IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

WP(C).No. 14734 of 2012 (N)

PETITIONER(S):

1. VAZHATHOPE SERVICE CO-OPERATIVE BANK LTD. NO.E 202, THADIYAMPADU BRANCH, IDUKKI DISTRICT REP.BY ITS SECRETARY.

2. PRESIDENT, VAZHATHOPE SERVICE CO-OPERATIVE BANK NO.E 202 THADIYAMPADU BRANCH, IDUKKI DISTRICT.

BY ADV. SRI.P.C.SASIDHARAN

RESPONDENT(S):

1. AGRI BIO CARE DOOR NO 642 A, KANIYANMALA JUNCTION, CHANNANIKADU P.O. KOTTAYAM, PIN-686533 REP.BY PARTNERS M.S MOHANDAS AND SHAJITH G NAIR.

2. THE KERALA CO-OPERATIVE TRIBUNAL, THIRUVANANTHAPURAM, REP.BY ITS SECRETARY-695 001.

3. THE ARBITRATOR, CO-OPERATIVE ASSISTANT REGISTRAR (GENERAL)OFFICE THODUPUZHA-685 584.

R1 BY ADV. SRI.MATHEW JOHN (K)
R1 BY ADV. SRI.DOMSON J.VATTAKUZHY
R BY GOVERNMENT PLEADER SRI V.K.RAFEEK

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 22-06-2015 ALONG WITH WPC.15329/2012, THE COURT ON 22-07-2015 DELIVERED THE FOLLOWING:

WP(C).No. 14734 of 2012 (N)

A P P E N D I X

PETITIONERS' EXHIBITS

EXT.P1: TRUE COPY OF THE ARC FILED BEFORE THE 3RD RESPONDENT.

EXT.P2: TRUE COPY OF ORDER OF THE MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL.

EXT.P3: TRUE COPY OF THE AWARD PASSED BY THE 3RD RESPONDENT.

EXT.P4: TRUE COPY OF THE JUDGMENT ISSUED BY THE 2ND RESPONDENT.

RESPONDENTS' EXHIBITS

EXT.R1(a): TRUE COPY OF THE PLAINT IN ARC NO.1250/2010.

EXT.R1(b): TRUE COPY OF THE ORDER FORM SIGNED BY THE PETITIONER 26.09.2007.

EXT.R1(c): TRUE COPY OF THE ORDER FORM SIGNED BY THE PETITIONER 5.11.2007.

EXT.R1(d): TRUE COPY OF THE ORDER FORM SIGNED BY THE PETITIONER 11.12.2007.

EXT.R1(e): TRUE COPY OF THE INVOICES.

EXT.R1(f): TRUE COPY OF THE INVOICES.

EXT.R1(g): TRUE COPY OF THE INVOICES.

EXT.R1(h): TRUE COPY OF THE INVOICES.

EXT.R1(i): TRUE COPY OF THE INVOICES.

EXT.R1(j): TRUE COPY OF THE INVOICES.

EXT.R1(k): TRUE COPY OF THE INVOICES.

EXT.R1(l): TRUE COPY OF THE INVOICES.

EXT.R1(m): TRUE COPY OF THE INVOICES.

EXT.R1(n): TRUE COPY OF THE INVOICES.

EXT.R1(o): TRUE COPY OF THE ARGUMENT NOTES SUBMITTED BY THE 1ST RESPONDENT DATED 22.5.2012.

EXT.R1(p): TRUE COPY OF THE ORDER DT.2.5.12 IN CMP.NO.2236/09.

EXT.R1(q): TRUE COPY OF THE ORDER DT.27.1.2010 BY THE JOINT REGISTRAR (GENERAL) IDUKKI.

EXT.R1(r): TRUE COPY OF THE VOUCHERS.

EXT.R1(s): TRUE COPY OF THE VOUCHERS.

EXT.R1(t): TRUE COPY OF THE VOUCHERS.
EXT.R1(u): TRUE COPY OF THE VOUCHERS.

EXT.R1(v): TRUE COPY OF THE ACCOUNT MAINTAINED BY THE 1ST PETITIONER.

/TRUE COPY/

P.S TO JUDGE

P.V.ASHA, J.

W.P(c) Nos.14734 of 2012-N and
W.P(c) No.15329 of 2012-M

Dated this the 22nd day of July, 2015

JUDGMENT

The question to be considered in these two Writ Petitions is whether the Arbitration Court can adjudicate the ARC filed by the 1st respondent when the additional 4th respondent – the Kerala Micro and Small Industries Facilitation Council, (hereinafter referred to as the 'Council'), has rendered an order -Ext.P2, while deciding the quesion of maintainability of the reference filed before it, by the 1st respondent for realising amount due from petitioners.

2. The factual circumstances of the case are as follows: The 1st respondent herein is a registered partnership firm, engaged in the business of fertilisers. The petitioners Bank used to purchase manure from 1st respondent. Claiming that a sum of Rs.5,52,808/- was due from the petitioners Bank towards the cost of organic manure (compost) supplied, based on purchase orders of Bank, the 1st respondent approached the Council, in a

reference under Rule 5(iii) of Micro and Small Enterprises Facilitation Council Rules, 2006, numbered as O.A. 6/2009, for recovery of the said amount from the Bank. The petitioners Bank filed an objection raising the question of maintainability. According to the Bank, Mr. Shine Joseph, who is the Sales Officer of the 1st respondent was the person who collected orders and supplied them the required quantity of fertilizer; the petitioners Bank remitted the payment towards the bill amount of each consignment, in the account of 1st respondent with the petitioners Bank and the Sales Officer has withdrawn the same and given them acknowledgement for the same signed on printed vouchers. The 1st respondent had preferred a complaint before the Idukki Police Station against the Bank as well as the Sales Officer Shine Joseph alleging defalcation and cheating. After conducting inquiry the Sub Inspector of Police, Idukki implicated the Sales Officer alone as accused and he informed that the Bank was not involved. Therefore petitioners contended that if the Sales Officer has defalcated any amount collected from the Bank, it is an issue between the Sales Officer and the 1st respondent and therefore the complaint will not lie against the Bank. After hearing the parties on the question of maintainability, the

Council found that it can be safely presumed that the representative Shine Joseph had accepted the money from the petitioners Bank. The Council therefore held that Sri.Shine Joseph, the representative manager of the 1st respondent alone is responsible for defalcation and cheating and hence the petition is not maintainable before the Council. It further found that the issue of cheating committed by the representative of the complainant can be agitated before the appropriate legal forum as the Council does not have any authority to adjudicate the same.

3. Thereafter the 1st respondent filed ARC.1250 of 2010 before the Assistant Registrar of Co-operative Societies, praying for an award directing the petitioners Bank to pay to the 1st respondent a sum of Rs.5,52,808/- as damages towards actual financial loss and Rs.50,000/- as special damages along with interest @ 12% per annum from 12.11.2009. In the Arbitration Case, the plaintiff/1st respondent, claimed damages for the irregular payment effected by the Bank to Sri.Shine Joseph from the account of 1st respondent without their consent, alleging deficiency in service also. The 1st respondent alleged that their partners alone were authorised to operate the said Bank account

in the name of 1st respondent. It was alleged that the bank had not intimated them the number of the account they opened in its name and its outstanding balance at any time. It was stated that in case the amounts were credited in their account in the name of Sri.Shine Joseph, such entries were unauthorised and not binding on them. In case it was credited in the name of the 1st respondent, its partners alone were able to operate such account and therefore the withdrawal made otherwise from such an account was not binding on them. They alleged that cash withdrawal was seen made to the tune of Rs.66,500/- in violation of the directives issued by the Reserve Bank relating to banking and other services, and non-adherence to fair practices code. It was further alleged that the Bank did not take any action even after they came to know about the illegal and unauthorised cash withdrawal caused by the Secretary; they had been supporting the illegality which caused financial loss and damages to the 1st respondent and hence the Bank was guilty of deficiency in banking and other services. Therefore it was alleged that, the Bank, its Secretary, President and members of the Director Board were jointly and severally liable to compensate them. The 1st respondent sought directions to the bank to furnish the details as to the authority under which account was opened in the name of their firm and to furnish the details of the accounts to which the proceeds of the price of manure sold as per the invoices mentioned therein were collected and disbursed etc. It was alleged that the secretary had caused the withdrawal and the President and members of the governing body were not initiating any steps against him. The 1st respondent sought for special damages to the tune of Rs.50,000/- and compensation to the tune of Rs.5,52,808/-.

4. The petitioners thereupon filed objection in the ARC raising the contention that the same was not maintainable in the light of the decision already rendered by the Council. It was contended that the issue raised in the arbitration case did not come under the purview of the Law of Co-operation; the Council, had found that Shine Joseph who was the agent of the 1st respondent alone was responsible for the defalcation of funds and the 1st respondent had admitted that the transactions were being done through their agent Sri.Shine Joseph; the case cannot be decided in the absence of Shine Joseph as a party and the arbitration case will not lie as an appeal against the order passed by the Council.

5. The 1st respondent contended that the Council did not go into the merits of the case and decided only the issue regarding the maintainability before that forum. Moreover, it was submitted that the contentions raised and issues arising in both the cases are different.

6. The Arbitrator, after hearing both sides found that the 1st respondent did not deny the contention of the petitioners that it was Shine Joseph through whom the transactions were being made and that it was Shine Joseph who was supplying the fertilizers on the basis of the orders placed by the petitioners and he himself was being paid the amount based on vouchers. The Arbitrator further found that the 1st respondent has not denied the contention that the value of fertilizers was paid by the bank to Shine Joseph and therefore the 1st respondent did not have any direct dealings with the bank and it was through Shine Joseph that all these transactions were being made. Further it was found that the Council has already rendered a finding that it was Shine Joseph who was solely responsible for the defalcation and fraud. The Arbitrator did not accept the contentions of the 1st respondent and found that based on the complaint of the 1st respondent before the Police against the Bank and Shine Joseph,

the Secretary and the President of the Bank were not implicated as accused and charge sheet was filed against Shine Joseph alone. Therefore, the arbitration case was dismissed on the ground that the said complaint filed against the Bank did not come under the Law of Co-operation, as Shine Joseph, the representative of 1st respondent alone is responsible for the loss caused to the complainant/1st respondent.

7. In the appeal against the award in ARC, the Co-operative Tribunal found that the principles of res judicata had application only when the earlier forum which decided a claim was having the jurisdiction to decide the claim advanced in the subsequent proceedings and when the claim in the subsequent proceedings is on the very same title on which the earlier proceedings were initiated. The Tribunal found that the council did not have authority to adjudicate a claim for damages on account of the irregularities in maintaining their account and deficiency in service while making payment towards supply of goods. Therefore the claim advanced in the dispute in the ARC could not be held as barred by the principles of resjudicata. It was also found that the ARC ought not have been dismissed for non-joinder of necessary party. The Tribunal further found that the

case of the petitioners Bank was one touching the business of the society coming under Section 69(f) of the Co-operative Societies Act. The issue raised is with respect to the irregularity in maintaining their account and deficiency in service in the business transaction with the Bank. According to petitioners, the price of the manure was being credited in their ledger account. According to the 1st respondent Sales Offiicer could not have withdrawn without their consent, which amounts to deficiency in service. The said claim raised by the 1st respondent was held to be one coming within the purview of a dispute defined under Section 2(i) of the Co-operative Societies Act and hence ARC was maintainable under Section 69(f) of the Co-operative Societies Act. The Tribunal held that the findings of the Arbitrator that the dispute does not come within the purview of Co-operative Societies Act and that the claim is barred by the principles of resjudicata were erroneous. On such findings the award in the ARC was set aside and the dispute was remitted back to the Arbitrator for re-adjudication on merits.

8. It is this order of the Tribunal that the petitioners has challenged before this Court. Sri.P.C.Sasidharan, learned counsel appearing for the petitionerss argued that when the

Council has entered upon a finding based on evidence that the bank is in no way responsible for the loss, if any caused to the 1st respondent and it is Sri.Shine Joseph alone responsible, the award passed in the ARC was quite correct as the issue raised therein was also one and the same. On the face of such a finding by the Council, no other forum can entertain the dispute and adjudicate the same on the selfsame cause of action under the principles of constructive res judicata or issue estoppel. It was also argued that in the event of deficiency in service of the bank, the appropriate forum for adjudication of the same was the Co-operative Ombudsman constituted under Section 69A of the Co-operative Societies Act.

9. On the otherhand Sri.Mathew John, learned counsel for the 1st respondent vehemently opposed the arguments of the learned counsel for the petitionerss, pointing out that the claim for damages on account of irregularity in maintaining their account enabling the Sales Officer to withdraw amounts without their knowledge causing them loss, when the partners of 1st respondent alone were authorised to operate their account and the loss caused to them was not an issue raised or considered before the Council. Moreover the finding rendered while

deciding the preliminary issue on maintainability, without adducing evidence at the stage cannot operate as res judicata. Therefore, the principles of res judicata or issue estoppel does not arise in the case. The Council did not have jurisdiction to decide the issue raised in the ARC. 1st respondent incurred loss towards the transactions relating to supply of manure to the petitioners Bank. A contention is raised alleging deficiency in service to the extent that the payment said to have been effected by the Bank has not reached the 1st respondent. Hence it is a dispute as defined in Section 2(i) read with Section 69(f) of the Co-operative Societies Act touching the business of the Bank which can be adjudicated by the Co-operative Arbitration Court.

10. In the light of the rival contentions, the records were called for from the Council, in order to verify whether the question of maintainability was decided after adducing evidence on either side. The learned Government Pleader made available the records and on perusal of the same, it was seen that immediately after objection was filed by the petitionerss herein, the Council heard the question of maintainability. It is seen that either of the parties have not adduced any evidence. It is also seen that the hearing was held before the stage of conciliation

reached. Therefore, the finding of the Tribunal rendered in such circumstances exonerating the Bank or its Secretary from liability to pay on the ground that Police did not implicate them as accused in the chargesheet cannot stand in the way of adjudication of the claims raised in ARC. Now coming to the question of resjudicata, Section 11 of Civil Procedure Code reads as follows:

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. "

11. The 1^{st} respondent had filed a reference before the Council, seeking payment of the amount due towards supply of manure. While deciding the preliminary issue of maintainability, the Council finds that the Bank had effected payment to Sri.Shine Joseph. The question as to the manner in which the bank has to maintain accounts or the loss caused to the 1^{st} respondent or the deficiency in service etc. did never arise

before the Council. The 1st respondent had approached the Council for getting the payment towards manure supplied. Moreover, the Council does not have any jurisdiction to enter upon such issues. The only relief which can be granted by the Council in a reference is to expedite the payment effected with interest. It did not have any jurisdiction to decide any other issue.

12. In this context, it is necessary to examine the provisions in the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the `Act' for short]. It is enacted for facilitating the promotion and development of micro, small and medium enterprises and for matters connected therewith or incidental thereto. The Act came into force on 02.10.2006. A Board has been constituted under Section 3 of the Act to examine the factors affecting the promotion and development of micro, small and medium enterprises and review the policies and programmes of the Central Government in regard to facilitating the promotion and development and enhancing the competitiveness of such enterprises and the impact thereof on such enterprises. Under Section 15 of the Act, where any supplier, supplies any goods or

renders any services to any buyer, the buyer shall make payment therefore on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day. Under Section 16, if the buyer fails to make payment to the supplier, as required under Section 15, the buyer shall be liable to pay compound interest to the supplier on that amount. Under Section 17, the buyer is made liable to pay the amount to the supplier for any goods supplied or service rendered by him. Under Section 18(4), nothwithstanding anything contained in any other law for the time being in force, any party who has got complaint with regard to any amount due under Section 17, can make reference to the Council. Sub section 2 provides that on receipt of a reference under sub section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation. Sub section (3) provides that where the conciliation is not successful, the council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996. Sub section (4) provides that the Council or the centre providing alternate dispute resolution services shall then have jurisdiction to act as an Arbitrator or Conciliator in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India. Section 24 provides that the provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Under Section 2(d), `buyer' means whoever buys any goods or receives any services from a supplier for consideration. The purpose of the enactment is to facilitate the promotion and development of micro, small and medium enterprises as well as to ensure their competitiveness. Sections 15 to 25 under Chapter V deals with the procedure to be adopted and reliefs available in the event of delayed payments to micro and small enterprises. Section 18 provides conciliation when there is a dispute with regard to any amount due under Section 17 which enables the council to act as an Arbitrator or conciliator in disputes between the supplier and the buyer in the matter of payment due to the supplier. Section 18 provides as follows:

"(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under Section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (Act 26 of 1996), shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996,

shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 79 of that Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an

> Arbitrator or Conciliator under this Section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.
> (5) Every reference made under this Section shall be decided within a period of ninety days from the date of making such a reference."

13. Going by the provisions of the Act, the finding of the Council, on the preliminary issue of maintainability or the finding therein, that the sales officer was the person involved in the matter, cannot be one which will disentitle the 1st respondent to initiate proceedings against the Bank, when it challenges the manner in which the payment was stated to be effected and sales officer could collect the amount from Bank account in their name without their knowledge. The question of constructive resjudicata or issue estoppel does not arise in the matter.

14. The complaint before the ARC is in respect of a dispute which comes within the meaning of its definition under Section 2(i) of the Co-operative Societies Act, as it relates to the business of the petitioners, the manner in which accounts are maintained, the manner in which payment is effected, purchase of manure, its supply and payment effected from the account maintained in the Bank etc. The Council did not have the jurisdiction to adjudicate the issues which arose in the

subsequent proceedings. The jurisdiction of the council is on matters relating to payment towards supply made and is confined to the supplier and buyer. Therefore the findings of the Council in Ext.P2 will not and cannot stand in the way of adjudication of the complaint of 1st respondent before the Arbitrator.

15. In the present case, it is seen that the Council has decided only a preliminary issue of maintainability, well before reaching even the stage of conciliation. The only conclusion in Ext.P2 order, is that Sri.Shine Joseph was a necessary party for adjudication of the claim of 1st rerspondent and in order to adjudicate such claim the Council does not have jurisdiction. Just because the Police Officials did not implicate the Bank as accused in the crime registered by them, it cannot be said that the Bank is not answerable to the allegations raised against it in the ARC. A finding on the basis of registration of a criminal case and subsequent filing of the charge sheet without implicating the bank, while deciding a preliminary issue without adducing evidence, will not lead to the conclusion that no action can be taken against the bank when there are allegations relating to the conduct of the bank. The case of the 1st respondent is that Shine Joseph could have committed defalcation only with the help of

and in collusion with the employees of the bank. Therefore the dispute is one which comes within the meaning of its definition under Section 2(i) of the Co-operative Societies Act, which reads as follows:

> "2(i) dispute" means any matter touching the business, constitution, establishments or management of a society capable of being the subject of litigation and includes a claim in respect of any sum payable to or by a society, whether such claim be admitted or not;

Similarly Section 69(f) reads as follows:

> "(1) Notwithstanding anything contained in any law for the time being in force, if a dispute arises:-
>
> (f) between the society and a person, other than a member of the society, who has been granted a loan by the society or with whom the society has or had business transactions or any person claiming through such a person."

16. Regarding the objection that the 1st respondent ought to have approached the Ombudsman, it is seen that the Kerala Co-operative Ombudsman Scheme 2010, was framed as per SRO 9/2011 and it was constituted only as per order dated 21.5.2011 of the Registrar of Co-opertive Societies. From Ext.P2, the ARC is seen filed in June 2010. Therefore that objection cannot be sustained.

In the light of the above findings, it can be seen that the judgments of the Co-operative Tribunal impugned in both these Writ Petitions do not warrant any interference by this Court under Article 226 of the Constitution of India.

These Writ Petitions are dismissed.

Sd/-
(P.V.ASHA, JUDGE)

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