Writ Appeal

PRESENT: The Hon'ble Mr. Justice Bhaskar Bhattacharya

And

The Hon'ble Mr. Justice Prasenjit Mandal

Judgment on: **29th January, 2010.**

M.A.T. No. 694 of 2009

With

C.A.N. 6706 of 2009

Sandip Biswas

Versus

The State of West Bengal & Ors.

Point:

Scope of Writ: Writ against a co-operative Bank not for any inaction or illegal action in performing any statutory duty but for a disputed question of fact as to the amount paid during the transaction with the bank whether maintainable- Constitution of India- Art 12, 226

Fact: The writ-petitioner preferred the instant appeal challenging the order of dismissal of his writ application whereby he challenged a notice issued by a Co-operative Bank by which the said Bank gave a notice to the appellant/writ petitioner by directing to pay-off an amount which was allegedly payable by the appellant to the Bank. Ld. Advocate for the Bank has contended that the writ application itself was not at all maintainable as a Co-operative Bank within the meaning of the West Bengal Co-operative Societies Act was not a "State" within the meaning of Article 12 of the Constitution of India.

The question that arises for determination in the instant appeal is whether the learned Single Judge was justified in refusing to enter into the merit of the dispute

as regards the repayment of loan in the writ application. Dismissing the appeal, the High Court,

Held: In deciding a question as to whether a non-statutory society would come within the definition of a "State" within the meaning of Article 12 of the Constitution of India, the six tests as laid down by the Apex Court in the case of Ajay Hasia vs. Khalid Mujib Sehravardi (1981 (1) SCC 722) must be satisfied**.** (Paragraph – 13)

In the case before us, none of the aforesaid six conditions is satisfied in case of a Co-operative Bank constituted under the provision of the West Bengal Co-operative Societies Act. It is also a settled law that the general regulation under a Statute like Companies Act or the Co-operative Societies Act would not render the activities of a company or a society as subject to control of the State. (Paragraph – 14)

Such control in terms of the provision of the Act are meant to ensure proper functioning of the society and the State or the statutory authority would have nothing to do with its day-to-day function. (Paragraph – 15)

The Co-operative Bank in question by itself cannot be said to be a "State" within the meaning of Article 12 of the Constitution of India. (Paragraph – 16)

Even if a society is not a "State" for not complying with the tests laid down in the case of Ajay Hasia vs. Khalid Mujib Sehravardi (supra), if any such society is duty bound to carry out any statutory obligation mandated under a particular Statute and if a person, affected by such non-compliance of the statutory obligations, approaches a Writ-Court, such Court can pass appropriate direction in exercise of its power under Article 226 of the Constitution of India for performance of the statutory obligation if it appears to the Court that for such non-performance, any of the legal rights of the writ-petitioner is infringed. (Paragraph – 17)

There is no allegation of non-performance of a statutory duty at the instance of the Co-operative Bank in question but the dispute involved in the writ-application

is as regards the amount of money payable by the writ-petitioner towards the Bank in course of repayment of a loan transaction. (Paragraph – 18)

The Statute itself, namely, the West Bengal Co-operative Societies Act, has prescribed the specific provision for resolving such dispute by way of arbitration through the Registrar of the Co-operative Society and such decision, is also subject to the provision of appeal prescribed under the Act. (Paragraph – 19)

The learned Single Judge rightly decided not to entertain the writ-application as there was no inaction or illegal action on the part of the Co-operative Bank in performing any statutory duty and the dispute involved in the writ-application is merely a disputed question of fact as to the amount paid by the appellant in course of transaction with the Bank. (Paragraph – 20)

Cases cited: 1. S.S. Rana vs. Registrar, Co-operative Societies & another reported in (2006) 11 SCC 634;

2. P.K. Biswas vs. Indian Institute of Chemical Biology & others reported in (2002) 5 SCC 111;

3. Bhabank Adhikari vs. West Bengal State Co-operative Bank Ltd. & others reported in (2009) 1 CHN 573.

4. Gayatri De vs. Mousumi Cooperative Housing Society Ltd. & others reported in (2004) 5 SCC 90.

5. Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology reported in (2002) 5 SCC 111.

6. Ajay Hasia vs. Khalid Mujib Sehravardi reported in (1981 (1) SCC 722)

7. State of U.P. and others vs. Bridge and Roof Co. (India) Ltd reported in AIR 1996 SC 3515

For the Writ-Petitioner/Appellant: Mr. Ashok Banerjee,

Mr. P. Chaturvedi,

Mr. Satyabrata Chakraborty.

For the Respondent Nos.4 to 6: Mr. Milan Chandra Bhattacharya,
Mr. D.K. Sengupta.
For the State-Respondent: Mr. Keshab Bhattacharyya,
Mr. Jagabandhu Roy.

Bhaskar Bhattacharya, J.: 1. This appeal is at the instance of a writ-petitioner and is directed against an order dated 6th May, 2009 passed by a learned Single Judge of this Court by which His Lordship dismissed the said writ-application filed by the appellant with further observation that the dismissal of the writ-application would not prejudice the right of the appellant in the event he chose to appear before the Bank and filed answer to the show- cause and/or explanation and in that event the same should be considered by the Bank in accordance with law.

2. Being dissatisfied, the appellant has come up with the present appeal.

3. The appellant filed an application under Article 226 of the Constitution of India thereby challenging a notice dated 17th October, 2008 issued by the Birbhum District Central Co-operative Bank Ltd., Rampurhat Branch, (hereinafter referred to as the Bank) by which the said Bank gave a notice to the appellant by directing it to pay-off the amount of Rs.59,58,094/- which was allegedly payable by the appellant to the Bank with a threat that in default of payment, a proceeding under Section 128 of the West Bengal Co-operative Societies Act, 1983 would be initiated against him for realisation of the due.

4. The grievance of the writ-petitioner in the application under Article 226 of the Constitution of India was that in fact no amount was due and payable by the appellant and the Bank authority illegally threatened action in terms of Section 128 of the aforesaid Act.

5. It appears from the order impugned that the learned counsel appearing on behalf of the writ-petitioner attacked the notice dated 17th October, 2008 on the ground that the same was without jurisdiction, inasmuch as, a notice under Section

128 or the proceedings under the West Bengal Co-operative Societies Act, 1983, could only be initiated by the Registrar of the Co-operative Society or any other person empowered under the Rule. According to the said learned advocate, the notice having been issued by the Branch Manager of the Bank was liable to be quashed.

6. The learned Single Judge, however, was not willing to accept the said contention on the ground that it was evident that the notice impugned was merely a notice of warning and not of initiation of proceeding under Section 128 of the West Bengal Co-operative Societies Act, 1983. His Lordship, therefore, discarded the said point on the ground that the writ-application was a premature one as the proceedings under Section 128 of the Act had not yet been initiated till then.

7. As regards the other question on merit as to whether the writ-petitioner really repaid the entire loan, His Lordship was of the view that such question was one of disputed fact and as such, His Lordship was not inclined to enter into such question. As pointed out earlier, His Lordship made it clear that the dismissal of the said writ-application would, however, not preclude the writ petitioner from appearing before the Bank or filing answer to the show-cause notice and if such answer was given, the Bank should consider the same in accordance with law.

8. Mr. Banerjee, the learned senior advocate appearing on behalf of the appellant, at the very outset, did not dispute the first part of the finding of the learned Single Judge but vehemently contended before us that the learned Single Judge should have gone into the question as to whether the appellant was really a defaulter as alleged. It appears from record that in this appeal an affidavit and supplementary affidavit were filed on behalf of the Bank disputing the aforesaid allegations and Mr. Banerjee tried to impress upon us that we should, on the basis of the affidavits of the parties, decide such question. In other words, Mr. Banerjee contends that it would appear from the documents of the respondent that the appellant was not at all a defaulter.

9. Mr. Bhattacharya, the learned advocate appearing on behalf of the Bank, has opposed the aforesaid contention of Mr. Banerjee and has contended that on the basis of the allegations made against the Co-operative Bank, the writ application itself was not at all maintainable as a Co-operative Bank within the meaning of the West Bengal Co-operative Societies Act was not a "State" within the meaning of Article 12 of the Constitution of India. Mr. Bhattacharya submits that if there was any dispute as regards repayment of the loan, such dispute ought to have been referred to the Registrar of the Co-operative Societies in terms of Section 95 of the Act and, therefore, there was no justification of going into such disputed question in the writ-application.

10. In support of the contention, the Co-operative Bank was not a "State" within the meaning of Article 12 of the Constitution of India, Mr. Bhattacharya has relied upon the following decisions:

1. S.S. Rana vs. Registrar, Co-operative Societies & another reported in (2006) 11 SCC 634;

2. P.K. Biswas vs. Indian Institute of Chemical Biology & others reported in (2002) 5 SCC 111;

3. Bhabank Adhikari vs. West Bengal State Co-operative Bank Ltd. & others reported in (2009) 1 CHN 573.

11. Mr. Banerjee, the learned senior advocate appearing on behalf of the appellant, however, has opposed the aforesaid preliminary objection of Mr. Bhattacharya and has strongly relied upon the decision of the Supreme Court in the case of Gayatri De vs. Mousumi Cooperative Housing Society Ltd. & others reported in (2004) 5 SCC 90.

12. Therefore, the question that arises for determination in this appeal is whether the learned Single Judge was justified in refusing to enter into the merit of the dispute as regards the repayment of loan in the application under Article 226 of the Constitution of India.

13. As pointed out by the Supreme Court in the case of Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology reported in (2002) 5 SCC 111, in deciding a question as to whether a non-statutory society would come within the definition of a "State" within the meaning of Article 12 of the Constitution of India, the following six tests as laid down by the Apex Court in the case of Ajay Hasia vs. Khalid Mujib Sehravardi (1981 (1) SCC 722) must be satisfied:

"(1) If the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor as to whether the corporation enjoys monopoly status which is State-conferred or State-protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

14. In the case before us, none of the aforesaid six conditions is satisfied in case of a Co-operative Bank constituted under the provision of the West Bengal Co-operative Societies Act. It is also a settled law that the general regulation under a Statute like Companies Act or the Co-operative Societies Act would not render the activities of a company or a society as subject to control of the State.

15. Such control in terms of the provision of the Act are meant to ensure proper functioning of the society and the State or the statutory authority would have nothing to do with its day-to-day function.

16. Therefore, we accept the contention of Mr. Bhattacharya, the learned advocate appearing on behalf of the respondents, that the Co-operative Bank in question by itself cannot be said to be a "State" within the meaning of Article 12 of the Constitution of India.

17. Even if a society is not a "State" for not complying with the tests laid down in the case of Ajay Hasia vs. Khalid Mujib Sehravardi (supra), if any such society is duty bound to carry out any statutory obligation mandated under a particular Statute and if a person, affected by such non-compliance of the statutory obligations, approaches a Writ-Court, such Court can pass appropriate direction in exercise of its power under Article 226 of the Constitution of India for performance of the statutory obligation if it appears to the Court that for such non-performance, any of the legal rights of the writ-petitioner is infringed. For instance, a licensee under the Electricity Act is not a "State" by itself for all purposes but if while acting as a licensee, it fails to comply with any of the statutory provisions under the Electricity Act thereby causing injustice to any of the consumers of electricity, such consumer can approach a High Court for a direction upon the licensee not to deviate from the statutory obligations.

18. In the case before us, there is no allegation of non-performance of a statutory duty at the instance of the Co-operative Bank in question but the dispute involved in the writ-application is as regards the amount of money payable by the writ-petitioner towards the Bank in course of repayment of a loan transaction.

19. The Statute itself, namely, the West Bengal Co-operative Societies Act, has prescribed the specific provision for resolving such dispute by way of arbitration through the Registrar of the Co-operative Society and such decision, is also subject to the provision of appeal prescribed under the Act.

20. In such circumstances, in our view, the learned Single Judge rightly decided not to entertain the writ-application as there was no inaction or illegal action on the part of the Co-operative Bank in performing any statutory duty and the dispute involved in the writ-application is merely a disputed question of fact as to the amount paid by the appellant in course of transaction with the Bank.

21. In this connection, we may aptly refer to a decision of the Supreme Court in the case of State of U.P. and others vs. Bridge and Roof Co. (India) Ltd reported in AIR 1996 SC 3515, where the Apex Court while dealing with a dispute arising out of a non-statutory contract even with a government made the following observations:

"15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e. in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D (1).

16. ***Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act, or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a Contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for Civil Court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ***

petition, viz., to restrain the Government from deducting particular amount from the writ petitioners' bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

17. Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of subclause (4) of Clause 70 of the Contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator or the Civil Court, as the case may be. If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the Civil Court, as the case may be, according to law. Similarly if the government says that any over-payment has been made to the respondent, its remedy also is the same.

18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of Mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. [See the decision of this Court in Assistant Excise Commissioner v. Isaac Peter (1994 4 SCC 104: (1994 AIR SCW 2616), where the law on the subject has been discussed fully.] The writ petition ought to have been dismissed on this ground alone.

19. We must mention in this behalf that the order of composition of tax liability, if any, under Section 7-D of the Act has not been placed before us. [We presume that it is an order separate from the order dated May 27, 1992. But, even if it is not, it makes no difference to what we were saying hereafter.] Whether such composition agreement results in reduction of tax

liability within the meaning of Clause 70 (4) of the Contract is again a matter concerning the interpretation of a term of the Contract. Accordingly, the question to whom the benefit of reduction in tax should go is not a matter for a writ petition, for the very same reasons as are mentioned hereinbefore.

20. Now coming to the order made by the Deputy Commissioner under the proviso to Section 8-D (1) of the Act, all that it says is that the Government shall deduct tax at source only at the rate of one per cent instead of at the rate of 4 per cent. The said order, having been made under the statute, relieves the government of its obligation to deduct at source at the rate of 4 per cent. In other words, by virtue of the said order, no action can be taken against the government [appellants] for not deducting at the rate of 4 per cent under Section 8-D. Learned counsel for the respondent contend that the order under the proviso to Section 8-D(1) does not determine the tax liability of the respondent, which liability, they say, will be determined only in the assessment proceedings. May be they are right or may be, not. We need not express any opinion on these submissions because, as already pointed out hereinabove, the said question depends upon the interpretation of the terms of the contract between the parties. Just because the interpretation of orders made under Section 7-D or Section 8-D(1) may also fall for consideration while construing the terms of the contract does not convert the controversy into a public law issue. It is yet a matter within the realm of private law and, therefore, outside the purview of the writ petition. The arbitrator under the contract or the Civil Court, as the case may be - can go into and decide both questions of fact as well as questions of law.

21. ***There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration***

[Clause 67 of the Contract]. The Arbitrators can decide both questions of fact as well as question of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the Court to decline to exercise its extraordinary jurisdiction under Article 226. The said Article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons mentioned supra."

(Emphasis supplied by us).

22. The case of Gayatri De vs. Mousumi Co-operative Housing Society Ltd. reported in (2004) 5 SCC 90, strongly relied upon by Mr. Banerjee, the learned senior advocate appearing on behalf of the writ-petitioner, in our view, cannot help the writ-petitioner in anyway. In the said case, the Co-operative Society was under the control of a Special Officer who was appointed by the High Court under the provision of the Act. The said Special Officer by the order impugned in the writ-application allotted a flat to a stranger even after he had received the letter regarding the transfer of ownership in favour of the legal heirs in December, 1986, long before such alleged re-allotment, without giving any opportunity of being heard and without deciding the question as to who was entitled to the said flat in

accordance with law. In such circumstances, the Supreme Court accepted the contention that the appropriate remedy of reallotment can be availed of by filing a writ-application as the Special Officer did not comply with the specific provision contained in the Act as regards the devolution of ownership of a flat in favour of the legal heirs.

23. In view of what have been stated above, we find substance in the preliminary objection raised by Mr. Bhattacharya that the learned Single Judge was quite justified in not entertaining the question as to whether any amount is still payable by the writ-petitioner to the Bank.

24. The appeal is, thus, devoid of any substance and is dismissed accordingly. We make it clear that we have not gone into the merit of the dispute and the dismissal of the writ-application will not stand in the way of the writ petitioner in seeking appropriate relief before the appropriate forum in accordance with law.

25. In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

(Prasenjit Mandal, J.)