

(2015) 07 KL CK 0234
In the High Court Of Kerala
Case No : Writ Petition (C) No. 3668 of 2015

Sharath Jyothi M.

APPELLANT

Vs

Dharmadam Service Co-operative Bank and Others

RESPONDENT

Date of Decision : 08-07-2015

Acts Referred:

Constitution of India, 1950 — Article 12, 15(2), 17, 226, 227
Income Tax Act, 1961 — Section 33A, 35
Kerala Co-operative Societies Act, 1969 — Section 69, 80

Citation : (2015) 3 ILR Ker 851

Hon'ble Judges : Dama Seshadri Naidu, J

Bench : Single Bench

Advocate : P.N. Mohanan, for the Appellant; M. Sasindran, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dama Seshadri Naidu, J—The issue of adjudicatory avoidance by this Court on the ground of alternative remedy is raised as frequently as the monsoon rains in this state--continually, almost incessantly. Decided definitively though, it still raises its head indefatigably, for the definitive decisions have, with unfailing regularity, held that it is a matter of discretion borne out of a self-imposed restriction on the part of the Constitutional Courts. This case is yet another instance.

2. The petitioner, presently working as the Branch Manager in the respondent society seeks promotion to the post of Chief Accountant. Complaining of denial of an opportunity, the petitioner has approached this Court.

3. Sri P.N. Mohanan, the learned counsel for the petitioner, has painstakingly advanced various submissions touching on the merits of the matter.

4. The learned counsel for the third respondent Bank has, however, submitted that the petitioner has an efficacious alternative remedy under Section 69 of the

Kerala Co-operative Societies Act, 1969 ("the Act" for brevity). According to him, unless there are compelling reasons for this Court to entertain the writ petition, the petitioner ought to be relegated to the primary adjudicatory authority i.e., the Arbitration Court in terms of Section 69 of the Act. In support of his submissions, the learned counsel for the respondent Bank has placed reliance on Raveendran, P.S. Vs. State of Kerala and Others and also on Union of India (UOI) and Another Vs. Guwahati Carbon Ltd., (2013) 19 GSTR 506 : (2012) 11 SCC 651 .

5. To meet the preliminary jurisdictional objection, the learned counsel for the petitioner has initially submitted that the writ petition was filed quite some time ago, i.e., on 4-2-2015, and that the issue raised in this writ petition is essentially a pure question of law, admitting of no disputed questions of fact. According to him, notwithstanding the alternative remedy provided under the statute, this Court can as well hear the matter on merits.

6. The learned counsel has contended that there are established grounds of judicial review in the face of alternative remedy. According to him, the denial of petitioner's claim to be considered for promotion is in violation of his fundamental right to be considered for promotion. In support of his submissions, the learned counsel has placed reliance on Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, AIR 2003 SC 2120 : (2002) 10 JT 561 : (2003) 2 SCC 107 : (2003) AIRSCW 126 : (2003) 1 Supreme 446 , Ajit Singh and Others Vs. The State of Punjab and Others, AIR 1999 SC 3471 : (1999) 7 JT 153 : (1999) 5 SCALE 556 : (1999) 7 SCC 209 : (1999) 2 SCR 521 Supp : (1999) AIRSCW 3460 : (1999) 8 Supreme 211 and Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others, AIR 2010 SC 1682 : (2010) 125 FLR 282 : (2010) 3 JT 240 : (2010) 2 SCALE 272 : (2010) 4 SCC 290 : (2010) 1 SCC(L&S) 1002 : (2010) 4 SCR 755 : (2010) 3 SLJ 138 : (2010) AIRSCW 2913 .

7. The learned counsel has further submitted that the writ petition filed on 4-2-2015 was soon thereafter admitted by this Court. Once the writ petition is admitted, contends the learned counsel, the question of alternative remedy does not fall for consideration. It is also the contention of the learned counsel that after a lapse of about five months from the date of filing of the writ petition, if the petitioner is to be relegated to a primary Tribunal in the name of alternative remedy, the petitioner would be put to irreparable hardship, especially given the fact that the petitioner is on the verge of superannuation. In support of his submissions, the learned counsel has placed reliance on L. Hirday Narain Vs. Income Tax Officer, Bareilly, AIR 1971 SC 33 : (1970) 78 ITR 26 : (1970) 2 SCC 355 : (1971) 1 SCR 683 and State of H.P. and Others Vs. Gujarat Ambuja Cement Ltd. and Another, AIR 2005 SC 3936 : (2005) 6 JT 298 : (2005) 2 SCR 684 Supp : (2005) 142 STC 1 : (2005) AIRSCW 3727 : (2005) 5 Supreme 161 .

8. With a view to refuting the contentions of the learned counsel for the petitioner, the learned counsel for the third respondent Bank has, apart from reiterating the legal principle laid down by a learned Division Bench of this Court

in Raveendran, P.S.'s case (supra), further contended that the writ petition was admitted even before notice could be served on the respondents. Presenting the march of events chronologically, the learned counsel for the respondent Bank has submitted that on 18-3-2015, on the date of second hearing, the first and second respondents filed counter-affidavit; on service of notice, the third respondent entered appearance on 25-3-2015, the third date of hearing; and by the very next adjournment, i.e., on 6-4-2015, the fourth date of hearing, the third respondent filed counter-affidavit.

9. According to the learned counsel, at the first given opportunity, the third respondent has taken a plea concerning the alternative remedy and the legal impediment for the maintainability of the writ petition. He has brought to the notice of the Court the fact that the writ petition having been filed on 4-2-2015, it was admitted on 5-2-2015, on the date of first hearing, by which time, no notice was served on the respondents.

10. In sum and substance, the learned counsel for the third respondent would contend that since the admission of the matter is not after considering the preliminary issue raised by the respondents on the question of maintainability, it could not enure to the benefit of the petitioner. In support of his submissions, the learned counsel has placed reliance on State of Kerala Vs. C.A. Jabbar, (2009) 14 JT 81 : (2009) 6 SCALE 659 : (2009) 15 SCC 92 : (2009) 7 SCR 300 .

11. The learned counsel for respondents 1 and 2 has adopted the submissions made by the learned counsel for the third respondent.

12. Heard the learned counsel for the petitioner, the learned Government Pleader, the learned counsel for the respondent Bank and the learned counsel for the third respondent, apart from perusing the record.

13. It is elemental for this Court to consider the preliminary objection raised by the respondents regarding the maintainability of the writ petition, in the face of the statutory alternative remedy under Section 69 of the Act. Before proceeding further, it is apposite to examine, to the extent relevant, Section 69 of the Act, which reads as follows:

69. Disputes to be decided by Co-operative Arbitration Court and Registrar.--

(1) Notwithstanding anything contained in any law for the time being in force, if a dispute arises,-

* * * *

(2) For the purpose of sub-section (1), the following shall also be deemed to be disputes, namely:

* * * *

(d) any dispute arising in connection with employment of officers and servants of the different classes of societies specified in sub-section (1) of Sec. 80, including

their promotion and inter se seniority.

* * * *

14. From the above extract of Section 69 of the Act, it is very evident that all service disputes involving the employees of the Co-operative Societies, including their inter se seniority shall be the subject-matter of adjudication before the Arbitration Court. Indeed, the provision is comprehensive. At the same time, there is no gain saying the fact that the alternative remedy is not an absolute bar against this Court's exercising the power of judicial review under Article 226 of the Constitution of India. Legion are the judicial precedents in that regard.

15. Through a profusion of precedents, this Court as well as the Hon'ble Supreme Court, has held that notwithstanding the alternative adjudicatory remedy, a writ petition can be entertained when the suitor complains of violation of fundamental rights, violation of principles of natural justice or of exercising the non-existing power by an authority, i.e., ultra vires.

16. The learned counsel for the petitioner has indeed laid much emphasis on the fact that though there is no fundamental right to promotion, the consideration of claim in that regard is nevertheless a fundamental right of an employee. According to him, the petitioner has been denied his claim to be considered for promotion without any justification. That being a facet of fundamental right having been violated, a question of alternative remedy does not hold this Court back from adjudicating the issue. Indeed, Harbanslal Sahana, Ajit Singh and Hemraj Singh Chauhan's case (supra) reiterate this well-established legal principle.

17. Appealing as the submission may be, regrettably the fundamental rights could be applied only vertically under Indian Constitution, save certain exceptions such as Articles 15(2), 17 and 23. In that reckoning, the learned counsel for the petitioner, to his credit, has fairly conceded that the respondent Bank does not answer the description of the State or its instrumentality in terms of Article 12 of the Constitution of India. I am, therefore, constrained to reject the contention of the learned counsel for the petitioner that this Court could entertain the writ petition on the ground of violation of the petitioner's fundamental rights to promotion vis-a-vis the respondent Bank, his employer.

18. In Raveendran, P.S.'s case (supra) the facts are that an employee of a Co-operative society filed a writ petition raising the dispute of seniority. This Court, per a learned Single Judge, directed the Joint Registrar to decide the issue. In compliance thereof, the Joint Registrar passed an order, which was challenged before this Court as being without any jurisdiction. A learned Single Judge allowed the writ petition. In appeal, a learned Division Bench, affirming the judgment in the writ petition, has held thus:

"3. We are of the view, after the coming into force of Act 1 of 2000 with effect from 2-1-2003, the dispute in connection with the employment of officers and

servants of different classes of societies specified in sub-section (1) of Section 8C including their promotion and inter se seniority has to be decided by the Arbitration Court and not by the Joint Registrar or by the Government. The mere fact that this Court in a writ petition filed by the Petitioners directed the Joint Registrar to decide the dispute cannot amount to conferring jurisdiction on the Joint Registrar to decide the dispute for which he has no jurisdiction. Judgment rendered by this Court would not confer any jurisdiction or authority on the Joint Registrar when legislature has conferred jurisdiction on the Arbitration Court. When this Court directs consideration of a matter by the Joint Registrar the Joint Registrar can decide that matter only in accordance with law. Legislature has conferred jurisdiction on the Arbitration Court to decide the question of seniority and promotion and therefore the order passed by the Joint Registrar is without jurisdiction. Learned Single Judge has rightly allowed the writ petition and quashed the order passed by the Government confirming the order of the Joint Registrar."

19. From a perusal of Raveendran, P.S.'s case (supra) it is evident the case was decided not on the issue of alternative remedy, but on that of conferring jurisdiction on an authority who, in the first place, does not have it. Nevertheless, the decision illustrates the need of approaching a competent forum of first instance for deciding a service dispute.

20. In Guwahati Carbon Ltd.'s case (supra), almost under identical fact situation as this case has, an assessee suffered an adverse order from an Appellate Tax Tribunal. Aggrieved by the said order, the assessee filed a writ petition under Articles 226 and 227 of the Constitution of India. Though the learned Single Judge had admitted the writ petition on the first date of hearing, subsequently thought it fit to dispose of the writ petition on the ground that the respondent can avail himself of an alternative remedy as provided in the Act. Further aggrieved, the assessee carried the matter in appeal to the Division Bench of the Calcutta High Court, which allowed the appeal on the ground that a writ court, in exercise of its powers under Article 226 of the Constitution of India, has vast powers to decide any question that may arise under the provisions of the Act. Finally when the matter reached the Apex Court, it is held thus:

"4. We reiterate that the High Court, under Article 226 of the Constitution of India, has vast powers as this Court has under Article 32 of the Constitution of India, but such powers can only be exercised in those cases where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice."

21. Given the above emphatic proposition of law, I cannot but hold that the petitioner's remedy lies elsewhere and that recourse to Article 226 of Constitution is, at least, premature, for none of the three exceptions to the rule of alternative remedy could be satisfied by the petitioner, as being applicable to

him.

22. The second principal contention advanced by the learned counsel for the petitioner is that once the matter stood admitted, the issue of alternative remedy should not bog this Court down. There is no cavil concerning the said proposition. In *Hirday Narain's* case (*supra*), a petitioner to revise an order under Section 35 of the Income Tax Act was before the High Court, instead of before the Commissioner of Income Tax. The High Court of Allahabad entertained the petition. In that context, the Supreme Court has held that if the High Court had not entertained his petition, the petitioner could have moved the Commissioner in revision, because by the date the petition was moved, the period prescribed by Section 33A of the Act had not expired. Their Lordships in that context have held:

"12. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income Tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits."

(emphasis added)

23. It is material to observe that in the present instance, the entertaining of the writ petition and hearing it on merits have not taken place. In *Gujarat Ambuja Cement Ltd.*'s case, too, the matter was entertained and heard on merits. In that context, the claim of non-exhaustion of statutory remedies has been rejected. It is, of course, not in dispute that in the present instance the writ petition has already been admitted. However, it is requisite to examine the circumstances under which the writ petition was admitted.

24. If we chronologically examine, as the writ petition was filed on 4-2-2015, it was admitted on the very next day when it was taken up for hearing for the first time; by then, no notice was issued to any of the respondents. Respondents 1 and 2 filed their counter-affidavits by the very next adjournment i.e., on 18-3-2015. The third respondent on receipt of notice entered appearance on 25-3-2015 and filed the counter-affidavit by the very next adjournment i.e., on 6-4-2015. It is pertinent to observe that the third respondent did take a specific plea concerning the alternative remedy in the counter-affidavit at the earliest point of time. We cannot, at any rate, hold that any of the respondents has been remiss in their approach in placing on record their objections concerning the maintainability of the writ petition. Since the admission of the writ petition on the very first day of hearing is *ex parte*, so to say, I am of the considered opinion that the respondents cannot be deprived of their opportunity to raise objections concerning the maintainability of the writ petition.

25. It is the further grievance of the petitioner that he is on the verge of retirement, and if he is driven back to the alternative forum at this juncture, it would cause untold misery to him. Sympathetic this Court may be, the fact however remains that the right once accrued to the petitioner, especially with regard to his claim to promotion, cannot be defeated by efflux of time, provided

he has chosen to agitate the same at the earliest given opportunity. His claim, even after the retirement, could be considered retroactively.

26. In terms of Section 69 of the Act, the Arbitration Court has been clothed with sufficient powers to adjudicate the issue and render justice on the issue raised by the petitioner. In other words, the Tribunal of first instance, the Arbitration Court, does not suffer from any inherent limitations in rendering complete justice to the petitioner. Further, any of the aggrieved persons could, as well, have an appellate remedy before the learned Tribunal. By entertaining the writ petition, this Court does not intend to short-circuit the entire process of alternative remedy of two tiers. Thus, this Court cannot but hold that the plea of hardship has to fall.

27. In the facts and circumstances, the writ petition is dismissed solely on the ground of alternative remedy, making it clear that the petitioner can ventilate his grievance before the Arbitration Court, if he chooses to, in terms of Section 69 of the Act by raising all pleas that are available to him. On the other hand, the respondents are also at liberty to oppose the claim of the petitioner before the said forum by taking all possible pleas of defence as legally permissible.

With the above observations, the writ petition stands dismissed, without prejudice to the cause of the either of the parties to the lis. No costs.

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