(1991) 09 KL CK 0034

In the High Court Of Kerala

Case No : C.R.P. No. 2474/90

The India Pepper and Spice Trade Association and Another — APPELLANT

Vs

S. Madhava Mallan — RESPONDENT

Date of Decision : 27-09-1991

Acts Referred:

- Civil Procedure Code, 1908 (CPC) — Section 9
- Constitution of India, 1950 — Article 245
- Forward Contracts (Regulation) Act, 1952 — Section 11, 11(3), 13(1), 27(2), 27A

Citation : AIR 1992 Ker 336 : (1992) 1 ILR (Ker) 372 : (1992) KLJ 583

Hon'ble Judges : G.H. Guttal, J

Bench : Single Bench

Advocate : C.M. Devan, for the Appellant; S. Parameswaran, for the Respondent

Final Decision : Dismissed

Judgement

G.H. Guttal, J.—This petition u/s 115 of the CPC is by the defendants in O.S. No. 210 of 1988 pending in the Court of the Additional Sub-Judge, Kochi. The question urged by counsel for the petitioners is whether civil court has jurisdiction to entertain and try the suit. In this judgment the petitioners are referred to as defendants and the respondent as the plaintiff. The facts out of which the suit arises are :

The plaintiff, in his capacity as the proprietor of the Sadanandam Oil Mills, Mattancherry, is a member of the India Pepper and Spices Trade Association recognised and registered respectively under Sections 6 and 14B of the Forward Contracts (Regulation) Act, 1952, hereinafter referred to as the Act. The association is a non-profit earning company registered and incorporated under the Indian Companies Act, 1956. The object of the Association is generally to promote, regulate and protect trade in pepper and spices and to assist its members to enter into Hedge and Transferable Specific Delivery Contracts in Pepper.

2. On 1-10-1988, a notice signed by the Assistant Secretary of the Association

was served on the plaintiff. The notice stated that the cheque presented by the plaintiff towards clearance charges was dishonoured. There"was thus a breach of the bye-laws. On the same day, the plaintiff was served with another notice signed by the Assistant Secretary of the Association informing him that the clearing house committee of the Association had decided to suspend him from the Rolls of the Association for a period of one month, that is to say, from 6-10-1988 to 5-11-1988. In the suit, the plaintiff has alleged that the notice is illegal for various reasons. It is unnecessary to go into the rival claims on the merits of the case. In the trial Court, among other claims, the defendants urged that having regard to the provisions of the Act, and the bye-laws of the Association the suit was not maintainable, issue No. 1 was "Is the suit maintainable"? This issue was tried as preliminary issue.

3. The learned Additional Sub-Judge held that the suit was maintainable. The defendants are aggrieved by this finding. Two questions have been urged.

(i) The suit is not maintainable because bye-law No. 172 which has statutory force, precludes in institution of the suit.

(ii) Section 27A creates an express bar against filing of any suit in the circumstances of this case.

The first question is considered in paragraphs 4 -- Hand the second in paragraphs 15-16 below.

4. A brief reference to the provisions of the Act and the bye-laws relevant to this case is necessary. The Act is intended to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith. "Association" means any body of individuals, whether incorporated or not, constituted for the purpose of regulating and controlling the business of the sale or purchase of any goods. "Commission" means the forward markets commission established u/s 3 of the Act. An Association is required to apply for recognition under S. 5 of the Act. The application shall be accompanied by a copy of bye-laws for the regulation and control of forward contracts and also a copy of the rules relating in general to the constitution of the association and in particular to the powers and duties of the office bearers of the association, the qualification of members and the exclusion, suspension, expulsion and re-admission of members''. The Central Government is empowered to grant recognition to the applicant Association in the manner prescribed by Sections 6 of the Act. However, no rules of a recognised Association shall be amended without the approval of the Central Government. The Central Government is empowered to withdraw recognition and call for periodical returns or direct enquiry to be made into the affairs of the association. The association may make rules or amend any rules in respect of the items specified in Section 9A of the Act. The rules or amendments in relation to the matters specified in Section 9A shall not have effect until they have been approved by the Central Government and published in the official gazette. Any

recognised association which includes the defendants, is empowered to make bye-laws for the "regulation and control" of forward contracts. The bye-laws, however, are subject to the previous approval of the Central Government. Among the subjects on which the Association may make bye-laws are:

(i) clearning house for periodical settlement of contracts, delivery, of goods, payments regulation and maintenance of the clearing house;

(ii) liability of members to fine, expulsion, or suspension or to any other penalty for contravention of any bye-law."

5. The Central Government is empowered to make or amend bye-laws of recognised Associations on matters specified in Section 11 of the Act in the circumstances stated in Section 12(1) of the Act.

While an association may provide for and act under a bye-law to suspend its member the commission has the statutory power to suspend a member from his membership if it is in the interest of trade to do so.

No association can carry on its business except under and in accordance with the conditions of a certificate of registration granted under the Act.

The Act creates a bar against institution of suits or any other legal proceedings against the Central Government, any member, or any member, officer or servant of the commission for anything in good faith done or intended to be done under the Act or any rule or bye-laws made there under. Similarly, "no suit or other legal proceeding shall lie in any Court against the governing body or any member, office bearer or servant of any recognised Association.,........for anything which is in good faith done or intended to be done with the approval or at the instance of the commission and in pursuance of this Act or of any rule or bye-law made thereunder."

6. Trading bye-laws have been passed by the Association in the purported exercise of the Association''s power u/s 11 of the Act. I will set out the substance of the relevant bye-laws. "Clearing House Committee" is appointed by the Board of Directors of the Association for the purpose of management of the clearing house and taking decisions on disputes arising out of the working of the clearing house. Any dispute arising out of the clearing house shall be settled by the clearing house committee, whose decision shall be binding on the parties. The aggrieved party has a right of appeal to the Board. The clearing house committee possesses the power to (1) scrutinize and examine the books of account of members (ii) who contravene the bye-laws by transacting business outside trading hours and (iii) to impose penalty of fine or suspension of such members."

The most important bye-law on which the defendants base their argument is bye-law No. 172. Under this bye-law no party shall:

(i) bring or prosecute any suit or proceeding whatsoever,

(ii) against the Association, the Board, the President, the Secretary or any employee or employees of the Association,

(iii) acting within authority.''

The same bye-law precludes any party from bringing or prosecuting any suit or proceeding whatsoever against the arbitrators, Umpire, Appellate Tribunal or any member or members thereof:

(a) in respect of any matter or thing done or purporting to be done,

(b) under these bye-laws.

The two provisions -- for convenience first part and second part -- are separated by use of the disjunctive "OR".

7. The admitted facts are:

(i) The clearing house committee found that the petitioner had violated the bye-laws relating to clearing house.

(ii) The bye-laws have been duly made after complying with Section 11 of the Act.

(iii) The association is recognised and registered, as required by Sections 6 and 14-of the Act.

(iv) The dispute between the plaintiff and the defendants is a dispute which falls within bye-laws 79 and 87.

8. The substance of the argument is that the bye-laws of the Association, made pursuant to the rule-making power granted by Section 11 of the Act, are statutory rules, and therefore have the same force as the Act. This argument is followed up by urging that the statute itself must be held to have taken away the right of the plaintiff to institute this suit, or any proceeding whatsoever.

9. In order to judge the validity of this argument two points need to be considered. Firstly whether the byelaw number 172 which denies to the parties the right of access to a Court, possesses, by virtue of its purported origin in the authority of Section 11, statutory force. Secondly, whether the byelaw No. 172 is, in fact, made pursuant to the rule-making power granted by Section 11 of the Act.

10. The byelaws of the Association are distinct from the Forward Contracts (Regulation) Rules 1954 made by the Central Government in exercise of its power u/s 28 of the Act. No doubt both seek their origin in the same statute.

Byelaws are a body of rules ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance. Generally speaking, the term, "bye-laws" applies to the local laws, or regulations made by public bodies like Municipal or other Corporations, Societies and other Associations formed for commercial or other purposes. They are a species of subordinate or delegated legislation.

A body of rules or byelaws made in exercise of power conferred by a statute may be called Statutory Rules. The byelaws in this case have been made after their publication as required by the Forward Contracts (Regulation) Rules 1954. It is reasonable to hold, therefore, that the byelaws have been validly made. Since the power of making byelaws is referable to the statutory provisions of Section 11 of the Act and since the statutory requirement of publication has been fulfilled, I hold that the byelaws are statutory in character.

11. The byelaws bear a distinct relation with the statute to which they are subordinate. This relationship is fundamental to a proper understanding of their scope and validity. The distinctive features of subordinate legislation, like the bye laws in relation to the statute to which they are subordinate may be noted:--

(i) the subordinate legislation must strictly conform to the delegated or derived authority.

(ii) In addition to publication and promulgation in accordance with the statutory authority, the subordinate law-making power must be exercised in accordance with the statutory provisions, not only in regard to the procedure of making but also in regard to the substance and sanction.

(iii) A subordinate legislation which fails to conform to the statutory essentials or is repugnant to it, is ultra vires of the statute under which it is made.

12. I will now consider what byelaw 172 is designed to enforce and whether it conforms to the essentials of a valid subordinate rule. The defendants claim that the byelaw No. 172 derives its authority from Section 11(3)(b) of the Act. Clause (b) of Sub-section (3) of Section 11 enables the Association to provide for two consequences of breach of any byelaw. A byelaw made under Clause (b) of Sub-section (3) of Section 11, must therefore confine itself to these two and none other matters. The Association may make a byelaw.

(i) rendering a member liable to fine or

(ii) render him liable to expulsion or suspension.

The byelaw No. 103 which empowers the committee to fine or suspend a member is clearly within the authority granted by the two Clauses (i) and (ii) of Section 11(3)(b) of the Act. ,

But the defendants claim that the byelaw No. 172 which takes away from a party to the dispute arising out of a breach of the byelaws, the right to bring or prosecute any suit or proceeding whatsoever, against the Association, is made in exercise of the power under Clause (b) of Section 11(3) of the Act. As stated above, the power to make byelaws u/s 11(3)(b) is confined to the two matters specified therein. Denial of the right of access to a Court by instituting suits or other proceedings is not among the powers of the Association specified in Section 11(3)(b). No other clause of Section 11 of the Act empowers the Association to make a byelaw barring any party from instituting suits or other proceedings in respect of a dispute arising out of a breach of the bye-laws.

13. It is an established rule of law that if a power exists by statute to make bye-laws, that power must be exercised strictly in accordance with the provisions of the statute which confers such power. In my opinion, the Association has no legislative authority to lay down that a party to a dispute shall not institute a suit or legal proceeding against the Board, Association or its office bearers. The bye-law No. 172 which lays down such a prohibition is not made in pursuance of the authority conferred by Section 11(3)(b) of the Act or any other provision of the Act. In my opinion, the bye-law No. 172 is ultra vires of the rule making power conferred by Section 11 of the Act and is therefore invalid. It has no existence in law. Since the bye-law No. 172 in so far as it precludes a party from instituting suits or legal proceedings, is invalid, the plaintiff is not precluded from instituting the suit out of which this petition arises.

14. The validity of the second part of bye-law No. 172 relating to suits or other proceedings against Arbitrators, Umpire or Appellate Authority has to be judged on the same tests as the suits against the Board, Association or its office bearers. But such a question does not arise on the facts of this case.

15. The second question is whether the suit is barred by virtue of Section 27A(2) of the Act. The suit is against India Pepper and Spice Trade Association, Jew Town, Kochi-2 through its Assistant Secretary holding charge as Secretary and the President of the said Association. Section 27A of the Act has two sub-sections. Sub-section (1) of Section 27A lays down that no suit or other legal proceedings shall lie in any court against the Central Government or any member, office bearer etc. or commission. This sub-section does not come into play in the circumstances of this case.

16. However, Sub-section (2) of Section 27A is relevant. It has four essential elements. It bars suits and other legal proceedings in any court (i) against the governing body or any member, office bearer or servant of any recognised association (ii) or against any person appointed under Sub-section (1) of Section 13(iii) for anything which is in good faith done or intended to be done with the approval, or at the instance, of the Commission and (iv) in pursuance of this Act, or of any rule or bye-law made thereunder. This is a suit against the President of the Association and the association as represented by the Secretary. Therefore, it is a suit against one of the persons named in Sub-section (2) of Section 27A of the Act. It is not a suit against the person appointed u/s 13(1) of the Act. Thus the elements set out at (i) and (ii) are fulfilled. But in order that the bar against suits applies, two more essential ingredients need to be satisfied. The validity of the Act of the Secretary by which he communicated the plaintiffs suspension from membership is impugned in the suit. Therefore, the suit is in respect of "anything which is in good faith done by the Association". This satisfies the ingredient No. (iii). But there is a fourth ingredient of Sub-section (2) of Section 27A of the Act which has to be present in order to attract the bar against suits.

The fourth ingredient is this:-- The Act done in good faith, by one or, the other persons mentioned in ingredient No. (i) or (ii) must have been done "with the approval or at the instance of the commission". The commission means the forward markets commission established u/s 3 of the Act. It has not been pointed out to me that the action of suspension impugned in this suit is an action taken with the approval of the commission or at the instance of the commission. No doubt, the action of the defendants purports to be an action in pursuance of the Act and the bye-laws made thereunder. But it is one of the essentials of Sub-section (2) of Section 27A that the Act done in good faith and impugned in the suit must have been done "with the approval or at the instance of the commission". The act impugned in the suit is not an act done by the defendants with the approval or at the instance of the commission. Therefore one of the essential elements constituting the bar against suits created by Section 27A(2) is absent.

17. The clause "with the approval or at the instance of the commission" is an adjectival clause qualifying the preceding words "anything which is in good faith done or intended to be done". To put it in simple words; no suit shall be brought against the named persons if such suit is in respect of anything done in good faith by such person. But Sub-section (2) of Section 27A does not stop there. It goes on to stipulate how and by whom the act should have been done, and qualifies the act as an act "done with the approval of or at the instance of the commission". In other words suits or other legal proceedings are barred in respect of acts done by the Association or its office hearers only if the action complained of in the suit or legal proceeding is done with the approval of or at the instance of the commission. If the letter of suspension, was not issued with the approval of or at the instance of the commission, the suit is clearly maintainable.

18. The question of jurisdiction or maintainability of suits is considered on the averments in the plaint. In this case, it has not been averred that the letter conveying the suspension of the plaintiff or the decision to suspend the plaintiff, was approved or initiated by the commission. Therefore, the bar against institution of suits or other legal proceedings against the defendants created by Section 27A(2) has no application. Consequently, the suit is maintainable.

19. In view of my conclusion set out in the foregoing paragraphs, there is no merit in this petition. Accordingly the petition is dismissed with costs.