

(1990) 08 CAL CK 0059
In the Calcutta High Court
Case No : Civil Order No. 9523 (W) of 1989

Arjed Ali Gazi

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 27-08-1990

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (1991) 1 CALLT 211 : 94 CWN 1057 : (1994) 2 ILR (Cal) 133

Hon'ble Judges : Sachi Kanta Hazari, J; Ganendra Narayan Ray, J

Bench : Division Bench

Advocate : Dhruba Kumar Mukherjee, for the Appellant; Milan Bhattacharyya, for the Respondent

Final Decision : Allowed

Judgement

Ganendra Narayan Ray, J.—This writ petition is directed against an order of the Secretary, Dakshin Barasat Service Co-operative Society (hereinafter referred to as the Society) dismissing the service of the writ petitioner, Sri Arjed Ali Gazi, who was an employee of the Society. Mr. Justice Monoranjan Mallick has noted that there are conflicting decisions of Single Bench of this Court on the question of maintainability of a writ petition against a Co-operative Society. As the said question is important and is often involved in other writ petitions, the learned Judge felt that the matter should be considered by a Division Bench. In view of such observation by the Single Bench, this matter has been assigned to this Division Bench by the Hon'ble the Chief Justice. The short facts relating to the order of dismissal may be stated hereunder. Sri Arjed Ali Gazi was an employee of the Society, which is a primary Co-operative Society governed by the West Bengal Co-operative Societies Act. It was alleged against Sri Gazi that he had not accounted for six bags of cement which were sold by him on behalf of the Society. On an enquiry made, it was revealed that there was shortage of fifty bags of cement. It was tentatively proposed to dismiss him from service. Sri Gazi made a representation in writing to the Governing Body of the Society not to

impose the extreme penalty of dismissal from service so that he would not starve with the members of his family in those hard days. He had admitted that out of want, he had misappropriated the sale proceeds of six bags of cement. Although different persons had dealt with cement from time to time and he was not accountable for the total loss of 50 bags of cement, he had agreed to deposit the price of 50 bags of cement with the Society by instalments. It is an admitted position that the Governing Body had considered the said representation and had adopted a resolution on 17.4.1988 that extreme penalty of dismissal from service should not be passed for lapses for the first time. He was directed to deposit the price of the said fifty bags of cement and was demoted as a Sub-staff from the clerical post. According to Sri Gazi, such decision was implemented and he had to accept the position of a Sub-staff of the Society. In spite of the said resolution of the Governing Body, a fresh enquiry was made by the Society and the enquiry committee consisted of three members of the Society which held that charge of misappropriation of six bags of cement was established and the Secretary passed the impugned order of dismissal from service on the basis of such ex parte enquiry without giving Sri Gazi any hearing. Against such order of dismissal from service, the writ petition has been moved by Sri Gazi challenging the legality and validity of the order of dismissal. It has been contended, inter alia, that the Governing Body of the Society had already resolved that for the loss of cement, no order of dismissal should be passed against Sri Gazi but he would compensate the loss and suffer the said punishment of demotion and such decision of the Governing Body having been implemented, there was no further scope to cause any enquiry about his complicity in the matter of dealing with cement and/or take any action pursuant to such ex parte enquiry. It has been alleged, inter alia, that under Clause 15 of Rule 108 of the West Bengal Co-operative Societies Rules, 1987, the Governing Body of the Society was the appropriate punishing authority and the General Body of the Society was the appellate authority. The appropriate punishing authority having imposed the said penalty of reversion and fine and no appeal having been preferred against such penalty before the Governing Body, the said penalty had become final and any further enquiry and consequential penalty as purported to have been passed against Sri Gazi were wholly illegal and without jurisdiction. In any event, the said enquiry having been held ex parte behind the back of Sri Gazi and the impugned order having been passed without giving any opportunity of being heard to Sri Gazi, such enquiry and the impugned order of dismissal were illegal and invalid. The facts as alleged by Sri Gazi that for the loss of said cement, the Governing Body had resolved for punishment of reversion and fine and such penalty had been implemented and thereafter an ex parte enquiry was made by a committee and on the recommendation of the committee holding him guilty for misappropriation of six bags of cement, an ex parte order of dismissal was passed by the Secretary of the Society appear to be correct. In the aforesaid facts and circumstances of the case, the impugned order of dismissal cannot be sustained. But a preliminary objection has been raised by the Respondents that no writ lies against the Co-operative Society in the matter of the impugned order

of dismissal of an employee of the Society and as such, the Writ Court cannot look into the merits of the case and/or to pass any order on the writ petition.

2. Mr. Milan Bhattacharya, appearing for the State of West Bengal and the Registrar of Co-operative Societies, West Bengal has contended that the Co-operative Society is formed by the initiation of the members of the Society. For such formation, no aid of a statute is necessary. The State Legislature in its anxiety to ensure that Co-operative Societies formed by private individuals function in a desired manner has enacted the West Bengal Co-operative Societies Act. By such Act, Registrar of Co-operative Societies, West Bengal and its officers have been empowered to oversee the activities of the Co-operative Societies and to entertain certain types of complaints about the irregular functioning of the Co-operative Societies and to take appropriate remedial measures prescribed in the said Act. He has submitted that the Registrar and other Sub-ordinate officers under him have been vested with statutory rights and duties in the matter of exercise of supervision of the affairs of the Co-operative Societies and for inaction or improper or illegal action of the Registrar and other Government officials, a prayer for appropriate writ and/or direction against the Registrar or other Government officials entrusted with statutory duties and responsibilities, may be made and the Courts have entertained such writ petitions for issuing writs or orders on such statutory authority. But the Society is not a statutory body nor an instrumentality of the Government and as such, "State" within the meaning of Article 12 of the Constitution. It is a private body and its dealing with its employees cannot be the subject matter for action in the constitutional writ jurisdiction under Article 226 of the Constitution.

3. Mr. Bhattacharya has contended that subject to the provisions of the Co-operative Societies Act, a Co-operative Society is governed by the Bye-laws framed by the Society. The terms and conditions of the service of an employee of the Co-operative Society emanate from the service contract between the employee and the Society and bye-laws, if any, framed by the Society in that regard. Such private contract and bye-laws have no statutory force and for breach of such terms of contract or bye-laws, the writ jurisdiction of High Court cannot be availed. Mr. Bhattacharya has submitted that this Court and other High Courts and also the Supreme Court have held that a Co-operative Society is not a statutory body and a State within the meaning of Article 12. He has submitted that law is well settled that for enforcement of a private right against a private body, no writ is maintainable." Mr. Bhattacharya has referred to the decision of a Single Bench of this Court made on 22.6.1989 in C.O. 13015(W) of 1987 (Asis Kumar Sen v. State of West Bengal and Ors.). In the said case, an alleged arbitrary and/or improper selection of a person in preference to the writ petitioner by a Co- operative Society was sought to be challenged. It has been held that no writ lies against the Co-operative Society.

4. In another writ proceeding being C.R. No. 3757(W) of 1985 disposed of on 8.12.1986, a Single Bench of this Court did not entertain a writ petition

challenging the settlement of fishery by a Co-operative Society on the ground that no writ lies against a Co-operative Society. Mr. Bhattacharya has contended that a Co-operative Society is not a statutory body or a statutory Corporation because it is not created by a statute. It is a body created by the act of group of individuals. In support of such contention, Mr. Bhattacharya has referred to the decision of the Supreme Court in *S.S. Dhanoa Vs. Municipal Corporation, Delhi and Others*, , and *The Nayagarh Co-operative Central Bank Ltd. and Another Vs. Narayan Rath and Another*, . It has been held that Co-operative Society is not formed under a Statute but it is formed by the private initiation of individuals. It may, however, be noted here that in *Nayagarh Co-operative Central Bank's* case, the question for consideration was as to whether or not the Registrar of Co-operative Societies being present in the meeting wherein a resolution for appointment of Sri Rath was adopted was precluded from raising any dispute that he had not given any approval to "the said appointment. It does not appear that the question as to whether or not a writ lies against a Co-operative Society was gone into, Mr. Bhattacharya has referred to another Single Bench decision of this Court in *Mukkuruddin Ahmed v. Midnapore Co-operative Land Development Bank Ltd.*, reported in 1988(1) CHN. It has been held that Co-operative Society not being "State" within the meaning of Article 12 of the Constitution, no writ lies against the Co-operative Society. In the said case, the deed writers appointed by the Co-operative Bank contended that in view of certain Government circulars, they were entitled to be treated as regular employees. Mr. Bhattacharya has also referred to a Full Bench decision of Kerala High Court in *P. Bhaskaran v. Additional Secretary, Agricultural {Co-operative} Department*. It has been held that the Co-operative Societies are not created by any statute and as such, they were not statutory bodies. Hence, no writ lies against the Co-operative Societies. He has also referred to a Full Bench decision of Punjab and Haryana High Court reported in *Ajmer Singh Vs. The Registrar, Co-operative Societies, Punjab, Chandigarh and Others*, . It has been held in the said decision that Co-operative Society is not a State within the meaning of Article 12 of the Constitution. Hence, a Co-operative Society is not amenable to writ jurisdiction. Mr. Bhattacharya has also referred to a Full Bench decision of Orissa High Court in *Banabihari Tripathy Vs. Registrar of Co-operative Societies and Another*, . In that case, an employee of Khurda Co-operative Central Bank challenged the order of dismissal by the Co-operative Bank. It was held that Co-operative Society not being State within the meaning of Article 12, the Bank was not amenable to writ jurisdiction. Mr. Bhattacharya has also referred to the Full Bench decision of the Andhra Pradesh High Court in *Sri Konaseema Co-operative Central Bank Ltd. v. N. Seetharaman* reported in AIR 1990 A.P. 71. It has been held that merely because Article 13(3) of the Constitution includes. Bye-laws within the definition of law, the bye-laws made by the said Co-operative Bank in accordance with Andhra Pradesh Co-operative Societies Act has no force of law. It has also been held that the function of a Co-operative Society is to raise funds for financial gain of its members. Functions of the said Co-operative Bank were not of public importance and closely related to governmental functions. Such Co-

operative Bank cannot be characterised as State within the meaning of Article 12. It has also been held that contractual obligation which is not statutory cannot be enforced by way of writ petition. Termination of service of the employee of the Co-operative Society having contractual obligation cannot be challenged in writ jurisdiction. It has, however, been held that in an appropriate case, Court will interfere under Article 226 if the violation of a statutory public duty is established. It has also been held that writs in the nature of Mandamus prohibition and certiorari are public law remedies. They are not available to enforce private law rights. Mr. Bhattacharya has also referred to a decision of the Karnataka High Court in Smt. Bharathi and others Vs. The Registrar of Co-operative Societies, Bangalore and others, . It has been held that a Co-operative Society is not a State and the Society is not amenable to writ jurisdiction in the matter of its relation with its members. Mr. Bhattacharya has submitted that the conditions of service of an employee of the Co-operative Societies basically flows from the contract of service between the parties and even if such service in the absence of terms of contract and bye-laws framed by the Co-operative Society is governed by the model rules indicate the Co-operative Societies Rules, the nature of right involved in such employment remains private right and as such, for enforcing such private right against a Co-operative Society no writ can lie. He has submitted that the writ petition, therefore, should be dismissed. Mr. Moitra, the learned Counsel appearing for the Co-operative Society has also adopted the arguments of Sri Bhattacharya and has submitted that the matter was raised in a general body meeting and thereafter further enquiry was held by a committee of three members and as the committee held that the charge of misappropriation of six bags of cement was established, it was found that no trust could be reposed on a dishonest employee and as such, the order of dismissal was passed. He has submitted that the decision of the Governing Body for a penalty of fine and reversion was a tentative decision subject to approval by the General Body of the Society. Hence, in merits also there is no scope for interference. In this connection, Mr. Moitra has referred to the decision of Supreme Court in Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others, . It has been held that rights and obligations of an employee of a private institutions are governed by the terms of contract between the parties. When under such terms, principal's service was terminated wrongly, a decree for damage and not an order of reinstatement will lie. Mr. Mukherjee, the learned Counsel appearing for the writ petitioner has, however, contended that if a reference is made to the provisions of the West Bengal Co-operative Societies Act, it will be amply revealed that the Legislature has intended for a deep and pervasive control on the Co-operative Societies. Starting from its formation, at each step, its functioning has been controlled by the statutory provisions of the Act. A Co-operative Society in West Bengal may be formed by the initiation of private individuals with their private capital but the Legislature in its wisdom and in its anxiety to effect deep and pervasive control by the State Government through the Registrar of Co-operative Societies and its Sub-ordinate Officers, have made various provisions in the Act by which the functioning of Co-operative Societies have been fully controlled. In

the decisions relied on by Mr. Bhattacharya, such question has not been gone into. Mr. Mukherjee has referred to the provisions of Rule 108 of the West Bengal Co-operative Societies Rules, 1987. Such Rules have been framed in exercise of the power to frame rules under the Co-operative Societies Act. It has been provided in Rule 108 that conditions of service of the employees of Co-operative Societies shall subject to the terms of specific contract enforceable by law and the provisions of any law for the time being in force, be as enunciated in the Appendix to this Rule. Paragraph 13 of the Appendix deals with conduct and discipline of an employee of the Co-operative Society, Paragraph 14 deals with misconduct and disciplinary action and theft, fraud and misappropriation have been defined as misconduct. Paragraph 15 provides that the Governing Body or the Board of Directors of a Co-operative Society shall be appointing and disciplinary authority and General Body of members shall be the appellate authority. Mr. Mukherjee has contended that no terms of contract or bye-laws of Society have been produced before this Court for ascertaining the terms of contract of service. Hence, the Court should proceed on the footing that so far as Sri Gazi is concerned, his terms of service are not controlled by any specific contract of service or bye-laws framed by the Society. Hence, the conditions of service are controlled by the statutory rules namely Rule 108 of the West Bengal Co-operative Societies Rules 1987. Under such rules, the Governing Body is the disciplinary authority and admittedly such Governing Body had resolved to impose penalty of fine and demotion to Sri Gazi and such penalty was implemented in action. There being no appeal before the General Body of members of the Society, there was no occasion for such General Body being the appellate authority to further consider the case of misconduct and/or punishment and/or to direct for any enquiry. Accordingly, the purported enquiry and punishment on the basis of such enquiry as alleged by the Society were par so illegal and contrary to the said statutory provisions. In any event, ex parte enquiry and imposition of the impugned punishment without giving any opportunity of being heard to Sri Gazi are wholly illegal and invalid even if such enquiry and consequential action are permissible in law.

5. Mr. Mukherjee has contended that in view of deep and pervasive control exercised over the Co-operative Societies under the provisions of the West Bengal Co-operative Societies Act, the Co-operative Societies in West Bengal have assumed a distinctive status and they should be held a "State" within the meaning of Article 12 of the Constitution. Mr. Mukherjee has also contended that even if it is assumed that the Society is not State but a private organization, the Society being governed by the said statutory rules in the matter of discipline and service conditions of its employees including. Sri Gazi, for violation of statutory duties, a writ petition against the Society is maintainable. Referring to a Single Bench decision of this Court in Kalpana Bishi v. State of West Bengal, Mr. Mukherjee has submitted that although Victoria Institution, a College was held to be private College and not a "State", it was held in the said decision that for violation of the provisions of West Bengal College Teachers (Security and

Service) Act, 1975 a writ will lie against the College authorities. Mr. Mukherjee has referred to the decision of the Supreme Court in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, , wherein it has been held by the Supreme Court that in case of a statutory body there is no personal element whatsoever because of the impersonal character of the statutory body. Mr. Mukherjee has submitted that although by the contribution and initiation of the members of a Co-operative Society is formed, such Co-operative Society when formed also assumes impersonal character and there is always a public element in the functioning of a Co-operative Society. Hence, against improper discharge of public functioning including the matter relating to its employees, a writ petition is maintainable against a Co-operative Society. Mr. Mukherjee has referred to various decisions of the Supreme Court wherein the relevant factors relating to the instrumentality of State have been taken into consideration but as we do not think that for the purpose of disposal of this case, such decisions are required to be referred to in details, we have not mentioned the same. He has also submitted that even if the Society is held a private body for violation of the said statutory rules in the matter of disciplinary action against Sri Gazi, a writ petition is maintainable. Mr. Mukherjee has also contended that powers to issue writs and orders and directions under Article 226 are very wide. Such writ may be issued not only for enforcing fundamental rights but also for enforcing a legal right. If an authority has to discharge a function in accordance with the statutory provision, for failure to discharge such function or irregular exercise of power as envisaged in such statutory provisions, such person even though not a statutory functionary will be amenable to writ jurisdiction. He has submitted that precisely for the said reason, the School and College authorities, though otherwise authorities of private institutions, have been made amenable to writ jurisdiction whenever violation of statutory duties and obligations of such authorities has been established. Mr. Mukherjee has referred to a recent decision of the Supreme Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, . It has been held in the said decision that power to issue writ under Article 226 is not confined to statutory authorities and instrumentalities of State. Such writ can also be issued to any other person or authority performing public duty. Such duty need not be imposed by statute. It has been held by the Supreme Court that the term "authority" under Article 226 must receive a liberal construction unlike "State" under Article 12. Mr. Mukherjee has, therefore, submitted it is immaterial if the Society is an instrumentality of the State or not. When the authorities of the Society in their dealings with the employees of the Society are vested with statutory duties and obligations for a breach of such statutory duties and obligations a writ petition is maintainable, Mr. Mukherjee has submitted that in none of the decisions relied on by the Respondents this aspect was considered presumably because there was no case of violation of statutory rights and obligations. Hence, the said decisions cannot be held to be decisions on the

question of law involved in this matter.

6. After considering the respective contentions of the learned Counsels appearing for the parties and giving our anxious thought to the facts and circumstances of the case, it appears to us that having accepted the prayer of the writ petitioner, the Governing Body had already imposed a penalty of fine and reversion. Therefore, there was no occasion to take further step to cause enquiry on an admitted position and to pass an order of dismissal. In any event, such enquiry having been made ex parte and behind the back of Sri Gazi and punishment having been passed ex parte without giving Sri Gazi an opportunity of being heard, there has been violation of the basic principles of natural justice. In such circumstances, there is hardly any impediment in quashing the impugned order of dismissal. But the difficulty lies in deciding the question about maintainability of the writ petition for issuing any writ or direction against the impugned order of dismissal. A Co-operative Society is formed by the private initiations of its members and despite the anxiety of the State Legislature to ensure functioning of a Co-operative Society in a deserted manner and making various provisions in the West Bengal Co-operative Societies Act and the Rules framed thereunder to exercise controls in the functioning of the Co-operative Society by the Registrar of Co-operative Societies and other officers of the State Government, a Co-operative Society is not a statutory body or an instrumentality of the State. The decisions made by various High Courts and also the Supreme Court on this question referred to hereinbefore are quite specific. Ordinarily a writ does not lie against a private body but the position will be entirely different if such private body is vested with statutory duties and functions. For inaction relating to such statutory duties or improper action contrary to the statutory provisions such private body becomes amenable to writ jurisdiction. In this connection, reference may be made to a Full Bench decision of Andhra Pradesh High Court reported in AIR 1974 AP 35. It has been held that High Court has powers to issue writ of certiorari even against a private body if it is vested with statutory powers affecting rights of citizens. In a case reported in AIR 1958 Bom 489, it was held by the Bombay High Court that for the failure to perform duties under the Electricity Act or for restraining it from abusing the powers under the said Act, at the instance of a consumer, a writ may be issued to a public utility concern. Following the said decision this Court in the case of Dr. Sudhir Chandra Neogy Vs. Calcutta Tramways Co. Ltd., has held that writ would lie against Tramways Company, a public limited Company incorporated under the Companies Act for violation of any provisions of law for which there is no adequate remedy. In Francis John Vs. Director of Education and Others, , the Supreme Court had held that in case of termination of service of a Head Master of a private School, which receives aid from Government under the Grant in aid code, a writ will lie. It has been held that the School, though a private body cannot escape from the consequences flowing from the breach of the Code particularly when the Director of the Education, an instrumentality of the State, has participated in the decision making process relating to the, order of termination of service of the Head

Master. In the decision made in Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, , it has been indicated by the Supreme Court that for enforcing a personal contract of employment, as a general rule, writ cannot be enforced but where the conditions of service are controlled by statutory rules and regulations, for breach of such rules and regulations, appropriate writ may be issued. In a very recent decision of the Supreme Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, , it has been held by the Supreme Court that "the form of the body concerned is not very much relevant. What is relevant is the nature of duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party". The term "authority" used in Article 226 in this context must receive a liberal meaning unlike the term "State" in Article 12. It has also been held that "Mandamus is a wide remedy which must be easily available to reach injustice wherever it is found. Technicalities should not come in the way of granting that relief under Article 226".

7. It appears to us that in the instant case, the conditions of service of Sri Gazi as an employee of the Society have not been controlled by terms of contract but in the absence of terms of contract for service, such conditions have been left to be controlled by the said Rule 108 which is undoubtedly a statutory rule. The Society has, therefore, an obligation to comply with the said statutory rule in the matter of discipline relating to the employment of Sri Gazi. When a duty flows from the statutory rule in the matter of employment, although such employment may be at the inception a product of private contract between the parties, in the matter of regulation of the condition of service of such employment a duty of a public nature comes into operation. Accordingly, for breach of such obligation under statutory rules, a writ petition for appropriate writs and/or directions are maintainable. In view of the special facts involved in this case, the decisions relied on by Mr. Bhattacharya and Mr. Moitra are not applicable. It, however, must be made clear that Co-operative Society in West Bengal is not a "State" within the meaning of Article 12 and is also not a public undertaking. It is essentially a private body formed at the initiations of private individuals. Hence, if the conditions of service of an employee of the Co-operative Society are not left to be controlled by the said statutory rules but are controlled by the terms of contract of service or bye-laws of the Society which is not a statutory rule, no writ will lie for enforcing any breach of the terms of employment of the employee of the Co-operative Society.

8. As in the instant case, it could not be established that the conditions of service of Sri Gazi were controlled by the terms of contract between the parties but it appears that the same have been left to be controlled by the aforesaid statutory rules, in our view the instant writ petition is maintainable. We have indicated that in the facts of the case, the impugned order of dismissal was illegal and made in violation of the principles of natural justice and also not in accordance with the provisions relating to disciplinary action as contained under the said Rule 108.

The impugned order, therefore, cannot be sustained. We, therefore, allow this writ petition and quash the impugned order of dismissal passed by the Society against Sri Gazi. Sri Gazi must be deemed to be in service and continue in such service in terms of the resolution of the Governing Body of the Society held in the meeting dated 17.4.1988 and should be paid all arrear salaries and employments as may be admissible to him as an employee of the Society if the order of dismissal had not been passed against him. Let such arrear salaries etc., if any, be paid to Sri Gazi within two months from today. There will be no order as to costs in this petition.

S.K. Hazari, J.

9. I agree.