

(1985) 05 KL CK 0002

In the High Court Of Kerala

Case No : O.P. No's. 5964 of 1983E and 5902 of 1984P

Immanuel Paul Chakkola

APPELLANT

Vs

Catholic Syrian Bank and Others
 K.M. Sethumadhavan
Vs Dhanalakshmi Bank Ltd. and Another

RESPONDENT

Date of Decision : 21-05-1985

Acts Referred:

Banking Regulation Act, 1949 — Section 10, 10A, 11, 12, 12A
Constitution of India, 1950 — Article 12, 226

Citation : (1988) 64 CompCas 399 : (1986) 52 FLR 5 : (1987) 2 LLJ 198

Hon'ble Judges : K. Sukumaran, J

Bench : Single Bench

Advocate : K.M. Joseph and V. Bhaskara Menon, for the Appellant; S. Narayanan Potti, for respondent No. 1, C.M. Devan and B.S. Krishnan, for the Respondent

Final Decision : Dismissed

Judgement

Sukumaran, J.—The two writ petitions seeking various reliefs are filed by the employees of two banks, the Catholic Syrian Bank Ltd. and the Dhanalakshmi Bank Ltd. A threshold question arises in both the cases. That is about the maintainability of the writ petition itself as against the banks. Do the banks answer the definition of a State or authority under Article 12 of the Constitution, and are they, therefore, amenable to the writ jurisdiction ?

2. Sri K.M. Joseph argued the matter with considerable force, supported by a thorough and detailed study of the working of the banking institutions and the developments in the constitutional law. In one sense, it might require devoting considerable space for advertng to his very elaborate arguments, abundance of factual materials and the long passages from the case-law to which reference had been made to him. A compression of the salient aspects is, however, attempted inasmuch as the law on the point is encapsulated by the authoritative decisions of the Supreme Court. On most of the factual aspects on which emphasis had been given, there was no controversy. Thus, notwithstanding the

persuasiveness of the arguments, the contention, discussion and conclusion can be dealt with in a not-too-prolix judgment.

3. Before examining the question in its own circumscribed area, it is profitable to have a general view of the pattern of functioning of private undertakings under the Constitution of India. Our Constitution is one which permits the co-existence of the public and private sectors. The means of production are not all monopolised by the State, though under Article 39(c) " the State shall...direct its policy towards securing...that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". The former Prime Minister of India declared in the inaugural address to the U.N. Seminar on Management of Public Industrial Enterprises in 1959:

" Broadly speaking, we want to control the basic industries. We, therefore, come to the establishment of public enterprises. At the same time, we encourage private enterprise in a vast field. "

(See Jawaharlal Nehru's Speeches, Volume IV, Page 133).

4. The founding fathers of the country, understandably, gave pride of place to the public sector. That did not, however, mean that the private enterprise was driven out of existence. In many ways, private entrepreneurs are conferred valuable constitutional and legal rights. We, therefore, have to proceed on the basis that under the Constitution, a private venture can come into being and carry on its activities, in the same way as a public sector undertaking.

5. The law, as noted earlier, has been exhaustively dealt with in the decisions in *Som Prakash Rekhi v. Union of India* : AIR 1981 SC 212 and *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, ; *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . These decisions in turn have largely drawn on the valuable thoughts contained in the decision in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* [1975] 45 Comp Cas 285 ; *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*, , the judgment of Mathew J. therein being a classical condensation of the legal thinking regarding the entire concept. No doubt, chronicling of the decisions of the Supreme Court may require mentioning about the decision in *Manmohan Singh Jaitla v. Commissioner, Union Territory Chandigarh* (Civil Appeal No. 2137 of 1984) and *Amir Singh v. Deputy Commissioner*. (Writ Petition No. 11238 of 1983) decided by Desai and Khalid JJ on December 19, 1984. That decision, however, does not advance the thought process further. The learned judges only applied the tests to the facts of the case before them. This court also had to consider the question in relation to various Government companies, viz. the *Kerala Fisheries Corporation--Gangadharan v. Managing Director* [1983] KLT 741, the *Fertilisers and Chemicals, Travancore--K.S. Sofhi v. Fertilizers and Chemicals Travancore Ltd.* [1984] KLT 32, *United Electrical Industries--Secretary, Meters Staff Association v.*

United Electrical Industries Ltd. [1984] KLT888, the Kerala State Industrial Development and Employment Corporation Ltd.--Kunju Mohammed v. State of Kerala [1984] KLT 403 (FB) and other institutions (a co-operative society--Sherthallai Urban Co-op. Bank Ltd. v. State of Kerala [1984] KLT 970, Housing Board--S. Kumaran v. Chairman, Kerala State Housing Board [1984] KLT 668. A nationalised bank, it was conceded, was "State " under Article 12 (K. Jagachandran v. Canara Bank [1983] KLT 983), but the Taluk Co-operative Land Mortgage Bank Ltd., it was held by Bhaskaran J. (as he then was), did not come within the term "State" under that article.

6. It was submitted that the banks discharge public functions of an important character. They are subjected to a deep and pervasive governmental control. They virtually have a monopoly character. The Reserve Bank and various governmental agencies give massive aid in relation to their functioning. (The provisions of the Banking Regulation Act, 1949, as amended from time to time, were referred to while elaborating the aspect of deep and pervasive governmental control over the banks). Every facet of its activity, starting from the incorporation and ending with the winding up, is regulated by the statutory provisions. It is not as though anybody or bodies of individuals could start a bank. A licence is required for that. And a licence is issued only on the satisfaction of the rigorous and detailed legal formalities made mention of in that connection. Once a licence is issued, the bank joins the privileged oligarchy of financiers and in that sense enjoys a monopoly. A licence can be revoked under various contingencies including the one where the directions issued to the bank are found to be disobeyed. There are very many restrictions in relation to the functioning of the bank of a type, pattern and extent which do not obtain in the case of other enterprises, such as, in the matter of the payment of dividends, election of new directors, the convening of the general body, etc. The business activities that could be undertaken by a bank are circumscribed by statutory provisions. There is prohibition about there being common directors. Even about the mode of giving loans, there are restrictions. The control over advances as exercised by the Reserve Bank is indeed rigorous, particularly after the amendment of the Act in 1969. A bank cannot open branches as and when it likes ; that too is dependent upon the permission accorded by the Reserve Bank, In relation to the maintenance of the percentage of assets, the making of monthly returns, the conduct of annual audit, and the like, controlling the provisions exist. Even for appointment of auditors, previous consent of the Reserve Bank is stipulated for. Wide powers of inspection are conferred on the Reserve Bank. There is a power for the Reserve Bank to issue directions in relation to the exercise of the powers and of the functioning of the bank. Financial assistance is given by the Government and governmental agencies on a massive scale. Officers have to send reports about the functioning of the bank to the Reserve Bank. Some high ranking officers hold office only during the pleasure of the Reserve Bank. The Reserve Bank is also empowered to appoint additional directors. These would be evident even from a passing reference to Sections 6,

10A, 12A, 15, 16, 20 - 24, 27, 30, 35, 35A, 36A, 36AB and other provisions of the Banking Regulation Act, 1949.

7. The existence of the statutory provisions and their operating with an unusually strict control and an unfailing vigil over the activities of the bank cannot be overlooked at all. The question has to be considered on the basis of such a rigorous control in relation to the actions and activities of the banking institution.

8. Counsel was not content by confining his contentions to the statutory provisions to show the deep and pervasive control over the banks. In relation to the actual working, the extent and depth of control actually exercised was also emphasised. I am not elaborating the details thereof, as on that aspect too, no issue was joined by the respondents. It was pointed out that under the various directions, about 49% of the available resources of the bank were not available for lending and that even out of the remaining 51%, there are directions about the priority sector to which the lending activity could be canalised. There is extensive re-financing, without which, counsel submitted, the bank " would be in the red". Under the Deposit Insurance Act, every depositor is insured up to Rs. 30,000. In particular, reference was made to Section 24 of the Act about the manner in which deposits of funds could be made by a bank. Thirty-six per cent, has to be in Government security bonds and in nationalised banks and 9% will have to be deposited in the Reserve Bank. Counsel referred to publications containing reference to such extensive directions in relation to the various activities of the bank. While not disputing the existence of such control by the Government in relation to the functioning of the banks, respondents' counsel pressed the following aspects to contend that the banks do not come within the concept of " State or authority " as referred to in Article 12 of the Constitution and as understood by judicial decisions. The capital structure of the bank is entirely private. In that sense, there is no contribution thereto by or from the Government or any of the financial agencies of the Government. The board of management in its entirety is elected from among the shareholders. No profit whatever goes to persons other than the shareholders of the banking company. These basic structural indications take the banks out of the category of institutions brought under Article 12 of the Constitution.

9. After considering the arguments advanced on either side and rereading the decisions including those of the Supreme Court, I am clearly of the view that the banks in question do not come within Article 12 of the Constitution. The essential tests in the matter may be summarised as follows:

1. The holding of the entirety or a close proximate entirety of the share capital.
2. Deep and pervasive State control.
3. Enjoyment of monopoly status either conferred or protected by the State.
4. Functions being of public importance closely related to governmental functions.
5. Origin being traceable to a transfer from what was originally a Department of

the Government.

10. It is useful to bear in mind that these tests had been laid down in the factual background of the two decisions, *Bharat Petroleum* : AIR 1981 SC 212 and *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, .

11. In *Bharat Petroleum*'s case : AIR 1981 SC 212, what was initially a private undertaking had been taken over by the Government. It thus became a Department of the Government. Then there was a transfer to a Corporation. The query was whether notwithstanding the corporate veil, the entity was not, in truth and substance, a State agency. The statutory flavour, financial dominance, functional peculiarities, prior history, and existence of a plenary control by the Government were all aspects particularly emphasised in the course of the discussion in that decision.

12. In *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, the Government wanted to run a college. The capital was contributed by the Government. Government officers ran the institution. The memorandum of articles and the rules threw much light on its essential character. The founding members of the society were Government officials. The centre of power was with the Government. Having regard to the totality of the circumstances, it was found to be a " surrogate of Government " and " the projection of the Government". The aspects referred to in the two decisions are substantially absent in the present case.

13. True, existence of a deep and pervasive State control may be an indication about the entity being a State agency. The converse is not necessarily true, take for instance, a private individualistic venture in an export commodity. From the time any reckonable activity is contemplated, governmental control and regulation will come into play. The establishment of a factory will have necessarily to conform to the provisions of the Factories Act. It has to satisfy municipal regulations. Restrictions imposed by the developmental authority, if any, may also have to be taken into account. In short, the birth of a productive unit itself is subject to deep and pervasive control. Its later functioning is equally, and at every critical stage, subject to control. Numerous pieces of industrial legislation would govern the employment of the personnel who will have to operate the factory. Their recruitment, terms and conditions of service, the payment of wages to them, the compensation payable to them in the case of an accident, the resolution of the industrial disputes between the employees and the management, the entitlement of workers for bonus, leave, holidays, and a variety of matters in relation to employment are all subjected to deep and extensive statutory control. And even when the products ultimately emerge, controls do not cease to operate. On the contrary, more rigorous controls start operating. Quite often, the central excise provisions impinge upon them. Fiscal measures like sales tax, octroi and the like pursue them. The products are subjected to quality control. General laws such as those operating against adulteration in goods, are also in the field. If the product is an exportable

commodity, and export is intended, again it is subjected to very rigorous and very detailed controls and checks. The export inspection agencies have to be satisfied about the quality of the product to be exported; the Customs have to be satisfied about exportability and even about the proper pricing of the goods. The transport to the wharf, the movement in the port area, the loading into a carrier, are all again subjected to controls. These controls pursue the commodity up to the time the ship crosses the customs barrier.

14. In relation to the working of the factory, finances are raised invariably from private institutions like the bank or other aiding agencies of the Government. The moment money is borrowed, control is exercised by the lending authorities. They too are quite often deep and pervasive. The income derived by the activities is again taxed and in connection therewith, the entity is subject to very many constraints and controls. But then, for these reasons, and for those draconian and drastic controls, could it be said that the private entrepreneur will get transmuted into a State agency ? The answer should undoubtedly be in the negative.

15. It is also necessary to advert to the background in which very tight control is exercised over the bank. The State is necessarily obliged to evince such deep interest in controlling and regulating the activities of a bank, inasmuch as the public are vitally interested in its security and stability. The larger the involvement of the public, the greater could, understandably, be the control exercised by the Government. Such a control, however drastic and pervasive it may be, would not convert what is essentially a private enterprise into a public functionary or State agency.

16. The carrying out of functions of public importance, may not, by itself, be full satisfaction of the test referred to above. Such public functions must, in addition, be closely related to governmental functions. Lending and borrowing cannot be viewed as closely related to governmental functions. The money-lender, and many other organisations do carry on virtually many of the essential functions of a bank. Attraction of a higher rate of interest the receipt of which may not be subjected to governmental gaze, prompts many to deposit their funds with individuals or organisations who in turn lend the money so available to those who are in dire need, but who could not easily obtain funds from public agencies.

17. Could the banks be said to enjoy monopoly status conferred or protected by the State ? Notwithstanding the fact that a severe licencing is introduced in relation to a banking venture, it is difficult to say that the various scheduled banks enjoy a " monopoly " in that sense of the term. It is, however, not necessary to pronounce categorically on that aspect. Even if a monopoly character, in the sense that the competitors in the field are not very many, is conceded, that by itself or in conjunction with the control to which it is subjected or its functions being of public importance, would not be sufficient to bring the bank within the term under Article 12 of the Constitution, while its structure and working are considered in all their aspects.

18. The banks in question spring into life as private ventures. They function as private ventures though subjected to severe control. The profits of their operation go to private pockets and not to the public exchequer. In the permitted field, they play to the tune of the private institutions and individuals who own and control the share capital. In short, they are born as private ventures; they flourish or flounder, and sometimes, flounder as private ventures. In no sense, could it be termed a State agency or public instrumentality as that term is understood under Article 12 of the Constitution.

19. The above conclusion renders it unnecessary to consider the various other contentions arising in the original petitions. They are, therefore, not being discussed or decided upon.

20. In the light of the conclusions reached above, the writ petitions are not maintainable. They are accordingly dismissed. The parties will bear their respective costs.