
(1981) 11 OHC CK 0010
In the Orissa High Court
Case No : Original Jurn. Case No. 608 of 1979

Chakradhar Patel

APPELLANT

Vs

Samasingha Service Co-operative Society Ltd. and Others

RESPONDENT

Date of Decision : 28-11-1981

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 245

Citation : AIR 1982 Ori 38 : (1982) 53 CLT 57 : (1982) 1 LLJ 381

Hon'ble Judges : R.N. Misra, C.J.; R.C. Patnaik, J

Bench : Division Bench

Advocate : A. Das and S.N. Satapathy, for the Appellant; G. Rath, R.K. Rath and N.C. Panigrahi and Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, C.J.—The Samasingha Service Co-operative Society Limited (opposite party No. 1) -- hereafter referred to as the "Society" -- is a society within the meaning of Section 2(k) of the Orissa Co-operative Societies Act, 1962 (hereafter referred to as the "Act") having its registered office at Samasingha within the district of Sambalpur. Petitioner was appointed as Secretary of the said society and was an officer within the meaning of Section 2 (g) of the Act. On 19-11-1978 the President of the society (opposite party No. 2) suspended the petitioner from service and directed him to hand over charge of his office to the Co-operative Extension Officer of the Kolabira Block. Later that day, the Board of Management of the society approved the action of the President and also accepted the resignation of the President. The Co-operative Extension Officer was appointed as the Enquiring Officer to investigate into the charges against the petitioner. He called upon him to offer his explanations against the charges. Though there is some amount of confusion as to whether the order under Annexure 1 was one of suspension or discharge, the succeeding President of the society wrote the following letter to the Enquiring Officer :--

"..... That the discharge order of 19-11-1978 is illegal as before issuing the dis-

charge order, no charge sheet has been issued to the Secretary. He was not even asked to show cause and there was no domestic enquiry made by our Board. So, the whole proceeding started against the Secretary (now suspended) is illegal, without jurisdiction and without justification. So, I request that before starting any proceeding against the Secretary, the status quo be maintained, and the suspension resolution be declared as null and void, as, if the Secretary seeks any redress in legal Court we will be bound to lose and our society would unnecessarily face irreparable loss in defending the case."

On 30-12-1978, the same President informed the petitioner that with effect from the date of issue of the order petitioner was removed from service. Challenge in this application is to the order of termination and petitioner has claimed consequential service benefits.

2. Opposite parties 1 and 2 have filed a common counter affidavit Therein, it has been pointed out that specific charges had been framed against the petitioner by the President and such action was subsequently ratified by the Board. Petitioner did not show cause against the charges though a direction to the effect was given. The Extension Officer was entrusted by the Board with the work of enquiry. Allegation has been made in the counter affidavit that the letter dated 14-12-1978 said to have been written by the interim President was a concoction. No such letter was actually issued to the Co-operative Extension Officer. The Assistant Registrar of Co-operative Societies, Kuchinda, by his letter dated 30th of Dec., 1978, advised the President to give effect to the decision of the Board dated 16-12-1978 in which it had been decided that petitioner's services should be put an end to. The final decision, therefore, was not of anybody else except the Board of the society which was competent to make the order. A specific plea was taken that the society was not "State" within the meaning of Article 12 and, therefore, the matter did not come within the ambit of Article 226 of the Constitution and petitioner was not entitled to claim relief of restoration to service by invoking the extraordinary jurisdiction of this Court.

A separate counter affidavit was filed by opposite parties 3 and 4 who were the Enquiring Officer and the Assistant Registrar respectively. The factual stand taken in the other counter affidavit was adopted and further details of delinquency which led to the order of termination of service were indicated. These public officers also took the stand that the matter was not cognisable in the extraordinary jurisdiction as the society was not "State".

Petitioner filed a rejoinder disputing the several questions of fact pleaded in the counter affidavit of the public officers.

3. Two questions arise, namely :--

(i) Whether opposite party No. 1 -- society is "State" within the meaning of Article 12 of the Constitution; and

(ii) Whether on the facts of the case, petitioner is entitled to relief.

4. The first aspect had been argued by counsel for both sides at considerable length. In the case of Indian Airlines Corporation Vs. Sukhdeo Rai, , it was observed (at p. 1829) :--

"It is a well settled principle that when there is a purported termination of a contract of service, a declaration, that the contract of service still subsisted, would not be made in the absence of special circumstances because of the principle that Courts do not ordinarily grant specific performance of service. This is so, even in cases where the authority appointing an employee was acting in exercise of statutory authority. The relationship between the person appointed and the employer would in such cases be contractual, i. e., as between a master and servant, and the termination of that relationship would not entitle the servant to a declaration that his employment had not been validly determined....."

The position was reiterated in the case of Bank of Baroda Ltd. Vs. Jeewan Lal Mehrotra, , where it was said :--

"... .. The law as settled by this Court is that no declaration to enforce a contract of personal service will be normally granted. The well recognised exceptions to this rule are : (1) where a public servant has been dismissed from service in contravention of Article 311; (2) where reinstatement is sought of a dismissed worker under the industrial law by labour or industrial tribunals; (3) where a statutory body has acted in breach of a mandatory obligation imposed by statute... .."

The position was further clarified in the case of Sirsi Municipality by its President Sirsi Vs. Cecelia Kom Francis Tellis, , where on a review of the several authorities, the Court by majority concluded saying (at p. 857) :--

"The cases of dismissal of a servant fall under three broad heads. The first head relates to relationship of master and servant governed purely by contract of employment. Any breach of contract in such a case is enforced by a suit for wrongful dismissal and damages. Just as a contract of employment is not capable of specific performance similarly breach of contract of employment is not capable of finding a declaratory judgment of subsistence of employment. A declaration of unlawful termination and restoration to service in such a case of contract of employment would be indirectly an instance of specific performance of contract for personal services. Such a declaration is not permissible under the law of Specific Relief Act.

The second type of cases of master and servant arises under Industrial Law. Under that branch of law a servant who is wrongfully dismissed may be reinstated. This is a special provision under Industrial Law. This relief is a departure from the reliefs available under the Indian Contract Act and the Specific Relief Act which do not provide for reinstatement of a servant.

The third category of cases of master and servant arises in regard to the servant

in the employment of the State or of other public Or local authorities or bodies created under statute.

Termination or dismissal of what is described as a pure contract of master and servant is not declared to be a nullity however wrongful or illegal it may be. The reason is that dismissal in breach of contract is remedied by damages. In the case of servant of the State or of local authorities or statutory bodies, Courts have declared in appropriate cases the dismissal to be invalid if the dismissal is contrary to rules of natural justice or if the dismissal is in violation of the provisions of the statutes. Apart from the intervention of statute there would not be a declaration of nullity in the case of termination or dismissal of a servant of the State or of other local authorities or statutory bodies.

The Courts keep the State and the public authorities within the limits of their statutory powers. Where a State or a public authority dismisses an employee in violation of the mandatory procedural requirements or "n grounds which are not sanctioned or supported by statute the Courts may exercise jurisdiction to declare the act of dismissal to be a nullity. Such implication of public employment is thus distinguished from private employment in pure cases of master and servant."

In the backdrop of the law declared by the Supreme Court, petitioner can succeed in his submission only if he can bring his case within the category indicated in the last paragraph extracted above. The co-operative society or its officers cannot be taken to be public authority and employment thereunder cannot be taken to be public employment in view of the recent pronouncement of the Supreme Court in the case of S.S. Dhanoa Vs. Municipal Corporation, Delhi and Others, . In para 7 of the judgment, it was categorically pointed out that a cooperative society registered under the Bombay Co-operative Societies Act of 1925 was not a "corporation" established by or under an Act of the Central or State legislature. The Court again pointed out :--

"..... Corporation established by or under an Act of Legislature can only mean a body corporate which owes its existence, and not merely its corporate status, to the Act. For example, a Municipality, a Zilla Parishad or a Gram Panchayat owes its existence and status to an Act of Legislature. On the other hand, an association of persons constituting themselves into a company under the Companies Act or a society under the Societies Registration Act owes its existence not to the Act of Legislature but to acts of parties though, it may owe its status as a body corporate to an Act of Legislature."

The Court approved the ratio in the case of 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, , where it was observed (at p. 1396) :--

"..... A company incorporated under the Companies Act is not created by the

Companies Act but comes into existence in accordance with the provisions of the Act"

and also the observations in the case of *Sabhajit Tewary Vs. Union of India (UOI) and Others*, , where Chief Justice Ray pointed (at p. 1330) :--

"..... The Society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. It is a society incorporated in accordance with the provisions of the Societies Registration Act. The fact that the Prime Minister is the President or that the Government appoints nominees to the Governing Body or that the Government may terminate the membership will not establish anything more than the fact that the Government takes special care that the promotion, guidance and co-operation of scientific and industrial research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problem affecting particular industry in a trade, the utilisation of the result of the researches conducted under the auspices of the Council towards the development of industries in the country are carried out in a responsible manner."

In the case of *Executive Committee of Vaish Degree College, Shamli v. Lakshmi Narain* AIR 1976 SC 888, a three-Judge Bench was considering a claim to protection of service in a College which was a society registered under the relevant Co-operative Societies Act. The question arose as to whether the Executive Committee of the College which later got affiliated to a University became a statutory body and, therefore, work under such College amounted to public employment and the majority decision was in the negative. In para 9, the majority opinion was expressed thus :--

"It is, therefore, clear that there is a well marked distinction between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words the position seems to be that the institution concerned must owe its very existence to a statute which would be the fountainhead of its powers. The question in such cases to be asked is, if there is no statute would the institution have any legal existence. If the answer is in the negative, then undoubtedly it is a statutory body, but if the institution has a separate existence of its own without any reference to the statute concerned but is merely governed by the statutory provisions it cannot be said to be a statutory body....."

The Supreme Court in another case which went in appeal from this Court relating to a co-operative society in the case of *The Nayagarh Co-operative Central Bank Ltd. and Another Vs. Narayan Rath and Another*, , observed (at p. 113) :--

"The High Court has dealt with the question whether a writ petition can be maintained against a co-operative society, but we are inclined to the view that the observations made by the High Court and its decision that such a writ petition is maintainable are not strictly in accordance with the decisions of this

Court.....

and further observed by saying :--

"We would like to observe that the judgment of the High Court should not be treated as an authority for the proposition that a writ petition is maintainable against a cooperative society. That question shall have to be decided by the High Court as and when it arises in the light of the decisions of this Court."

There are thus three categorical authorities of the Supreme Court where co-operative societies have not been considered to be "State" nor employment under a co-operative society has been considered to constitute "public employment". These societies have also not been accepted to be statutory in character.

5. Mr. Das for the petitioner, however, relied upon three later decisions of the Supreme Court being the cases of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ; *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . The cases of the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and *Som Prakash Rekhi* were decided by three-Judge Benches of the Supreme Court. A Bench of this Court had recently occasion to deal with all these decisions of the Supreme Court in the case of *B. Rajkumar Patra Vs. Union of India (UOI) and Others*, , where the question came up whether the Indian Rare Earths Limited -- a Government Company wholly owned by the Union of India was "State". This Court highlighted the aspects which led the learned Judges in the Airport Authority case to hold that it was an instrumentality of Government and found that a Company registered under the Companies Act like the Rare Earths Limited did not constitute an instrumentality of the State. Referring to the majority judgment in *Som Prakash Rekhi*'s case , the Court extracted a part of the judgment to the following effect :--

"A study of *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*, (a Constitution Bench decision of this Court) yields the clear result that the preponderant considerations for pronouncing an entity as State agency or instrumentality are :

- (1) financial resources of the State being the chief finding source.
- (2) functional character being governmental in essence,
- (3) plenary control residing in Government,
- (4) prior history of the same activity having been carried on by Government and made over to the new body, and
- (5) some element of authority or command."

These obviously would not exist in the case of a co-operative society as here.

Then came *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . Referring to this decision, the Division Bench of this Court observed (at p. 146 of *B. Rajkumar Patra Vs. Union of India (UOI) and Others*, :--

"..... This decision is of the Constitution Bench and the question that fell for determination was whether one of the Regional Engineering Colleges located at Srinagar being one of the fifteen such Colleges in the country sponsored by the Government of India, was an instrumentality of the State. The College was being managed by a Society registered under the Jammu & Kashmir Registration of Societies Act, 1898. The Court pointed out that where a Corporation is an instrumentality or agency of the Government, it must be held to be an "authority" within the meaning of Article 12 of the Constitution and hence subject to the same basic obligation to obey the Fundamental Rights as the Government. Then came the question as to whether this was an instrumentality of the State. Sumptuous reference was made to the ratio of the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . In para 9 of the judgment, the tests for determining when a Corporation can be said to be an instrumentality or agency of Government were gathered thus :--

"(1) One thing is clear that if the entire share capital of the corporation is held by Government 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 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 whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence or "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."

The Court then proceeded to observe :--

"If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the *International Airport Authority's* case, be an authority and, therefore, State within the meaning of the expression in Article 12."

In para 11 of the judgment, the Court pointed out that it was immaterial whether the corporation is created by a statute or under a statute. The test was whether it was an instrumentality or agency of the Government and not as to how it was created."

The Division Bench further pointed out :--

"We are inclined to think that no particular test has a predominant role to play. The cumulative effect has to be looked into. Where the functions are closely related to governmental functions and where a department of Government is transferred to a corporation or where rule-making or regulation-making power has been given which when made would regulate the conduct of the people at large are clear features in support of treating the institution as an instrumentality or agency of Government. Where, however, Government while embarking upon a commercial activity putting the entire money, exercise direct or indirect control and receive the profits -- these by themselves may not be adequate to hold the institution to be an agency or instrumentality of Government....."

We may at this stage refer to another three-Judge decision of the Supreme Court in the case of Smt. J. Tiwari Vs. Smt. Jwala Devi Vidya Mandir and Others, , where an educational institution registered under the Societies Registration Act was held not to be an authority within the meaning of Article 12. The judgment was delivered in January, 1978 and it is an instance of belated reporting.

As pointed out by one of the learned Judges in Som Prakash Rekhi's case, the decision in the Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, has given the matter a new turn and the older decisions may require review. Notwithstanding this position, even applying the tests in the three cases which we have referred to above and on which strong reliance was placed by petitioner's counsel, we are of the view that a co-operative society of the type we are concerned with cannot be treated as "State" within the meaning of Article 12 of the Constitution.

6. In view of what we have found on the first point, the second point does not arise for consideration. Yet, since it has been argued at the Bar and can be disposed of briefly, we shall deal with it. Admittedly, petitioner by Annexure 1 was served with a set of charges. The action of the President was ratified by the Board and the Board directed the Extension Officer to enquire into the matter. Annexure 3 produced by the petitioner in clear terms calls for the explanation or show cause. It is not the case of the petitioner that he did not have knowledge of the resolution of the Board or the direction in Annexure 3 for showing cause. It is the specific case of the opposite parties that no cause was shown by the petitioner and in the absence of refutation to the charges, the Enquiring Officer was of the view that the charges were admitted. There is no foundation for the contention that the Board -- the employer -- had abdicated its power to the Co-operative Extension Officer or to the Assistant Registrar. The Board had decided on 16-12-1978 to remove the Secretary as he had failed to show cause against

the charges and the Board felt that the charges in the circumstances were on good foundation. The Assistant Registrar directed the society in terms of the Board's resolution dated 16-12-1978 to terminate the service of the petitioner. In the facts of the case, there is hardly scope to interfere on merit even if this Court is found to have jurisdiction on the footing that the society is "State" within the meaning of Article 12 of the Constitution.

7. It follows, therefore, that in regard to grievances relating to employment under such a co-operative society, jurisdiction under Article 226 of the Constitution cannot be invoked and restoration of service cannot be ordered in terms of the ratio in the series of authorities of the Supreme Court some of which we have referred to above. The writ application is thus devoid of merit on either score and is dismissed. The writ application was filed even before the judgment in the International Airport Authority's case was pronounced and the argument which has been advanced at the hearing was obviously on the basis of the law as indicated in the later cases. Yet, we think it is a fit case where parties should be directed to bear their own costs.

Patnaik, J.

8. I agree.