

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 11.09.2017

Orders Pronounced on : 22.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

W.P.No.14743 of 2017

and

W.M.P No. 15971 of 2017

M/s. Health Care Pharmacy
Rep. by its Partner
Mrs. R.G. Vani

... Petitioner

vs.

1. The Deputy Registrar of
Co-operative Societies
Collectorate Building
Coimbatore - 641 018.

2. The Thudiyalur Co-operative
Agricultural Services Ltd. (TUCS)
Rep. by its Joint Secretary
No.K-1550, Thudiyalur
Coimbatore - 641 034.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari, calling for the records on the file of 1st respondent leading to the order dated 27.10.2016 passed in A.R.C. No.215/2015/Sa.Pa.1 and quash the same and pass such further orders.

For Petitioner : Mr. Vignesh Venkat

For Respondents : Mr. L.P. Shanmugasundaram,
Spl. Govt. Pleader for R1 and R2

ORDER

The petitioner has filed this writ petition seeking to quash the order of the 1st respondent dated 27.10.2016 passed in A.R.C. No.215 /2015/Sa.Pa.1.

2. Brief facts of the case is as follows :

The petitioner firm entered into a rental agreement on 06.11.2003, for renting a portion of the second respondent premises, for a period of five years. The said agreement period expired on 15.11.2008. Thereafter, the rental agreement was extended for a further period of five years from 01.11.2008 to 30.10.2013. The said rental agreement expired on 30.10.2013. As there was a dispute in payment of rent, the petitioner sent a legal notice to the 2nd respondent on 22.11.2014, enclosing two demand drafts. The said demand drafts were returned. Therefore, the petitioner preferred RCOP No.71 of 2015 before the Rent Control Authority on 18.02.2015. Without disclosing the aforesaid fact, the 2nd respondent made Arbitration Reference Petition under Section 90 of the Tamil Nadu Co-operative Societies Act, 1983 in ARC No. 215/2015. In the said proceedings, a detail objection was filed by the petitioner, stating that reference petition is not maintainable under the Act and that the jurisdiction lies only with the Rent Control Authority. According to the petitioner, the 1st respondent without considering the jurisdiction and allowed the petition on 27.10.2016. Aggrieved by the same, the petitioner has filed the writ petition before this Court.

3. The counter affidavit has been filed by the 1st respondent. Reiterating the contention stated in the counter affidavit, the learned Special Government Pleader would submit that if the petitioner is aggrieved by the award, the petitioner should have filed an appeal before the Appellate Authority. However, without exhausting the appeal remedy provided under Section 152(1) of the Act, the petitioner has filed the present writ petition. The next contention of the respondent, the petition is amended under purview of Section 90 of the Tamil Nadu Cooperative Societies Act. Therefore, the writ petition is liable to be dismissed.

4. In response to the contention of the learned Special Government Pleader, the petitioner would submit that the dispute between the petitioner and the 2nd respondent is the relationship of a tenant and landlord. Therefore, the proceedings under Section 90 of the Tamil Nadu Co-operative Societies Act, is not maintainable and the same is without jurisdiction.

5. In view of the contention of the petitioner and the decisions relied by the learned counsel for the petitioner, this Court has considered the issue involved in the present writ petition, whether the proceedings under Section 90 of the Act is without jurisdiction and the same is not maintainable. The following decisions are relied by the petitioner :

The decision of the Hon'ble Supreme Court In the case of A. Ayyasamy vs. A. Paramasivam & Ors., reported in MANU/SC/ 1179/2016, wherein the relevant paragraphs are 16, 29, 32 and 15 and the same is

extracted below :

"15. We shall revert to the question of per incuriam at a later stage. At this juncture, we may point out that the issue has been revisited by another Division Bench of this Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Limited and others*[10]. In this case, one of the questions that had arisen for determination was, in the context of Section 8 of the Act, as to whether the subject matter of the suit was 'arbitrable' i.e. capable of being adjudicated by a private forum (Arbitral Tribunal). In this context, the Court carried out detailed discussion on the term 'arbitrability' by pointing out three facets thereof, viz.:

- 1) whether the disputes are capable of adjudication and settlement by arbitration?
- 2) whether the disputes are covered by the arbitration agreement?
- 3) whether the parties have referred the disputes to arbitration?

16. As we are concerned with the first facet of the arbitrability of dispute, on this aspect the Court pointed out that in those cases where the subject matter falls exclusively within the domain of public fora, viz. the Courts, such disputes would be non-arbitrable and cannot be decided by the Arbitral Tribunal but by the Courts alone. The justification and rationale given for adjudicating such disputes through the process of Courts, i.e. public fora, and not by Arbitral Tribunals, which is a private forum, is given by the court in the following manner:

35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are:
(i) disputes relating to rights and liabilities which give rise

to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an A. Ayyasamy vs A. Paramasivam & Ors on 4 October, 2016 Indian Kanoon - <http://indiankanoon.org/doc/180680303/7> interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

.....

29. Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration subject to the dispute being governed by the arbitration agreement unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. In Booz-Allen and Hamilton Inc. v. SBI Home Finance Ltd.[13], this Court held that adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not exclusively reserved for adjudication by courts and tribunals may by necessary implication stand excluded from the purview of private fora. This Court set down certain examples of non-arbitrable disputes

such as:

(i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;

(iii) Matters of guardianship;

(iv) Insolvency and winding up;

(v) Testamentary matters, such as the grant of probate, letters of administration and succession certificates; and

vi) Eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.

...

32. Hence, in addition to various classes of disputes which are generally considered by the courts as appropriate for decision by public fora, there are classes of disputes which fall within the exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinarily civil court. That such disputes are not arbitrable dovetails with the general principle that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy such a dispute would not then be capable of resolution by arbitration."

In the case of Reliance Digital Media Ltd., vs. Jawed Habib Hair Xpreso Ltd., reported in MANU/PH/0994/2014, the High Court of Punjab and Haryana, in paragraphs 8 and 11, has observed as follows;

" 8. In Haryana Telecom Ltd. vs. Sterlite Industries (India) Ltd., MANU/SC/0401/1999 : 1999 (3) R.C.R (Civil) 619: (1999) 5 SCC 688, the Supreme Court had occasion to examine the scope of arbitration and observed that only such disputes or matters, which an arbitrator is competent or empowered to decide, can be referred to arbitration. The Court dealt with the issue under the company law. An Arbitrator notwithstanding any agreement between the parties would have no jurisdiction to order winding up of a company since such power is conferred on the Company Court. Resort to Section 8 application under the Arbitration and Conciliation Act, 1996 for referring a winding up petition to arbitration untenable. By analysis, the arguments culled out is that ejection can be ordered only through Court process. The Arbitral Tribunal is not a court and

thus has no power to evict a person from the disputed property where possession is duly delivered to tenant in accordance with laws governing tenancy operated through the Rent Controller constituted under statutory tenancy laws.

11. The contract signed between the parties in this case is no better than a rent note or a lease agreement subject to the local rent laws permitting actions to be brought before the Rent Controller or through the due process of law ignited in civil courts where rent laws are not applicable then remedies can be sought through notices served under Section 106 of the Transfer of Property Act determining tenancy, followed by a civil suit praying for eviction by grant of a permanent and mandatory injunction. "

In the case of Deccan Merchants Co-operative Bank Ltd., vs. M/s. Dalichand Jugraj Jain & Ors., reported in AIR 1969 SC 1320 the Hon'ble Supreme Court, has observed as follows in paragraphs 18, 23, 32 and 41 :

"18. The question arises whether the dispute touching the assets of a society would be a dispute touching the business of a society. This would depend on the nature of the society and the rules and bye-laws governing it. Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business. In this case, the society is a co-operative bank and ordinarily a co-operative bank cannot be said to be engaged in business when it lets out properties owned by it. There fore, it seems to us that the present dispute between a tenant of a member of the bank in a building, which has subsequently been acquired by the bank, cannot be said to be a dispute touching the business of the bank, and the appeal should fail on this short ground.

23. One other limitation on the word " dispute " may also be placed and that is that the word " dispute " covers only those disputes which are capable of being resolved by the Registrar or his nominee. It seems to us very doubtful that the word " dispute " would include a dispute between a landlord society and a tenant when the landlord society has not been set up for the purpose of constructing or buying and letting out houses. In the presence of various Rent Acts, which give special privileges to tenants, it would be difficult to say that such disputes were intended to be referred to the Registrar. Of course, this result may also follow from the interpretation of the Rent Act and the Co-operative Societies Act by applying other principles of construction.

32. This takes us to the point whether the Rent Act applies to the facts of this case and, accordingly, the jurisdiction of the

Registrar is ousted, and it is only the Court of Small Causes which has jurisdiction to eject the petitioners.

41. Bachawat, J.: I agree that the dispute concerning the property purchased by the society from one of its members is not a dispute touching the business of the society. I also agree that the court of small causes has exclusive jurisdiction under Section 28 of the Rent Act to entertain a proceeding by a landlord for ejectment of a tenant. A dispute concerning the ejectment of a tenant by a landlord is outside the purview of Section 91 of the Maharashtra Co-operative Societies Act. It has also been argued that, as the lease under which the contesting respondent is claiming was not executed by the owner in his capacity as a member of the society, there is no dispute between the society and a person claiming through a member. On this last question, I express no opinion. Having regard to our findings on the other two points, the appeal must fail. I, therefore, agree to the order proposed by my learned brother."

Also in the case of Natraj Studios (P) Ltd., vs. Navrang Studios & anr., reported in AIR 1981 SC 537, in paragraphs 17, 18, 21 & 24 it is held as follows by the Hon'ble Supreme Court :

"17. The Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain Courts is pursuant to the social objective at which the legislation aims. Public policy requires that contracts to the contrary which nullify the rights conferred on tenants by the Act cannot be permitted. Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognised by a Court of law.

18. Thus exclusive jurisdiction is given to the Court of Small Causes and jurisdiction is denied to other Courts (1) to entertain and try any suit or proceeding between a landlord and a tenant relating to recovery of rent or possession of any premises, (2) to try any suit or proceeding between a licensor and a licensee relating to the recovery of licence fee or charge, (3) to decide any application made under the Act and, (4) to deal with any claim or question arising out of the Act or any of its provisions. Exclusive jurisdiction to entertain and try certain suits, to decide certain applications or to deal with certain claims or questions does not necessarily mean exclusive jurisdiction to decide jurisdictional facts also. Jurisdictional facts have necessarily to be decided by the Court where the jurisdictional question falls to be decided, and the question may fall for decision before the Court of exclusive jurisdiction or before the Court of ordinary jurisdiction. A person

claiming to be a landlord may sue his alleged tenant for possession of a building on grounds specified in the Rent Act. Such a suit will have to be brought in the Court of Small Causes, which has been made the Court of exclusive jurisdiction. In such a suit, the defendant may deny the tenancy but the denial by the defendant will not oust the jurisdiction of Court of Small Causes. If ultimately the Court finds that the defendant is not a tenant the suit will fail for that reason. If the suit is instituted in the ordinary Civil Court instead of the Court of Small Causes the plaint will have to be returned irrespective of the plea of the defendant. Conversely a person claiming to be the owner of a building and alleging the defendant to be a trespasser will have to institute the suit, on the plaint allegations, in the ordinary Civil Court only. In such a suit the defendant may raise the plea that he is a tenant and not a trespasser. The defendant's plea will not straightaway oust the jurisdiction of the ordinary Civil Court but if ultimately the plea of the defendant is accepted the suit must fail on that ground. So the question whether there is relationship of landlord and tenant between the parties or such other jurisdictional questions may have to be determined by the Court where it falls for determination-be it the Court of Small Causes or the ordinary Civil Court. If the jurisdictional question is decided in favour of the Court of exclusive jurisdiction the suit or proceeding before the ordinary Civil Court must cease to the extent its jurisdiction is ousted.

24. In the light of the foregoing discussion and the authority of the precedents, we hold that both by reason of S.28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 and by reason of the broader considerations of public policy mentioned by us earlier and also in *Deccan Merchants Cooperative Bank Ltd. v. M/s. Dalichand Jugraj Jain & Ors.* (supra), the Court of Small Causes has and the Arbitrator has not the jurisdiction to decide the question whether the respondent-licensee-landlord is entitled to seek possession of the two studios and other premises together with machinery and equipment from the appellant-licensee-tenant. That this is the real dispute between the parties is abundantly clear from the petition filed by the respondents in the High Court of Bombay, under S. 8 of the Arbitration Act seeking a reference to Arbitration. The petition refers to the notices exchanged by the parties, the respondent calling upon the appellant to hand over possession of the studios to him and the appellant claiming to be a tenant or protected licensee in respect of the studios. The relationship between the parties being that of licensor-landlord and licensee-tenant and the dispute between them relating to the possession of the licensed-demised premises, there is no help from the conclusion that the Court of Small Causes alone has the jurisdiction and the Arbitrator has none to adjudicate upon the dispute between the parties."

In *The Manager, Co-op. Tex. & anr. vs. The Secretary Co-op. Urban Bank Ltd.*, reported in 2012 -1 - LW. 558, this Court as observed as

follows in paragraph 32:

" 32. On the facts and circumstances of the present case and reading of the statutory provisions makes it clear that the rights or eligibility out of tenancy and the question in that regard, the remedy what the Civil Courts are normally empowered to do in a suit are not provided under the Tamil Nadu Co-operative Societies Act and the Rules framed thereunder, creating an absolute bar to the suits instituted to determine the tenancy between one society and another. Therefore, the contention of the defendants that a Civil suit would not lie to adjudicate a tenancy, not falling within the definition of dispute under Section 90 of the Act, is not tenable. "

In the judgement passed by this Court in the case of H. Vijaya Samundeeswari vs. The Dindigul District Co-op. Milk Producers Union Limited., in MANU/TN/0412/2004, the relevant paragraphs 3 & 18 are extracted below;

" 3. The respondent filed a written statement stating that the petitioner is an associate member of the respondents Union which is a Cooperative Society registered under the Tamil Nadu Cooperative Societies Act (hereinafter referred to as the Act) and the petitioner being a member, any dispute between the member and the Society has got to be adjudicated under the machinery provided under the Act by virtue of Section 156 of the Act. The jurisdiction of the Civil Court is ousted and the suit filed by the petitioner is not maintainable. The respondent also stated that the petitioner is liable to pay a sum of Rs.8029/- as municipal tax and Rs.34,275/- as rent arrears and thereby he has been defaulted in payment of rent and tax amount.

18. The Tenancy between the petitioner and the respondent is in dispute and the said dispute of a civil nature and it would not take away the right of the parties. As the dispute between the parties is of a civil dispute in simplicitor, the right of the petitioner to approach the civil court cannot be held to be a bar and the said relief cannot at all be granted by the machineries created under the Act and in view of the same, the petitioner is well within his right to file the suit before the civil Court and the Court below has fallen into an error, in coming to the conclusion that the bar under Section 156 of the Act is applicable to the case on hand, is not correct and the said order is liable to be set aside and accordingly, it is set aside."

In the case of Sathish Raj vs. Atlanta Applied Dynamics (India), in CRP (PD) No.673 of 2006, this Court has observed as follows in paragraphs 8, 11, 17 & 20 :.

"8. The learned counsel drew support from the decisions reported in 1966-II-M.L.J. 63 (M/s.Raval & Co. v. Ramachandran), AIR 1974 S.C. 818 (Raval & Co. v. K.G.Ramachandran) and 1981(1) SCC 523 (Natraj Studios v. Navrang Studios) to contend that even if there is an

agreement between the landlord and tenant to refer the dispute to arbitration, still the landlord can maintain the petition before the rent controller for eviction. The learned counsel for the revision petitioners further submitted that the arbitrator himself cannot decide the question of eviction as the Hon'ble Supreme Court has held that an award passed contrary to the substantive provisions of law would be patently illegal. He relied on the decision of the Hon'ble Supreme Court in 2006(4) SCC 445 (Hindustan Zinc Ltd. v. Friends Coal Carbonisation) in this regard.

11. The issue involved in this case is whether rent control proceedings filed by the revision petitioners during the pendency of the arbitration proceedings are maintainable.

17. I am unable to accept the findings given by the rent controller to allow M.P.No.581/2005 by stating that since the landlords and tenants have opted conciliation, the landlords cannot invoke the jurisdiction of rent controller. Now it has been settled that civil court has no jurisdiction to try an eviction suit as Sec.10 of the Act, 1960 prohibits eviction of a tenant whether in execution of a decree or otherwise except in accordance with the provisions of Sec.10 or Sections 14 to 16 of the Act. If that being so, no petition for eviction can be maintained before the arbitrator also. Therefore the findings of the rent controller that she has no jurisdiction when there is a lease agreement containing a clause referring the matter to arbitration is vitiated and is liable to be set aside. Parties can enter into any contract containing clause for arbitration to refer any dispute for arbitration. But when there is a special Act covering the field of a particular dispute, the provisions of that Act alone have to be invoked and the dispute cannot be referred to any other mode of adjudication. Rent Control Proceedings are special proceedings insofar as the eviction of a tenant, fixation of fair rent of a building etc. are concerned and therefore that Act alone will cover the dispute in that field. Therefore I have no hesitation to hold that the rent control proceedings before the 14th Small Causes Court (Rent Controller) are very much maintainable and the same has to be continued by the parties despite the pending arbitration proceedings.

20. That apart assuming that the eviction issue is also decided by the arbitrator and in such circumstances if any award is passed for eviction by the arbitrator, whether the same will be binding and enforceable in the light of the specific provisions of the Act, 1960. The answer is only no as no tenant can be evicted except in accordance with the the Act, 1960, once the Act is notified to that particular area. Therefore no useful purpose would be served even if the issue of eviction is agreed to be referred to arbitration."

6. In the light of the aforesaid facts and the decisions, the impugned proceedings issued under Section 90 of the Tamil Nadu

Co-operative Societies Act, 1983 by the respondents, is without jurisdiction and therefore the impugned summons issued by the 1st respondent in ARC No.215/ 2015/Sa.Pa1 dated 27.10.2016 is liable to be quashed.

7. Accordingly, the Writ Petition is allowed. Consequently, the connected Miscellaneous Petition is closed. No order as to costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

avr

To

1. The Deputy Registrar of
Co-operative Societies
Collectorate Building
Coimbatore - 641 018.
2. The Thudiyalur Co-operative
Agricultural Services Ltd. (TUCS)
Rep. by its Joint Secretary
No.K-1550, Thudiyalur
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+1 CC to The Government Pleader SR.No.308/18

CO-KGK

ths : 03.02.2018

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and
W.M.P No. 15971 of 2017