
(2010) 08 KL CK 0262

In the High Court Of Kerala

Case No : Writ Petition (C) No. 24464 of 2010

Shukkoor

APPELLANT

Vs

Muthoot Vehicle and Asset Finance Ltd.

RESPONDENT

Date of Decision : 10-08-2010

Acts Referred:

Arbitration Act, 1940 — Section 17

Arbitration and Conciliation Act, 1996 — Section 25, 33, 33(1), 34, 34(2)

Kerala Co-operative Societies Act, 1969 — Section 70

Citation : AIR 2011 Ker 31 : (2010) 4 CivCC 677 : (2010) 4 ILR (Ker) 210 :
(2010) 3 KLT 936 : (2011) 6 RCR(Civil) 558

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : Paul K. Varghese, for the Appellant;

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—Could an Arbitrator appointed in terms of an agreement between the parties set aside an ex parte award after it is signed, is the question urged for a decision in this Writ Petition.

2. Under terms of an agreement executed between petitioners and respondents and in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (for short, "the Act") the dispute between them was referred to the sole Arbitrator. The Arbitrator passed an award. Petitioners, claiming that the award was passed without notice to them filed application before the Arbitrator to set aside the award accompanied by an application to condone the delay in filing that application. The Arbitrator, observing that he has no power to set aside the award dismissed both the applications. Petitioners wanted to challenge that order before the learned District Judge. Petitioners state that their appeal petition was not received in the office of learned District Judge. Hence this Writ Petition praying that learned District Judge may be directed to receive Ext.P3, appeal petition and Ext.P4, application for stay and proceed with the same in accordance

with law. Learned Counsel for petitioners, placing reliance on the decisions in *Thankam R. Pillai v. Arbitrator* 1996 (1) KLT 225 and *Paul v. Asst. Registrar* 1998 (2) KLT 449 argued that the Arbitrator has the power to set aside an ex parte award and hence decision of the Arbitrator to the contra is illegal which is amenable to an appeal before the learned District Judge. The Office of learned District Judge was therefore not correct in refusing to receive on file Exts.P3 and P4.

3. In *Thankam R. Pillai v. Arbitrator* (supra), a Division Bench of this Court referring to the decision in *Cheru Ouseph v. Kunhipathumma* 1981 KLT 495 among other decisions, and concerning power of the Arbitrator u/s 70 of the Kerala Cooperative Societies Act, 1969 (for short "the Co-operative Societies Act") held that "a Tribunal in its wider connotation embraced every adjudicatory organ including an Arbitrator". There the question considered was whether the Arbitrator acting u/s 70 of the Co-operative Societies Act has power to order impleadment of a legal heir on the death of a party to the proceeding before such Arbitrator. Referring to the various decisions it was held that the Arbitrator has the power. It was observed that a Tribunal literally means a seat of justice and justice is dispensed by a quasi-judicial body, an Arbitrator, a Commission, a Court or other adjudicatory organ created by the State. Following that decision, in *Paul v. Asst. Registrar* (supra) again dealing with an award passed by the Arbitrator under the Co-operative Societies Act and the relevant Rules it was held that the Arbitrator has power to set aside an ex parte award. Learned Judge took the view that the power conferred on the Arbitrator under Rule 67(4)(a) of the Rules enabled him so far as there is no restriction, to set aside an ex parte award.

4. A statutory arbitration is distinct from a consensual arbitration. Russel On Arbitration, 20th Edn. (by Anthony Walton and Mary Victoria) at page 141 states that a statute may provide that disputes of a particular class shall be determined by arbitration of a particular sort, either in every case or upon certain steps being taken by the parties. Where such a provision applies, the Arbitral Tribunal laid down by the Statute has exclusive jurisdiction over such disputes. But a consensual arbitration is the result of agreement between the parties. Quoting from *Wood v. Leake* (1806) 12 Ves. 412 Russel says at page No. 262 (of the text above mentioned) that every Arbitrator is authorised, by the nature of his office to proceed ex parte for good cause and that it is unnecessary, though not unusual to give him that power in express terms in the submission. Quoting the power of an Arbitrator on reference under the order of the court (from *Wenlock v. River Dee Co.* (1883) 53 LJ. QB 208 Russel says that the Arbitrator has power to proceed in the absence of a party. Russel says at page No. 262 (of the text above mentioned),

It would seem that a similar implication arises in the case of an arbitration under a submission, because, otherwise, either party, by refusing to attend, could render the arbitration abortive, and in effect revoke the authority of the Arbitrator...

Section 25 of the Act empowers the Arbitrator to make an award even in the absence of opposite party in the circumstances stated therein. Then the question is whether in a consensual arbitration the Arbitrator has power to set aside an ex parte award after the award is signed.

5. The Law in England as to the power of an Arbitrator to set aside an ex parte award was decided by Mellish LJ. in *Mordue v. Palmer* (1871) LR 6 Ch. App. 22. There, it was held that an Arbitrator having signed his award is *functus officio* and cannot alter the slightest error in it, even though such error has arisen from the mistake of a clerk in copying the draft. The proper course in such a case was to obtain an order to refer the award back to the Arbitrator. Lord Esher M.R. in *Bache v. Billingham* (1894) 1 QB 107 said,

They (the arbitrators) examined witnesses against him when he was not present, and did not give him the opportunity of cross examining those witnesses. That is a wrong procedure in arbitration; but nevertheless they did that to come to a decision, and they came to a decision.... That does not make the decision void. It only gives ground for a court to set it aside or for an appeal (to the Tribunal specified in the agreement).

The decision in *Mordue v. Palmer* was followed in "*In re An Arbitration between Stringer and Riley Brothers* (1901) 1 QB 105. In *Mountain v. Parr* (1899) 1 QB 805 question considered was whether a County Court Judge sitting to hear an application for compensation under the Workmen's Compensation Act, 1897 (England) acting as an Arbitrator could exercise similar power. A.L. Smith LJ. held,

It is perfectly clear upon a consideration of the Act and its schedules that the County Court Judge is to sit as an Arbitrator and Arbitrator only. Then the question arises; can an Arbitrator grant a new trial? That question has only to be put in order to be answered he clearly cannot do so.

Russel at page No. 265 (of the text above mentioned) says:

The arbitrator is not *functus officio* until he has made an award. Until then either party can make any application to him he pleases, and the arbitrator, still having jurisdiction, must deal with such application. Though the case has been formally closed, it is in the discretion of the arbitrator whether he will re-open it and receive further evidence....

(emphasis supplied)

The above authorities are to the effect that once the Arbitrator makes his award, he becomes *functus officio*. The expression "*functus officio*" is of Latin origin. In Trayner's Latin Maxim, 4th Edition gives that expression the following meaning.

Having discharged his official duty. This is said of any one holding a certain appointment, when the duties of his office have been discharged. Thus a Judge, who has decided a question brought before him, is *functus officio* and cannot

review his own decision.

In Wharton's Law Lexicon, 14th Edition the expression "functus officio" is given the meaning.

A person who has discharged his duty, or whose office or authority is at an end.

P. Ramanatha Aiyar's Law Lexicon gives the expression the meaning,

A term applied to something which once has had a life and power, but which has become of no virtue whatsoever. Thus when an agent has completed the business which he was entrusted his agency is functus officio.

The Author also refers to the meaning (of the expression) given in Board of School Trustees of Washington City Administrator Unit v. Benner 222 NC 566 thus,

Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority.

6. But referring to Section 17 of the Arbitration Act, 1950 (England) it was held in Mutual Shipping Corporation of Newyork v. Bay shore Shipping Co. of Monrovia (1985) 1 All. ER 520 that the arbitrator, after making the award can correct clerical error or accidental slips in the award although he cannot reconsider his award. It was "held that u/s 17 of the Act of 1950 without reference to the court the Arbitrator can correct errors in the award arising from an accidental slip.

7. Referring to the Arbitration Act, 1940 the Supreme Court in Rikhabdas Vs. Ballabhdas and Others, stated that once the Arbitrator has signed his award he becomes functus officio. There, question considered was whether the Arbitrator having entered an award in non-judicial stamp paper could sit back and draft the award in stamp paper. It was held that Arbitrator has no such power and that the defect has to be cured otherwise. u/s 33 of the Act specific power has been given to the Arbitrator to correct any computation errors, clerical or typographical errors or any other errors of a similar nature occurring in the award. The Arbitral Tribunal could make corrections as stated in Clause (a) to Sub-section (1) of Section 33 of the Act within 30 days from the date of arbitral award.

8. Section 25 of the Act empowers the Arbitrator to make the award in the absence of the opposite party in the circumstances stated therein. But the Act does not provide for an Arbitrator setting aside his award once it is made, be it on the ground that it was passed ex parte. On the other hand the Legislature was anxious to confer that power on the "court" u/s 34 of the Act. Section 34(2)(i) of the Act enables the court to set aside an award if "a party was under some incapacity" and under Sub-section (iii), "if the party making the application was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case." Thus the power to set aside an award be it on the ground that the party concerned was under some incapacity or that he was not given proper notice of appointment of the Arbitrator

or of the arbitral proceedings or was otherwise unable to present his case. There is no reason to think that concurrent power to set aside an ex parte award on similar grounds has been given to the Arbitrator.

9. So far as the decisions referred to by the learned Counsel are concerned, I must bear in mind that those decisions concerned power of a judicial authority or statutory Arbitrator. *Cheru Ouseph v. Kunjipathumma* (supra) was a case concerning the power of Rent Control Court under Act 2 of 1965 to restore an application dismissed for default. In *Thankam R. Pillai v. Arbitrator* (supra) question considered was whether an Arbitrator acting under provisions of the Co-operative Societies Act, who is a statutory Arbitrator has the power to order impleadment of a legal representative of a deceased party to the proceeding before such Arbitrator. The question was answered in the affirmative. Similar view was taken in *Paul v. Asst. Registrar* (supra) though, in the matter of setting aside an ex parte award but of course passed by the statutory Arbitrator under the provisions of the Co-operative Societies Act. Those decisions only concerned power of the statutory arbitrator and not a consensual arbitrator recognized under the Act (of 1996). Viewed in that line I am to hold that except for the limited purpose of correction of errors referred to in Section 33(1)(a) of the Act, an Arbitrator appointed under the Act becomes functus officio once he has signed the award. Hence the Arbitrator in the present case was correct in holding that he has no power to set aside the ex parte award.

10. Next question is whether office of learned District Judge was correct in not accepting Ext.P3, appeal petition and Ext.P4, application for stay. It is not disputed that Ext.P3, appeal petition was in challenge of the order passed by the Arbitrator refusing to set aside the ex parte award and condone the delay. The power of court u/s 34 of the Act does not enable the court to entertain an appeal against an order passed by the Arbitrator. Section 37 of the Act deals with appealable orders and that provision also does not take in an order passed by the Arbitrator refusing to set aside the ex parte award. Hence the District Court could not have entertained Exts.P3 and P4. In the circumstances directions sought for in this Writ Petition cannot be issued.

Writ Petition is accordingly dismissed.