(1959) 04 AHC CK 0023

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 2652 of 1958

Mohammad Husain Ansari APPELLANT

Vs

The Benaras State Carpet Weavers'' Co-operative Union Ltd. and Others RESPONDENT

Date of Decision : 14-04-1959

Acts Referred:
Constitution of India, 1950 — Article 21, 226

Citation : AIR 1959 All 733

Hon'ble Judges : S.S. Dhavan, J

Bench : Single Bench

Advocate : Man Singh and S.N. Dwivedi, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Disposed Off

Judgement

S.S. Dhavan, J.—This is a deplorable case in which the petitioner has suffered wrongful arrest in the process of realisation of dues as arrears of land revenue, and illustrates the dangers of vesting the Executive authorities with powers uncontrolled by any guiding principles or checks to arrest any citizen for dues which according to their erroneous interpretation of the law, are considered to be recoverable as arrears of land revenue. The petitioner was arrested under an order of the local Tehsildar and remained in custody for one day. On his furnishing security the Tehsildar directed his release and he was given one week''s time for payment of the alleged dues. Almost immediately after his release he filed this petition impugning the legality of the entire proceedings which led to his arrest. The facts of this case, as proved or admitted by the parties, very briefly are these :

2. The petitioner was a share-holder of a Co-operative Society registered under the Co-operative Societies Act 1912 under the name of the Banaras State Carpet Weavers'' Co-operative Union Ltd., Bhadohi, district Banaras. He acted as Managing Director for a short interval of about eight months. On his resignation

he was succceded by a man called Habib Ullah as Managing Director. According to the case of the petitioner, this Habib Ullah mismanaged the affairs of the Society and was even arrested at one time for embezzlement. The petitioner alleges that Habib Ullah owed a sum of Rs. 17,000/- to him (the petitioner), but to evade his liability, he manufactured a false case against the petitioner to the effect that he (the petitioner) owed a sum of Rs. 11,274/- to the Society. It is not necessary to give a detailed account of the controversy between the petitioner and Habib Ullah or between him and the Union as to whether any amount was due from him or not.

This Court is only concerned with the legality or otherwise o? the steps taken by the local officials at the instance of the Union to recover the amount alleged to be due from him. At first the matter was referred to arbitration by the Registrar of Co-operative Societies, Uttar Pradesh. But, while the reference was pending, the Society went into liquidation and a liquidator was appointed. He served a notice on the petitioner asking him to pay a sum of Rs. 17,322-8-6. It is admitted by the State that this sum consists of Rs. 8,721-0-6 as principal and the rest as interest calculated at 12 per cent per annum. The petitioner did not appear before the liquidator. There is some, controversy as to why he did not, the petitioner alleging that he was not aware of the date fixed by the liquidator and the latter saying that the petitioner deliberately stayed away.

But nothing turns upon this question. On 12-7-1957 the then liquidator Mool Chand Yadava, held some kind of ex parte hearing and directed the recovery of the aforesaid amount from the petitioner u/s 42(5) of the Co-operative Societies Act 1912. On 30-3-1958 his successor. Nirankar Lal passed an order directing that the amount in dispute should be recovered from the petitioner as "contribution and costs of liquidation under Clauses (b) and (d) of Section 42(2) of the Co-operative Societies Act". He also sent a requisition to the Registrar of Co-operative Societies requesting him to move the Collector, Varanasi to realise this amount from the petitioner as arrears of land revenue u/s 42(4-A) of the aforesaid Act. Thereupon the Assistant Registrar of the Co-operative Societies. Banaras set in motion the machinery for the realisation of this amount as arrears of land revenue.

On 21-8-1958 the Tehsildar of Banaras issued a notice to the petitioner asking him to pay the amount. On his failure to do so, he issued on 11-9-1958 a warrant of arrest. The petitioner was arrested on 12-9-1958. On the next day he moved an application for permission to furnish security and for two weeks'' time. It is not stated whether he wanted this time for payment or for seeking his legal remedies against the action taken against him. However, on 13-9-1958 he was released on furnishing security, having spent one day in custody. He has now come to this Court for relief and prays for the quashing of the entire proceedings including the warrant of arrest on the simple ground that they are completely unauthorised by law.

3. The petition was initially opposed by the State and a counter affidavit was

filed. As this Court was not satisfied with the vague and somewhat evasive character of the statements contained in the counter affidavit, it directed the appearance in person of Mool Chand Yadava the liquidator who passed the order dated 12-7-1957 and of Nirankar Lal, the liquidator who subsequently made the request for the realisation of the disputed amount as arrears of land revenue. Both these persons were examined on oath at some length by the Court and their depositions are on the record. The Court also directed that the Deputy Registrar, Co-operative Societies and the Tehsilclar of Banaras should file affidavits and the former was made a respondent in this petition under, an order of the Court, in which it was observed, inter alia, as follows :

"After hearing learned counsel for both the sides I am provisionally of the view that the petitioner''s arrest was illegal and he has been subjected to what is known to the law of torts as wrongful confinement. The record does not show who initiated the proceedings leading to the arrest of the petitioner. Evidently there were some nroeeedings for the recovery of the sum mentioned above as arrears of land revenue. There is a provision for the recovery of certain types of dues in the same manner as arrears of land revenue. u/s 42(4-A) of the Co-operative Societies Act 1912, the Collector has the power to recover the dues as arrears of land revenue on a requisition by the Registrar of the Co-operative Societies. This power is confined to the recovery of any sum due as contribution to the assets of the Society or as costs of liquidation.

But in the present case it appears that the peti-tioner was arrested for non-payment of a sum which was neither due as contribution to the assets nor as costs of liquidation and which he denied was due at all.....

The Court is inclined to take a serious view of this case. As the result of an illegal arrest, a citizen of the Republic was deprived of his personal freedom. Every single official who, by his order or action, contributed to this illegal arrest is responsible and answerable to this Court.

At present I am not even satisfied that the deci-sion to arrest the petitioner was made bona fide. He has alleged in paragraph 25 of his affidavit that he "is a man of substance having several houses of his own and has a good business of carpet making ....." He further says that "these proceedings for his arrest have been started with a view to defame him and harass him in every manner." It is somewhat difficult to understand -- and learned counsel for the respondents gave no explanation in this matter -- Why the liquidator or the Registrar, as the case may be, whose primary duty under the Cooperative Societies Act is to collect the assets of the Society in liquidation, should have preferred to exercise their option in favour of the arrest and detention of the petitioner in preference to the attachment and sale of his immovable property".

4. In the same order it was made clear "that the object of further proceedings is to fix the responsibility for the illegal arrest of the petitioner on the guilty official or officials individually":

5. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The sole question before this Court is whether, on the material placed before it in the form of affidavits and the depositions of the two liquidators, the respondents have established their case that the arrest of the petitioner was lawful and according to procedure established by law. After a perusal of all the affidavits and the relevant documents and after hearing the two liquidators on oath I have come to the conclusion that the arrest of the petitioner was illegal and not authorised by the Cooperative Societies Act 1912 or any other law. The only provision in that Act which authorises the realisation of any amount due to a Co-operative Society is Sub-section (4-A), of Section 42 which is as follow :

"Any sum ordered under this Section to be recovered as a contribution to the assets of the society or as costs of liquidation may be recovered on a requisition being made in this behalf to the Collector by the Registrar of Co-operative Societies, in the same manner as arrears of land revenue".

6. It must be noted, however, that the power under this sub-section does not extend to every kind of dues payable to the society. It is limited to the recovery of two classes of dues -- (1) any amount as contribution to the assets of the society or (2) as costs of liquidation. The phrase "contribution to the assets of the society" is referred to in Section 42(2)(b) of the Act which says "A liquidator ..... shall have power to determine the contribution to be made by the members and past members of the society respectively to the assets of the society". Thus this phrase refers to the liability of the members of the society to contribute to its assets in the event of the winding up of the society. The principle, of contribution by present or. past members to the assets of a society in winding up is well-known in Company Law and has obviously been borrowed from it,

The members of a society with limited liability are liable to contribute, in the event of the winding up of the society, to its assets subject to a maximum which is determined by the limit of the member''s liability. In the present case, it was admitted that the petifioner Mohammad Hussain Ansari was the holder of shares which were fully paid up and in respect of which, therefore, there was no question of his being called upon to contribute to the assets of the society in the event of winding up

. 7. The second class of dues recoverable as arrears of land revenue are "costs of liquidation". It is admitted by the respondents that the amount sought to be recovered from the petitioner does not fall under this class. Therefore, the controversy in this case is reduced to a very simple question: are the amounts sought to be recovered from the petitioner as arrears of land revenue in the nature of contribution to be made by the petitioner as member of the society to its assets during the winding up. If they are the proceedings against the petitioner were authorised. If, on the other hand they are not, the proceedings were unauthorised and the official concerned usurped the powers to realise it as arrears of land revenue and consequently the arrest of the petitioner was illegal.

8. The counter affidavit sworn by Mool Chand Yadava, the liquidator who made the order directing the recovery of tins amount from the petitioner, is conclusive on this point. In paragraph 5 of his second counter affidavit dated 30-3-1959 he has stated,

"..... It is submitted that strictly speaking the amount due from the petitioner was neither contribution to the assets of the union nor was it cost of liquidation under clauses B and D of Section 42 of the Go-operative Societies Act II of 1912." In his statement on oath made in Court to-day Mool Chand Yadava confirmed his admission that the amount in dispute is neither contribution to the assets of the society nor costs of liquidation. He also admitted that the amount of Rs. 17,322-8-6 con-sists of two items -- Rs. 8,721-0-6 claimed as principal and the rest as interest at the rate of 12 per cent per annum. In his evidence before this Court today he was asked to explain how he had calculated interest at this rate. He replied, "I fix this rate according to general practice".

On further questioned by the Court he explained that by genera! practice he meant his own practise.

He admitted that he had neither asked for nor received any instructions from Government or the Registrar about the rate of interest to be charged, and also admitted that he was not aware of any other liquidator in the department who calculated interest at this rate. He admitted that bye-law No. 40 of the respondent society provides that interest on moneys borrowed from (by?) the society shall not exceed the rate of 7 1/2 per cent per annum. He also admitted that the amount directed to be realised from the petitioner included moneys which were borrowed by him and on which interest was calculated by him at 12 per cent.

9. Nirankar Lal, the other liquidator who passed the order directing the recovery of this amount as arrears of land revenue, was asked to explain how he had concluded that the amount in dispute was due from the petitioner as contribution to the assets of the society. He replied, "During liquidation proceedings, any amount due from any one is regarded by us as contribution within the meaning of Section 42(2)(b) of the Act." When asked to explain what he meant by the word "us" he replied, "I mean the liquidators and the Go-operative Department in general''.

10. From all this evidence it is clear that the amount in dispute is neither payable as contribution to the assets of the society meant u/s 42(2)(b) nor as costs of liquidation u/s 42(2)(b). In fact, almost half the amount is made up of interest calculated by the liquidator at 12 per cent per annum. It is now admitted, though belatedly, by the respondent that the amount in dispute cannot be classed either as contribution to the assets of the society or as costs of liquidation. In the face of these facts, the foundation of the power to recover this amount as arrears of land revenue disappears and the entire proceedings taken against the petitioner

must be condemned as illegal and in violation of the constitutional guarantee under Article 21 of the Constitution.

11. In view of the admission of the respondents, it is perhaps not necessary for me to consider the contentions of learned counsel for the respondents, made at an earlier stage of the hearing, that the amount in dispute comes within the category of the contribution to the assets of the society. But as the argument was addressed at considerable length, it is necessary to decide this point of law so that decision of this Court may serve as a a prece-dent in the future. Learned counsel contended that, u/s 42(2)(d) the liquidator has power, "to determine by what persons and in what proportions the costs of the liquidation are to be borne" and he has the further power under Class (e) of the same Section "to give snch direction in regard to the collection and distribution of the assets of the so-ciety, as may appear in him to be necessary for winding up the affairs of the society".

But this contention is negatived by the plain language of the section itself. To give direction in regard to the collection and distribution of the assets of the society does not empower to adjudicate upon disputes between the society and others. In the same section, power has been given to the liquidator, under clause (b), "to investigate all claims against the society and subject to the provisions of this Act, to decide questions of priority arising between claimants", and again under clause (d), "to determine by what persons and in what proportions the costs of the liquidation are to be borne".

Learned counsel for the respondents was not able to explain in spite of repeated questions by the Court, why the same phraseology has not been used in clause (e) which only authorises the liquidator to give "direction" in regard to the collection and distribution of the assets of the society. Mr. S. N. Dwi-vedi, learned counsel for the petitioner, in his very able argument before this Court, rightly pointed out that the difference in the phraseology of clauses (b) and (c) on the one hand which do invest the liquidator with a quasi-judicial power of investigation and clause (e) on the other which only gives him administrative power, is significant and conclusive. In my view, clause (e) merely prescribes the administrative procedure for the manner in which the collection and distribution of the assets of the society in winding up may be made. But the Registrar or his department cannot carve out for themselves an entirely new power under the guise of prescribing a procedure for the exercise of an existing power.

12. I am fortified in my opinion by several judicial decisions. In Co-operative Society Thathi Musalian v. Aqil Husain Shah AIR 1941 Lah 355 Beckett, J. held that the directions given in Section 42(2)(e) are mainly administrative and that a liquidator has no power under that provision to make an order having the force of a decree in respect of a debt due to a society in liquidation. He further held that such a debt cannot be included in contributions mentioned in Section 42(2)(b). In Abdul Ghani v. Anjuman-i-Imdad Qarza Bahami Chak No. 127 AIR 1942 Lah 237 Tek Chand, J. held that the essentials of a liquidator''s jurisdiction u/s

42(2) are that the person concerned must be a member or a past member, of the society and that he is jointly liable with other members to contribute to the assets of the society to meet the losses which it has incurred.

If these, or any of these, conditions are satisfied the liquidator has authority to determine the amount and his decision cannot be questioned in any Court. But if, for instance, he makes an assessment on a person who is not a member, or had ceased to be a member for over two years before the dissolution of the society or his liability to contribute had otherwise been extinguished by operation of law, be has clearly acted in excess of his jurisdiction and his order is a nullity and, therefore, incapable of execution.

The learned Tudee further held that the word "contribution" in Section 42(2)(b) pre-supposes an existing liability. Applying the principles laid down in this case to the facts before me it is clear that the petitioner was not under any liability to contribute to the assets of the society as his shares were admittedly fully paid up, In Anjuman-i-Imdad Qarza Bahami Bafindazan v. Mehr Din AIR 1937 Lah 931 it was held that the word "contribution" in Section 42(2)(b) of the Co-operative Society Act means a payment by each of the member or his share in any common loss or liability of a society and does not include a debt owed by an individual member of the society. u/s 42(2)(b) of the Act, the liquidator has therefore no jurisdiction to determine the liability of a person in relation to a debt alleged to have been owed by him to the society.

Lastly, it was held by this Court (V. Bhargava, J.) in Ramditi Kharbanda Vs. Collector, Allahabad and Others, that the amounts due by a debtor to the society can be treated as assets of the society and not as contributions. The learned judge further held that these amounts can only be recovered by following the procedure laid down in Clause (5) of Section 42 -- that is, by enforcing the orders of the liquidator as decrees of the Court, but they cannot be realised as arrears of land revenue. Thus the weight of judicial authority against the legality of the action of the respondents is conclusive and overwhelming.

13. In the circumstances, I hold that the petitioner has fully established his case for protection of this Court. I direct the issue of a writ of certio-rari quashing the entire proceedings, including the warrant of the arrest of the petitioner for the recovery of the amount in dispute from the petitioner as arrears of land revenue.

14. This Court, however, is concerned that such an illegal order, of arrest should have been made without the authority of any law. It is even more gravely concerned that the officials of the Cooperative Department should have assumed light-heartedly the existence of a power which in fact does not exist and which they ought to have known did not exist. This Court cannot but deplore the fact that throughout the proceedings in the present case there has not been the slightest indication of any realisation by the officials of the Co-operative Department that a citizen was wrongly deprived of his liberty under an illegal arrest unauthorised by any known process of the law. If I may borrow the

language of the Privy Council in AIR 1932 1 (Privy Council) , "it is to be hoped that orders like that of" the liquidator. Nirankar Lal, of the Deputy Registrar Sri Ram Krishna Lal and of the Tehsildar Sri Jwala Prasad "will not in future be lightly made in the course of similar instances,

15. Learned counsel for the petitioner has asked for heavy costs against the respondents. He pointed out that the petitioner was the victim of an arrest which the authorities ought to have known was completely illegal. As against this, learned Junior Standing Counsel for the State has urged that the officials acted in good faith and in the exercise of what they considered to be their duty under the law. In my view the circumstances of this case justify the awarding of special costs. In England, any action resulting in the physical coercion or restraint on a citizen, if proved to be illegal, entitles him to a cause of action against his gaoler. I am not concerned with any remedy which the petitioner may have against the respondents in respect of his illegal arrest.

But, in the present proceedings, the Court must take note of the fact that the respondents began with a full justification of their action. Their initial affidavits were vague and evasive as a result of which this Court had to pass orders calling for personal affidavits from the officials concerned. The hearing of this case was unnecessarily prolonged and officials had to be examined in Court. Through-out these proceedings the respondents gave no indication of any feeling of regret even after realisation of the patent illegality of the arrest of the petitioner In the case of Ram Manohar Lohia Vs. The Supdt., Central Prison, Fatehgarh and Another, , this Court awarded Rs. 500/- as costs to a petitioner who had suffered illegal arrest under a statute which was declared unconstitutional.

In that case, however, the action of the State was under an Act passed by the legislature. In the present case, the arrest of the petitioner was manifestly illegal and due to the grossly exaggerated notion of the officials of the Co-operative Department of their powers under the statute. In my view, the petitioner is entitled at least to the same costs as awarded to Dr. Ram Manohar Lohia. I have taken into consideration the fact that the hearing of the case was quite unnecessarily prolonged as a result of the attempt of the State to justify the arrest.

16. I, therefore, direct the respondents to pay Rs. 500/- as costs to the petitioner.

