribunal pointed out that the application made by the bank u/s 69 of the Act was not accompanied by a copy of the resolution, if any, adopted by the board of directors of the bank. On that aspect, the Tribunal observed as follows :

"The failure of the committee to pass such a resolution is fatal to the arbitration case. If an essential requirement provided by law before filing a suit has not been complied with, then the suit itself cannot stand. Even if there was a resolution to file a suit against the defendants the plaintiff should have filed a copy thereof along with the application for reference as enjoined under Rule 67(1). I am inclined to hold that there was procedural irregularity in taking the suit to file and passing the award. The impugned award is liable to be set aside on this ground itself."

8. Learned counsel for the bank pointed out that the arbitrator who perused the records has made a mention in the award that he came across a resolution passed by the board to file a suit against, the respondents. No doubt, a copy of the resolution was not produced along with the application filed u/s 69 of the Act. The question is whether non-production of a copy of the resolution is fatal to the maintainability of the claim.

9. Rule 67(1) of the Rules deals with filing of an application for reference u/s 69 of the Act. The rule says that the application shall be accompanied by a list of relevant records on which the dispute is based and a receipted chalan evidencing payment of the fees fixed for deciding the dispute. The rule further provides that "in the case of an application filed for and on behalf of a society, a certified copy of the resolution adopted by the committee resolving to file the application shall also be filed". Learned counsel for the first respondent contended that the requirement of the rule is mandatory as the word "shall" has been employed in it and non-compliance thereof renders the application un-entertainable.

10. The mere fact that the rule employed the word "shall" is not sufficient to make the requirement mandatory so as to render its non-compliance fatal to the entertainability of the application. Whether a particular provision or rule is mandatory or not has to be judged from a variety of considerations such as the

purpose for which the provision has been made, its nature, the intention of the Legislature in making the provision, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a case including the language of the provision. A Constitution Bench of the Supreme Court has observed in *Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur*, that (headnote) :

"The question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it uses the word "shall" or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and, for that purpose, the object of the statute in making the provision is the determining factor".

11. The following passage from Crawford on Statutory Construction, page 516 in 1940 edition, can profitably be perused in this context :

"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other . . ."

12. The said passage was quoted with approval by the Supreme Court in two decisions (vide *State of U.P. Vs. Manbodhan Lal Srivastava*, and *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others*,). It is a well-settled proposition of law that the use of the word "shall" or "may" is not conclusive on the question whether a particular requirement of law is mandatory or directory and the governing factor is the meaning and intent of the Legislature which should be gathered not merely from the words used by the Legislature but from a variety of other circumstances and considerations. "The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations" (vide *Khub Chand and Others Vs. State of Rajasthan and Others*, and *Haridwar Singh Vs. Bagun Sumbrui and Others*,).

13. The legal consequence of non-compliance with the requirement of production of a copy of the resolution mentioned in Rule 67(1) of the Rules has to be decided in the light of the law stated above. Whether the use of the word "shall" in the sub-rule is intended to convey a mandatory duty and failure of its compliance would necessarily visit the application with a dismissal ? The sub-rule empowers the Registrar (before whom the application for reference is made) to require the party to produce a certified copy of the records on which the dispute is based before proceeding with the consideration of such reference. This power can be exercised . "whenever necessary". Sub-rule (4) lays down that the Registrar or the arbitrator deciding the dispute shall pass a decision or award

upon the evidence recorded and after consideration of any documentary evidence produced by the parties "in accordance with justice, equity and good conscience". Chapter IX of the Rules, under which Rule 67 falls, contains rules for "settlement of disputes" as its very title denotes. The main intention of the rule-making authority can be gathered from the attendant clauses and also from the context that a dispute should be decided in accordance with justice, equity and good conscience. The Registrar or the arbitrator is not supposed to avoid making a decision on technical grounds such as non-production of a document. By incorporating a rule that an application-filed for and on behalf of a society should be accompanied by a certified copy of the resolution, the rule-making authority would only have intended to ensure that no individual officer of the society files any such application for and on behalf of a society without the committee of the society resolving to file the application. If the parties do not dispute that a resolution has been adopted, the application cannot be dismissed-merely due to non-production of its certified copy. Such decision to dismiss the application is not in accordance with justice, equity and good con-science. Even if there is a dispute as to whether the committee did adopt any such resolution, it is open to the Registrar to require the applicant or the society itself to produce a certified copy of the resolution. Scrutiny of the sub-rule, therefore, indicates that insistence on production of a certified copy of the resolution along with the application is merely directory. Its non-compliance cannot have the necessary consequence of throwing the application overboard on that simple ground.

14. Support for the above view can be gathered from the observation of Bhat J. who dealt with another portion of Rule 67(1) in *Bhaskara Panicker v. Co-operative Tribunal* [1984] KLT 1043. It is one of the requirements of the sub-rule that the application "shall" be accompanied by a list of relevant records on which the dispute is based. It was contended in the said case that the application is liable to be rejected in limine on that ground. Rejecting the contention, the learned judge has observed thus (at p. 1046) : "There is no provision in the Act or the Rules prescribing the consequence of the list of relevant records not being produced along with the application. Therefore, dismissal of the application on that ground cannot be said to be mandatory". The requirement of production of a certified copy of the resolution adopted by the committee along with the application need not be treated differently from the requirement to produce a list of relevant records.

15. The Tribunal, therefore, went wrong in dismissing the application solely on the ground of non-production of a certified copy of the resolution. That part of the Tribunal's decision warrants interference. I, therefore, quash exhibit P-1 order in so far as it dismissed the application as against the first respondent. I direct the Tribunal to dispose of the revision, in so far as it concerns the first respondent, afresh and on merits.

16. Original petition is disposed of in the above terms.