(1993) 06 GAU CK 0038

In the Gauhati High Court

Case No : W.A. No. 67 of 1993

Sahabuddin Choudhury — APPELLANT

Vs

State of Assam and Others — RESPONDENT

Date of Decision : 18-06-1993

Acts Referred:
Constitution of India, 1950 — Article 12, 226

Citation : (1993) 06 GAU CK 0038

Hon'ble Judges : U.L. Bhat, C.J;R.K. Manisana, J;D. N. Baruah, J

Bench : Full Bench

Advocate : A.S. Choudhary, M. Deo, I. Hussain and M. Seal, for the Appellant;

Judgement

Bhat, C.J.—The case has been referred to Full Bench in view of the importance of the question involved in the case. Judgment in Civil Rule 3176/91 is challenged in this writ appeal by the writ petitioner.

2. Appellant was selected and trained to work as Secretary of Co-operative Societies by Assam Cadre Management Co-operative Society Limited. He was first appointed and posted as Secretary, Ambagaon Samities Society, Nagaon on May 24, 1975. Later he was appointed as Secretary, Kapashbari Samabai Samity Limited. While so, he was placed under suspension by 3rd respondent, Chief Executive Officer of Assam Cadre Management Co-operative Society Limited. Memo of charges dated August 16, 1988 was served on him by the 3rd respondent specifying 4(four) charges and requiring him to file written statement within 10(ten) days. Appellant did not do so. Finally show cause notice was published in a newspaper and thereupon appellant submitted explanation dated December 15, 1988 3rd respondent decided to conduct an enquiry. Intimation that the enquiry would be held on May 15, 1989 was sent to appellant by registered post. He did not present himself for the enquiry. 3rd respondent conducted the enquiry and prepared a report holding appellant guilty of all the four charges. The second show cause notice enclosing a copy of the enquiry report and requiring the appellant to show cause why punishment proposed

should not be inflicted on him, was sent to him by registered post. He did not respond. Thereupon, 3rd respondent passed an order dated September 26, 1989 dismissing appellant from service. This order also was sent to appellant. On May 30, 1991, appellant submitted a representation to Registrar of Co-operative Societies complaining for non-payment of subsisting allowance and praying for reinstatement, ignoring the enquiry and the dismissal. This was on the basis that the appellant was not aware of the developments. On June 17, 1991 he filed the writ petition seeking to quash the order of dismissal and seeking reinstatement and payment of wages as if he had been in continuous service. According to appellant, he did not receive the second show cause notice or the intimation regarding enquiry and, therefore, the enquiry and the dismissal order are illegal on account of violation of principles of natural justice.

3. 3rd respondent filed counter affidavit rebutting the challenge against the enquiry and the dismissal order and contending that the second show cause notice as well as the intimation of enquiry were sent to the appellant by registered post at the address shown in the writ petition and the appellant was aware of these developments. He also asserted that subsistence allowance was paid up to November 30, 1988. Appellant failed to attend the enquiry or to submit reply to the second show cause notice and the enquiry was conducted lawfully. 3rd respondent was prepared to pay subsistence allowance from December 1, 1988. Appellant did not submit reply affidavit.

4. Learned single Judge, who heard the counsel and perused the records of 3rd respondent, was satisfied that notice of intimation of enquiry and second show cause notice were sent to the appellant by registered post to an address which he had himself given in the writ petition and, therefore, the notice of intimation and second show cause notice could be deemed to have been received by him and as such there was no violation of principles of natural justice. Learned single Judge noticed that after appellant was placed under suspension, instead of remaining at the headquarters he went to his village and even to the first show cause notice he did not submit written statement initially and he did so only after the show cause notice was published in newspaper. Learned Judge also commented on the unusual circumstance that appellant kept; quiet in spite of subsistence allowance not having been received for nearly three years. Learned single Judge found that there was no illegality in the enquiry or the dismissal order and dismissed the writ petition. This order is now; challenged in the writ appeal. The main question arising for consideration is whether writ would lie against the Co-operative Society. Learned counsel submitted that the Co-operative Society in question is "other authority" under Article 12 of the Constitution and, therefore, the writ petition is maintainable. We have been referred to some decisions in this connection.

5. In Sabhajit Tewary Vs. Union of India (UOI) and Others, Council of Scientific and Industrial Research, a Society registered under the Societies Registration Act, was held to be not an authority within the meaning of Article 12. We may in

this connection refer also to a decision in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . It was held that the authority attracted Article 12 of the Constitution after elaborate discussion about the criteria for deciding whether a Corporation is an instrumentality or agency of Government. In Som Prakash Rekhi v. Union of India (1981 I LLJ 9) , it was held that Bharat Petroleum Corporation Limited is a State within the meaning of Article 12. The decision indicates financial resources of the State being the chief funding source, functional character being governmental in essence, plenary control residing in Government, prior history of the same activity having been carried on by Government and made over to the new body and some element of authority or command as the preponderant considerations for pronouncing an entity as an instrumentality of State. In Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, a Constitution Bench held that the Society administering the Srinagar Regional Engineering College was an instrumentality of State having regard to Memorandum of Association and the Rules of the Society. Composition of Society is dominated by Government representatives, the money required for running the college is provided by the Central Government and the local Government Rules require prior approval of the Government, accounts have to be submitted to the Government, Society is required to comply with all directions issued by the State Government with the approval of the Central Government - they are indicative of deep and pervasive control by the Government. In P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, , it was held that Indian Council of Agricultural Research, a Society registered under the Societies Registration Act, is an instrumentality of State since it came into existence as a department of the Government, continued to be an attached office of the Government and wholly financed by the Government and the taxing power of the State was invoked to make it financially viable and to which independent research institutes set up by the Government were transferred and it was almost an inseparable adjunct of the Government. In Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , it was held that the Corporation is a State within the meaning of Article 12 having regard to various tests which have been laid down in the matter. In Tekraj Vasandi alias K.L. Basandhi Vs. Union of India (UOI) and Others, , it was held that the Institute of Constitutional and Parliamentary Studies, registered under the Societies Registration Act, does not attract Article 12 of the Constitution. It has been explained that the tests formulated cannot be a strait-jacket formula. The Court uttered a word of caution to the effect that in a welfare State, Government control is very pervasive and in fact touches all aspects of social existence. In the absence of a fair application to the tests to be made, there is possibility of turning every non-governmental society into an agency or instrumentality of the State. In Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , the Court held that the National Council of Educational Research and Training, a Society registered under the Societies Registration Act, does not attract Article 12 of the Constitution. The Court indicated that Article 12 should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression ''State''. A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of welfare State, independent institution, corporation and agency are generally subject to State control and therefore, State control however, vast and pervasive, is not determinative. Financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "State".

6. We may also advert to Surendra Nath Kalita v. Assam Co-operative Apex Bank Limited (1989) 1 Gau LR 424 where, having regard to six specific features of the Co-operative Apex Bank, it was held that it is an instrumentality of the State and amenable to the writ jurisdiction. The circumstances referred to are the State Government being the chief funding source, composition of the Administrative Council and Board of Directions being dominated by Government nominees, important rules and regulations and conditions of service of the staff requiring approval of the Government, the Bank being obliged to comply with the directions of the State Government on important ma tiers, the Chief Executive being appointed by the Government and the Government having power to reconstitute the Board. In Nihar Sengupta Vs. Union Territory of Arunachal Pradesh and Others, , a Division Bench of this Court, relying on the decision in Surendra Nath Kalita''s case and an unreported decision of another Division Bench in Lakshi Prasad Chaliha v. The Managing Director, Stat-fed, Civil Rule No. 338 of 1979 held the Co-operative Society involved in the litigation to be a State within the meaning of Article 12 of the Constitution.

7. The Assam State Co-operative Marketing and Consumer''s Federation Ltd. (Statfed), a Cooperative Society governed by the provisions of the Assam Co-operative Societies Act, was held to attract Article 12 of the Constitution in Lakshi Prasad Chaliha''s case. In para 2 of the judgment it was observed:

"In this petition we do not propose to decide as to whether a writ can be issued against any and every co-operative society........."

In paragraph 4 of the judgment it was observed:

"Let it be seen what is the position in the case at hand. It is apparent that every case has to be determined on its facts, and no a priori conclusion is possible in this regard."

In paragraph 5 of the judgment, the Division Bench examined the provisions of the Act and noticed that-

"The control exercised over the registered societies by the Registrar of Co-operative Societies is writ large on the face of the Act......Thus, the State Government is in thick and thin with these societies either directly or through its officer, the Registrar."

It was contended for the Society that the provisions in the Act conferring certain powers on the Registrar of the State Government would not be sufficient to characterise every registered Society as an agency of the Government and the matter should be decided on an examination of the provisions of the Bye-laws of the Society. The Bench, however, did not examine the provisions of the Bye-laws, but noticed that almost the entire finances of the Society came from the Government, that the State Government has entrusted with the Society the duty of marketing and distributing essential commodities including salt, cement, edible oil, pulses, wheat products etc., that the Society had taken over the responsibility of procurement and distribution of fertilizer and agricultural inputs to the growers as well as procurement of paddy and collection of levy, marketing of jute and that during successive years the Society was managed by ad hoc Board constituted by the Registrar or the Government with large number of officials in the Board and that the Government had been providing considerable amount of subsidy annually to the Society to discharge its loan obligation. Having regard to these circumstances, it was held that the Society attracted Article 12 of the Constitution.

8. We are prepared to agree with the conclusion in Lakshi Prasad Chaliha''s case that the Staffed is an instrumentality of the State. However, with respect, we have to observe, a decision on this question should have been preceded by an examination of the Bye-laws of the Society to examine the objects and composition, the constitution, membership, management of the Society and other factors relevant to the question. We do not understand the decision as laying down a proposition that merely because the Act confers on the Registrar of the Co-operative Society or the Government considerable amount of power over all Societies, all such Societies will attract Article 12. We have already referred to the passages in the judgment which affirms that every case has to be determined on its own facts.

9. Nihar Sengupta''s case (supra) related to a Society governed by the provisions of Arunachal Pradesh Co-operative Societies Act, 1978. The Bench referring to the provisions of the Assam Co-operative Societies Act, 1949 observed with reference to the decision in Lakshi Prasad Chaliha''s case that (at p. 186):

"The measure of control over all registered Societies by the Registrar and the Government under the provisions of the Act impelled them to infer a Society incorporated under 1949 Act is a State within the meaning of Article 12 of the Constitution. The above decision was followed in another case on November 14, 1988 in Civil Rule 1161/86 (Surendra Nath Kalita''s case) (reported in (1989) 1 GLR 424) wherein a Division Bench applied the tests to Assam Co-operative Societies Act of 1949 and held the society was an authority within the meaning of Article 12 of the Constitution of India."

The Bench proceeded to scrutinise the provisions of Arunachal Pradesh Co-operative Societies Act, noticed that the provisions conferred on the State Government and the Registrar powers and functions more or less similar to those conferred under the Assam Co-operative Societies Act, 1949, purported to agree with the reasoning in the two judgments referred to above and held the Society in question to be an instrumentality of State under Article 12 of the Constitution.

10. With great respect we have to point out that the logic and reasoning of the two earlier decisions were not fully appreciated in Nihar Sengupata''s case. The Bench in Nihar Sengupta''s case proceeded on the basis that in the two earlier decisions the court held that because the Assam Co-operative Societies Act conferred on the State Government and the Registrar considerable degree of control over Co-operative Societies, the Societies in question were instrumentalities of State. A careful examination of the two previous judgments would show that the court arrived at the decision on the facts of the cases and on analysis of the financial backing by the State, the administrative control exercised de facto on the Society, the fact that a large number of governmental or public functions were undertaken by the Society at the instance of the Government. The assumption that in the two earlier decisions, the Division Benches of this court held that a large measure of administrative control conferred on the Government and the Registrar by the provisions of the Statute would render every society governed by such provisions to be "State" or "other authority" within the meaning of Article 12 of the Constitution is erroneous. In Nihar Sengupta''s case the Bench proceeded on the assumption that the nature of the provisions of the Statute would attract Article 12 of the Constitution in the case of every Society governed by the Statute. This proposition, with respect, does not reflect the correct position of law. The correct position, as pointed out by the Supreme Court in a catena of decisions, is that in order to decide whether a particular organisation attracts Article 12 of the Constitution, the court must have regard to various factors, such as, functional character being governmental in essence, plenary control residing in Government or its officers, financial resources of the State being the chief funding source, prior history of the same activity having been carried on by Government and made over to the new body, the composition of the body being dominated by the Government representatives, the presence or absence of deep and pervasive control by the Government over the organisation. The test cannot be fitted into a strait jacket formula. When the court considers functional character regard must be had to the fact that in a welfare State Government control is pervasive and touches all aspects of social existence and independent and autonomous institutions are, therefore, subject to a degree of State control. In the case of a Co-operative Society, the court must necessarily examine these factors in the light of the bye laws as well as other relevant circumstances. Nihar Sengupta''s case (supra) does not lay down good law.

11. The writ petition does not contain any averment to the effect that the Assam Cadre Management Co-operative Society Limited is an instrumentality of State within the meaning of Article 12 of the Constitution. The writ petition does not

indicate the grounds on which the Society can be held to be an instrumentality of State.

12. We find it unnecessary to refer in detail the provisions of the Assam Co-operative Societies Act, 1949. The judgments in Lakshi Prasad Chaliha''s case and Surendra Nath Kalita''s case (supra) refer to these provisions and indicate that the Act confers on the Registrar of Societies and to an extent on the State Government, supervisory power and control over all Co-operative Societies governed by the Act. This, however, is not sufficient to hold that any particular Society governed by the provisions of the Act is an instrumentality of State for the purpose of Article 12 of the Constitution.

13. Learned counsel for the appellant has placed before us the Bye-Laws of the Society. It has been registered under the Assam Co- operative Societies Act. The objects of the Society are to create and maintain a cadre for Secretaries, Managers and other paid employees of Gaon Panchayat Level Co-operative Societies, to raise funds to maintain the cadre, to frame Rules for approval by the Registrar of Co-operative Societies, to undertake inspection of such societies as may be considered necessary and to render advice to the Societies coming under the purview of the Bye-Laws. Bye-Law No. 5 indicates that funds may be raised by issue of shares and admission fees, raising loans and overdrafts, staff deposits, donations, contribution and grants and subsidies from Government and institutions. The Gaon Panchayat Level Societies are required to make contribution, as specified in the Bye-Laws. The State Government will subsidise the cost of Secretaries for a period of 3 (three) years on a tapering basis beginning from 100% and ending with 331/3%. The Financing Banks are also required to make contribution. The deficit, if any, in meeting the cost of the staff on the cadre from the fourth year onwards will be determined by State Government in consultation with the financing bank. The funds shall be invested as provided under the provisions of the Assam Co-operative Societies Act and the Rules. Membership of the Society shall be open to the Assam Co-operative Apex Bank Ltd., the State Bank of India and other Commercial Banks, the Assam Co-operative Apex Marketing Society Ltd., the Assam State Co-operative Union, the Assam State Consumers Co-operative Federation Ltd., the Government of Assam and any other State Level Co-operative Society. All Societies referred to in Bye-Law No. 4(a) shall be nominal members without voting rights. The Bye Laws provide for holding Annual General Meeting. There shall be a Managing Committee of the Society consisting of one representative each from the State Level Co-operative Institutions and Commercial Banks referred to in Bye Law No. 7, two representatives of Gaon Panchayat Level Societies to be nominated by the Registrar of Co-operative Societies, six representatives of the State Government including Commissioner for Agricultural Production, Finance Secretary, an officer from the Co-operative Department, an officer from the office of the Registrar of Co-operative Societies and two persons to be nominated by the Registrar of Co-operative Societies for expert advice. By Law No. 19 indicates vesting with the Managing Committee certain powers in regard to various aspects of the

management. The Chief Executive Officer shall function subject to overall directions issued by the Managing Committee.

14. Bye Laws do not indicate any pervasive government control over the functioning or the finance of the Society. It is not indicated that the Society is dependent wholly or mainly on financial assistance of the Government. The Society is naturally subject to the provisions of the Assam Co-operative Societies Act and, therefore, in some respects subject to jurisdiction of the Registrar of Co-operative Societies and the State Government But this is the case in respect of all the Co- operative Societies in the State. It cannot by any stretch of imagination be declared that all Co-operative Societies in the State of Assam are instrumentalities of State, without reference to the Constitution, status, nature and functioning of each Society. It is not as if the Society renders an important public service being an obligatory function of the State. The object of the Society is to train and provide Secretaries for Gaon Panchayat Level Co-operative Societies. Ordinarily it is for each Society to select and appoint its Secretary. The Assam Cadre Management Co-operative Society Ltd. performs this function on behalf of other Societies and for this purpose levies contribution from those Societies and takes assistance from the Financing Banks and State Government. State Government is obliged to subsidise the cost of Secretaries for a period of three years on a tapering basis. State Government may also step in to grant assistance after this period to enable the Society to tide over difficulty caused by deficit. The General Body will not be dominated by the State Government as membership is open to various other Bodies including Commercial Banks and Co-operative Societies. Similarly Managing Committee will also not be dominated by nominees of the Government, such nomination being restricted to six. The Chief Executive Officer is nominated by the Government, but he is to function under the general directions of the Managing Committee and subject to the Bye Laws. In these circumstances it is difficult to agree that the Society in question bears the imprint of State instrumentality. Article 12 of the Constitution is not attracted in the instant case. The Society is not amenable to writ jurisdiction of this Court. In this view we do not propose to go into other contentions raised.

15. Writ Appeal is accordingly dismissed.

