(1994) 11 PAT CK 0017

In the Patna High Court

Case No : C.W.J.C. No. 9328 of 1993

Bharat Tripathy — APPELLANT

Vs

District Co-Operative Officer-Cum-Certificate Officer and Others
 Bindesh Kumar Singh Vs The State of Bihar and Others — RESPONDENT

Date of Decision : 18-11-1994

Acts Referred:

Citation : (1994) 11 PAT CK 0017

Final Decision : Dismissed

Judgement

S.N. Jha, J.—These three writ petitions arising out of a common proceeding under the Bihar Public Demands Recovery Act, 1914 ("the Public Demands Act" in short) have been heard together and are disposed of by this common order.

2. The petitioners have challenged the maintainability of the impugned proceeding which has been levied for recovery of sum of Rs. 1,17,17,903 said to be due to Shri Ram Nagari Sahkari Grih Nirman Samiti Ltd. (''the Society'' in short). They also seek quashing of the order passed in the said proceeding directing recovery of the dues from their assets by auction sale. The petitioner in C.W.J.C. No. 9328 of 1993 Bindesh Kumar Singh is an Advocate by profession. He, however, figures as certificate-debtor not as an advocate or legal Advisor to the Society, as claimed by him, rather as the person who executed the sale deeds in favour of the members on behalf of the Secretary of the Society, received the consideration money but allegedly misappropriated the same. The petitioner in C.W.J.C. No. 9445 of 1993 Ramesh Bhagat was an employee of the society while the petitioner in C.W. J.C. No. 10569 of 1993 Bharat Tripathy was its member-Secretary. They have been arrayed as certificate-debtors for having misappropriated more than one crore of rupees of consideration money which they had received from the members of the Society for sale of plots of land to them. A number of point have been raised in support of the writ petitions. I shall first take up the point which is common to all the three cases.

3. The Public Demands Act has been enacted for recovery of ''public demand which is defined u/s 3(6) of the Act to mean "any arrear of money mentioned or referred to in Schedule I...". In terms of Entry 3 and Entry 4 of the Schedule, amongst others, any money which is declared by any law for the time being in force to be recoverable or realisable as arrear of revenue or land revenue and any money which is declared by any enactment for the time being in force to be a demand or a public demand or to be recoverable as demand or public demand are deemed to be ''public demand'' within the meaning of Section 3(6). Section 52 of the Bihar Co-operative Societies Act, 1935 (in short ''the Co-operative Act'') provides for recovery of certain types of money payable by any person or by any registered society as public demand or as arrear of land revenue in the State of Bihar it is not in dispute that any money falling within the ambit of Section 52 is recoverable as a public demand under the Public Demands Act. The point urged on behalf of the petitioners, however, is that in terms of the said section only the Registrar, Co-operative Societies. Bihar, or the person authorised by him in that behalf is competent to send the requisition to the Certificate Officer for recovery of the dues. Since in the instant case the requisition was sent by the Administrator of the society without any authorisation by the Registrar in that behalf, the certificate and the resultant proceeding are illegal and without jurisdiction.

4. As the dispute involves interpretion of Section 52 of the Co-operative Act it would be proper to quote its provisions in extenso at the very out set.

52. Recovery of sums due. Any sum payable by any person or by any registered society

(a) as fees for an audit held u/s 33.

(b) in accordance with an order of the Registrar u/s 39 apportioning the costs of an inquiry or inspections.

(c) in accordance with an order passed u/s 40.

(d) in accordance with an order of the Registrar or of a liquidator passed u/s 44, or

(e) in accordance with an order decision or award passed or made u/s 48.

(f) As an amount due from member, past member or the nominee, heirs or legal representative of the deceased member, of a primary co-operative society, shall be recoverable, as a public demand in any area, in which the Bihar and Orissa Public Demands Recovery Act, 1914 (B. and 0. Act 4 of 1914), is in force or as an arrear of land revenue throughout the whole of the State and the Registrar or other person authorised by him in this behalf, shall be deemed to be the person to whom such public demand is due or to whom such arrear of land revenue is payable.

The question for consideration is whether the Administrator of the society without any authorisation by the Registrar was competent to send the requisition.

5. Public Demands or the certificate dues, broadly speaking, are of two types; one payable to the Collector and the other payable to any person other than the Collector. If the money is payable to the Collector the Certificate Officer may himself sign the certificate in the prescribed form and proceed in the matter. If, however, the money is payable to any person other than the Collector, that person is required to send written requisition to the Certificate Officer in the prescribed form. The above provisions are contained in Sections 4 and 5 of the Public Demands Act. In the instant case money admittedly is payable to a person other than the Collector, namely, a registered cooperative society, and there four his requisition was required to be sent u/s 5. Rule 71 of the Bihar Co-operative Societies Rules, 1959, in fact, expressly provides so.

It would be useful to notice the relevant part of Section 5 of the Public Demands Act at this stage:

5. Requisition for certificate in other cases.(1) When any public demand payable to any person other than the Collector is due such person may send to the Certificate Officer a written requisition in the prescribed form:

Provided that in the case of an order framed by a liquidator under the Cooperative Societies Act, 1912 (2 of 1912) the written requisition will be sent by the Registrar of Co-operative Societies, Bihar and Orissa.

6. According to the petitioners, since in terms of the provisions of Section 52 of the Co-operative Act the Registrar or other person authorised by him in that behalf is deemed to be the person to home the money is due and payable, it is he alone, that is to say the Registrar or the person authorised by him in that behalf alone, who was competent to send the requisition. At the first instance the argument does appear to find support from the language of Section 5. Mr. Ram Balak Mahto, learned Counsel appearing for the Administrator, however, submitted that Section 52 of the Co-operative Act merely vests the Registrar (or the person authorised by him) with the legal competence to send requisition by creating legal fiction in his favour as the person to whom the money is deemed to be due and payable. Counsel submitted that factually the money is due to the society and, therefore, it would be preposterous to hold that the society through its office bearers was/is not competent to take the steps for recovery of money by taking recourse to certificate proceeding. It was submitted that the object of a deeming provision or legal fiction creating an artificial personality or conferring a deemed authority upon the person must be interpreted as enlarging the scope of the authority rather than restricting it. It was pointed out that if the Registrar or the person authorised by him in that behalf is held to be the only person competent to send requisition that would amount to excluding the person i.e. the society which otherwise is entitled to receive the money and to take steps for its recovery in whatever manner it takes. Counsel submitted that the object underlying the legal fiction was obviously to enlarge the authority in regard to

sending of requisition for recovery of dues through certificate proceeding so as to vest the Registrar of the Cooperative Societies (or any person authorised by him) the authority in addition to authority of the person who in the normal or natural course of things is entitled to do so, so that the money due to the society may not lapse on account of the conduct of an unscrupulous office-bearer of the Managing Committee of the Society. I find force in the submissions of Mr. Mahto.

7. In interpreting a deeming provision creating legal fiction the Court is required to ascertain the purpose for which the fiction has been created and after ascertaining the same, to assume the facts and consequences which are incidental or inevitable corolary to the fiction. In the words of S. R. Das. J., "When a legal fiction is created, one is led to ask at once "for what purpose it is so created." (State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others,). It is well settled that where the statute enacts that something be deemed to exist or some status be deemed to have been acquired which would not otherwise have been so, full effect must be given to the fiction but not so as to extend it beyond the purpose for which it is created. As was observed by the Apex Court in the well-known case of The Bengal Immunity Company Limited Vs. The State of Bihar and Others, , Legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond that legitimate field. The purpose underlying the legal fiction appears to be to provide for an alternative so that if the office-bearers of the managing committee or the Administrator of the Society does not act, the Registrar or the person authorised by him may take the necessary steps and the interest of the society and its members is protected. There is nothing is Section 52 to suggest that the legal fiction creating authority in the Registrar (or the person authorised by him) as the person to whom the money is due and payable extends upto extinguishment of the authority of the person, who as a matter of fact and reality and in the natural course of things is possessed of it. That may amount to extending the fiction by importing another fiction. (See Commissioner of Income Tax (Central), Calcutta Vs. Moon Mills Ltd., . If the object was not to divest the authority or the interest which was possessed by the Managing Committee on behalf of the society, it would be preposterous to hold that the authority created in Registrar or the person authorised by him is exclusive and supersedes the authority of the Managing Committee or the Administrator of the society. That interpretation would also result in an anomalous situation. While the society through its Managing committee may take steps for recovery of the money by filing a suit in the civil court, it cannot do so if it decides to recover the money by instituting certificate proceeding. I, therefore, have no hesitation in rejecting the plea of the petitioners that the administrator was not competent to send the requisition and resultantly, the impugned proceeding is illegal and without jurisdiction.

8. In C.W.J.C. No. 9328 of 1993 Mr. Ajayendu Bose made two more submissions. It was contended that the petitioner being an advocate by profession merely acted as legal Advisor to the society. Not being a member or past member of the

society, he does not fall within the ambit of Clause (f) of Section 52 The proceeding having admittedly not been initiated in respect of fee for an audit held u/s 33 or pursuant to any order of the Registrar u/s 39 as a result of enquiry or inspection or surcharge proceeding u/s 40 or in accordance with any order of Registrar or Liquidator u/s 44 or in accordance with any order, decision or award u/s 48, the proceeding so far as the petitioner is concerned, is not maintainable.

9. Section 52 has already been quoted above. It would appear from bare perusal of Section 52(f) that any money due not only from member or past member, his heir or legal representative (in case of the member being dead) but also the nominees of the member or past member are covered by the said Clause. It is not in dispute that petitioner Bindesh Kumar Singh, apart from the service that he might have rendered in his capacity as a lawyer, executed sale deeds on behalf of the Secretary of the society. He must, therefore, be held to be his nominee. The petitioner himself has brought on record the deed of power of attorney dated February 6, 1988. It would be useful to quote the relevant provisions of the said deed as hereunder:

By this power of attorney I, Bharat Tripathy S/o Raghubar Tripathy...Honorary Secretary. Shri Ram Nagari Sahkari Grih Nirman Samiti Ltd. Patna, Registration No. 124 PAT 1982 hereby appoint and nominate Sri Bindesh Kumar Singh son of Sri Jugal Singh., the executant above as my Attorney in my name and on my behalf to do inter alia the following acts, deeds and things, viz.

(1) To negotiate on terms for and to agree to arid sale the land of my society...to the members of my above named society.

(2) Upon such transfer as aforesaid in my name and as my act and deed, to sign, execute and deliver any conveyance or conveyances of my society''s property in favour of the said members (purchasers) or his nominee or assignee or assignees of my society.

(3) To sign and execute, all other deeds, instruments and assurances which he shall consider necessary and to enter into and/or agree to such convenients and conditions as may be required for fully effectually conveying the said property of my society as could do myself, if personally present.

(4) To present any such conveyance or conveyances for registration, to admit execution and receipt of consideration before the Sub-Registrar.

And I hereby agree to ratify and confirm all whatever other act and acts my said attorney shall lawfully do, execute or perform or caused to be done, executed or performed in connection with the sale of the said property to the members of my society under and by virtue of this deed.

The above clear and unequivocal declaration by the Secretary leaves no room for any doubt that Bindesh Kumar Singh acted as nominee of the Secretary, a member of the society, and, therefore, he is covered by Clause (f) of Section 52.

In other words, the proceeding has been initiated against him not as an advocate but as nominee of the Secretary and cannot be said to be without jurisdiction.

10. Mr. Bose also took the plea of non-service of notice u/s 7. From the records, however, it appears that the petitioner had refused to accept the notice. According to the respondents, by reason of the refusal he must be deemed to have received the notice. I find force in the contention of the respondents. I may only add that any dispute regarding service or non-service of notice involves question of fact. It is not necessary to go into the said dispute in the instant proceeding when alternative remedies by way of appeal revision etc. are provided in the Act.

11. Mr. Ramchandra Jha, learned Counsel for the petitioner in C.W. J.C. No. 10569 of 1993, questioned the propriety of initiation of certificate proceeding in respect of ''unascertained'' sum or money. He referred to various provisions of Chapter V of the Cooperative Act dealing with audit, inspection and enquiry and contended that in the fitness of things the Administrator should have got the account audited, enquiry held and inspection made and then after giving opportunity of hearing initiated surcharge proceeding u/s 40. Without taking recourse to the above measures and ascertaining the amount due, the impugned proceeding must be held to be an abuse of process of law. I do not find any force in the above submission.

12. It would appear from various Clauses of Section 52 that the proceeding can be initiated not only in respect of fees for audit held u/s 33 or in accordance with the order of the Registrar (or liquidator) under Sections 39, 40 or 48 but also in respect of amount due from member, past member, their nominee etc. It is important to keep in mind that any money found due from member or past member on the basis of order passed in a surcharge proceeding u/s 40 or on the basis of an order, award or decision on any dispute u/s 48 has been specifically mentioned in Clause (c) and Clause (e) of the section. In other words, while with respect to any sum found due in proceedings u/s 40 or 48 the recourse can be taken to certificate proceeding, this is also permissible with respect to the amount which is otherwise found to be due from member, past member and so on. In other words, it is not necessary for the purpose of initiating certificate proceeding that a proceeding must be taken at the first instance to ascertain the amount u/s 40 or 48 etc. and then only to levy the proceeding. If that was so, the two sets of provisions, one in respect of money found due in a proceeding etc. as envisaged in Clauses (a) to (e) and the other found due without any proceeding as envisaged in Clause (f), would not have been mentioned separately but in the same section. It may also be noted that Clause (f) came in the statute by amendment in 1989.

13. Counsel contended that if the certificate proceeding is allowed to be initiated without ascertaining the amount after giving opportunity of hearing, the certificate-debtor may be put to loss, hardship and injustice. It was submitted that having regard to summary nature of the proceeding it may not be possible

to ascertain the amount and the liability.

14. Section 9 of the Public Demands Recovery Act enables the certificate-debtor to file objection within the stipulated period denying his liability in whole or in part. Section 10 provides that the certificate officer in whose office the certificate is filed, shall hear the petition, take evidence (if necessary) and determine whether the Certificate Officer is liable for the whole or any part of the amount for which the certificate was signed and may set aside, modify or vary the certificate accordingly. A certificate proceeding is, no doubt, not as full-fledged as a suit. However, having regard to the provisions of Sections 9 and 10 there cannot be any doubt that the Certificate Officer is fully empowered to go behind the certificate and after determining the liability of the certificate-debtor, to set aside, modify or vary the certificate. In that sense the position of the Certificate Officer is different from the executing court under the Civil Procedure Code, while the executing court cannot go behind the decree and it has to execute it as it is, the Certificate Officer is entitled to go behind it, even set aside modify or vary it. The proceeding before the certificate proceeding must, therefore, be held to be composite in nature. If it is open to him to determine the liability and allow the claim of the certificate-debtor either in whole or part it follows that it is also competent to ascertain and determine the actual liability of the certificate-debtor and in case of more than one certificate-debtor, to apportion the liability amongst them. I, therefore, do not find any substance in the argument that the certificate proceeding cannot be initiated in respect of an unascertained sum and that no proceeding having been taken under Chapter V of the Co-operative Act the impugned proceeding is bad. From perusal of Section 52 it is obvious that it is open to the society to take recourse to the proceeding under Chapter V, and thereafter, to levy certificate proceeding or to straightaway send requisition for instituting the certificate proceeding. They are alternative in nature and not exclusive to each other.

15. In C.W.J.C. No. 9445 of 1993 Mr. Ajit Kumar Singh while adopting the submissions of Mr. Ajayendu Bose and Mr. Ramchandra Jha pointed out that petitioner Ramesh Bhagat was an employee of the society only for 16 months and, therefore, he cannot be held liable in respect of acts of misfeasance for the entire period. I have already indicated above while dealing with the submission of Mr. Ramchandra Jha in C.W.J.C. No. 10569 of 1993 that the Certificate Officer is competent to determine the liability and if nod be, after taking evidence in appropriate cases, to modify or vary the certificate and apportion the liability amongst different certificate debtors if there are more than one. Thus it is open to the petitioner to satisfy the Certificate Officer that he is not liable for the entire amount since he worked as employee or the like may during part of the period by adducing evidence. That is a question of fact and on that ground the proceeding cannot be held to be invalid or illegal.

16. The points urged on behalf of the petitioners are thus, held to be devoid of substance. The writ petitions, accordingly, are dismissed.

Narayan Roy, J.

17. I agree.

