(1988) 11 GAU CK 0002

In the Gauhati High Court

Case No : Civil Rule No. 1161 of 1986

Surendra Nath Kalita APPELLANT

Vs

Assam Co-Operative Apex Bank Ltd. RESPONDENT

Date of Decision : 14-11-1988

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

Citation : (1989) 1 GLJ 54 : (1989) 1 GLR 424

Hon'ble Judges : S.N.Phukan, J and S.P.Rajkhowa, J

Bench : Division Bench

Advocate : J.N.Sharma, H.N.Sharma, D.C.Mahanta, Advocates appearing for Parties

Judgement

Phukan, J.—In this writ petition under Article 226 of the Constitution, the petitioner has challenged the order of reduction in rank from the post of Assistant Cashier in the Assam Cooperative Apex Bank Limited, respondent No. 1 to the rank of Substaff GradeB, i. e. Peon. The said order was passed in a departmental proceeding on 19.2.85 by the Managing Director of the respondentBank. Appeal of the petitioner was also dismissed.

2. The first point which needs our consideration is whether the respondentBank, namely, Assam Cooperative Apex Bank is an instrumentality of the State. The question whether Assam State Cooperative Marketing and Consumers'' Federation Limited, which is a Cooperative Society registered under the Assam Cooperative Societies Act, 1949 is an instrumentality of the State or hot came up for consideration before this Court and a Division Bench of this Court by judgment and order dated 8. 3. 82 in Civil Rule No. 338 of 1979 answered the question in the affirmative i.e. held that the said Federation is an authority under the State, Mr. Mahanta. {earned counsel for the petitioner relying on the above decision and on the basis of materials placed before us urged that the respondentBank is an instrumentality of the State and as such amenable to the writ jurisdiction of this Court. On the other hand Mr. Sarma, learned counsel for

respondents has urged that in view of the decision of the Apex Court in S. S. Dhanoa vs. Municipal Corporation, Delhi, AIR 1981 S. C. 1395 the respondentBank is not an instrumentality of the State. Mr. Sarma has gone to the extent of saying that in view of the above decision even the decision rendered by the Division Ben h of this Court regarding Assam State Cooperative Marketing and Consumers'' Federation Ltd. needs reconsideration.

3. In the landmark decision of the Apex Court rendered in Ajar Hasia, vs. Khalid Mujib, A.I.R. 1981 &. C 487 the Apex Court expanded the horizon of Article 12 of the Constitution and in doing so it was held that it is immaterial for determining whether a Corporation is an authority within the meaning of Article 12 as to whether the Corporation or such body is created by a statute or under a statte. The enquiry for this purpose has to be confined as to why the said Corporation had been brought into existence. For deciding this question the Court may lift the veil. The Division Bench of this Court in the aforesaid Civil Rule No. 338 of 1979 following the decisions of the Apex Court in Ajay Hasia (supra), International Airport Authority''s case, A, 1. R. 1979 S. C. 1628, and Shorn Prakash vs. Union of India, A. I. R 1981 S. C. 212 summarised the test to be applied in determining the question as to whether a Corporation or body is an instrumentality of the State or not and the said tests are as follows:

(i) financial resources of the State being the chief funding source; (i) functional character being Government in essence; (iii) plenary control residing in Government; (iv) prior history of the sane activity having been carried on by the Government and made over the new body;

(v) some element of authority or command.

4. In a recent decision of the Apex Court in Tekraj vs. Union of India. A. I. R. 1988 S. C. 469, the same question came up for consideration and in respect of above tests, it was held that there cannot be a strait jacket formula and it is not necessary that all the tests should be satisfied for reaching the conclusion either for or against holding an institution to be a State. It was further held that in a given case some of the features may emerge so boldly and prominently that a second view may not be possible.

5. Now let us turn to the facts of the present case to find out what the conclusion may be reached when the above tests are applied.

6. In support of the contention that respondentBank is an instrumentality of the State the petitioner in para 14 of the petition has stated the following facts:

14, * * * * * *

(a) Large scale financing to the Bank by the State Government : Out of total paid up share capital of the Bank as on 30. 6. 84. Rs. 1,62,59,700/, the share of the State Government of Assam is Rs. 1,21,18.000/ and out of 3,25,194 equity shares, the number of shares held by the State Government is 2,42,360. (SourceAnnual Report & Statement of Account for the year ending 30th June, 1984).

(b) The Bank is taking the governmental function of providing credit to the Cooperative Societies and Cooperative Banks for the supply and distribution of agricultural inputs and other essential commodities for the benefit of the weaker section of the society.

(c) Maintenance of public distribution system through the agency of the wholesale consumers'' Cooperative Societies Marketing and Primary Marketing Societies all over the State of Assam.

(d) The Bank is carrying out banking activities under State protection,

(e) The respondentBank is undertaking different activities on instruction of the State Government.

(f) Management of the affairs of the Board of Directors consisting of large number of Government officials. The Managing Director of the Board of Director* of the Bank is an I. A. S. Officer sent on deputation and the Administrative Council, the Highest Authority of the Bank is constituted by the State Government."

* * * * *

The counter on behalf of the respondents has been sworn by the Deputy Manager of the respondentBank and in reply to the above para it has been stated as follows :

"11. That the statements made in paragraph 14 of the writ petition are not admitted by this deponent. The Assam Cooperative Apex Bank Ltd being a Banking Society and a cooperative society and not amenable to the writ jurisdiction. The ratio of Civil Rule 338/79 is not applicable in the instant case. The facts narrated in para 14 (a) to 14 (b) do not bring the respondent Bank to the jurisdiction under Article 226 of the Constitution. Further granting banking facilities to the credit cooperative societies is not a governmental function. Similarly the facts stated in para 14 (c)&(d) are not correct. The management of the respondent Bank is carried out in accordance with the provisions of the Byelaw of the Bank and the provisions of the Assam Cooperative Societies Act. The respondents reserve their right to make their submissions of this point at the time of hearing."

7. Thus it appears the respondents have not denied large scale financing of the Bank by the State Govt. and the fact that the Bank is taking the governmental function of providing credit to the cooperative societies and other cooperative banks for supply and distribution of agricultural input and other essential commodities for benefit of the weaker section of the society. It is also not disputed that the respondentBank is undertaking different activities on instruction of the State Government and the that composition of the Board of Directors consists of large number of Government officials including the

Managing Director who is a member of the Indian Administrative Service on deputation to the Bank. It may be worthwhile to mention that though this serious issue has been raised by the petitioner, the Managing Director or any member of the Board of Directors or Administrative Council has not come forward to deny the allegation.

8. Copy of the memorandum of association and byelaws was made available to us and in the said copy the application submitted by the Bank for registration as cooperative society has also been printed. From the said application we find that one of the objectives for which the Bank was established was to finance the cooperative movement in Assam. There, cannot be any dispute that in the Indian economy cooperation is a very important subject of the State and cooperative movement cannot be successful without adequate finance. So from the above objective, we are of opinion that the Bank is also assisting the State in the movement, in other words the Bank is also discharging governmental function. The inaugural meeting of the Bank was held on 20th October, 1948 presided over by Late G. N. Bordoloi, the then Premier of Assam. The copy of the minutes of the said meeting is available in the above memorandum of association and byelaws of the Bank and from minutes No. 6 we find that Government of Assam was entrusted to nominate the first Administrative Council of the Bank, the board of directors and the office bearers in accordance with the then byelaw No. 7 (2) (b). The then Premier late G. N. Bordoloi explained to the members of the meeting that Government would put in 21/2 crores (Rupees two and half crores) to the Bank and would guarantee the interest on debentures and the Registrar of Cooperative Societies stated that the Bank would render assistance to the agriculturists and workers by providing adequate finances (Minutes Nos. 2 and 3). Byelaw No. 19 (ii) inter alia, provides that though the supreme authority of the Bank shall be vested in the General Assembly the State Government has got overriding powers. According to the byelaws the management of the Bank shall vest m the Administrative Council and in the said council State Government has to nominate 3 (three) persons in addition to the Managing Director. Administrative Council has to form a Board of Directors and the Managing Director and three nominees of the Government shall be members. The Managing Director of the Bank is the Chief Executive and according to byelaw No. 37 (3) he is appointed by the Government on such terms and conditions as the Government may decide. The byelaws of the Bank shall be subject to rules framed by the Government and any amendment shall take effect only after approval of the Registrar of the Cooperative Societies (byelaw No. 42). Though powers have been given under byelaw No. 46 to Administrative Council, board of directors, any committee or any office bearers or any employee to make rules regarding conduct of the business of the Bank, the State Government may prescribe such rules which shall be binding on the Bank.

9. At the time of hearing the annual reports of the Bank for the years 198485 and 1986 have been made available to us. From the said reports the following facts emerge;

(a) substantial investments by the State towards paid up share capital of the Bank. For example in the year 1985 out of total paid up share capital of Rs. 1,72,60,450/ the State''s contribution was Rs. l,ll,18.000/

(b) in the year 1984 at the instance of the Registrar of Cooperative Societies, Assam allotment of shares to individuals was kept in abeyance;

(c) state Government extended to the Bank an unconditional guarantee to replenish the Bank the uncovered portion of overdues and interest due thereunder due by the old Service Cooperative Societies and Large sized Multipurpose Cooperative Societies;

(d) state Government also agreed to replenish the Bank in regard to short fall in the recovery of old overdues as detailed by the Bank as well as future instalments to be due for payment;

(e) substantial amount of loan was given by the Bank to Panchayats and agriculturists; and

(f) cash credit accommodation was also extended by the Bank to the whole sale Consumers Cooperative Societies for essential commodities including controlled cloth and vanaspati etc.

10. The respondentBank has framed a set of rules called the Assam Cooperatives Bank Limited (Staff) Rules, 1980 for short the Rules. Rule 4, inter alia, provides that Administrative Council can modify the said rules with the approval of the Registrar of Cooperative Societies, Assam. Clause (A) of Rule 5 empowers the Board of Directors and Administrative Council to interprete the rules, but such interpretation is subject to the advice of the Registrar of Cooperative Societies, Assam.

We may now refer to some of the provisions of the Assam Cooperative Societies Act, 1949. The Registrar of the Cooperative Societies is authorised under the provisions of the Act, to inter alia, (1) dissolve or reconstruct the managing committee, the Administrative Council or any committee of any Society as provided in section 36; (2) require every office bearer to furnish information and produce documents mentioned in section 45 ; (3) cause audit of accounts vide section 55 ; (4) hold enquiry into the constitution, working and financial condition of a cooperative society registered under the Act (section 60); (5) settle disputes as provided under section 64 ; (6) cancel registration (see section 65); and (7) act as an appellate authority under section 80. On the top of that various sections of the Act empowers the State Government to exercise powers as regards registered cooperative societies. Therefore, the State Government either directly or through officers subordinate to it is thick and thin with those societies. We may, however like to make it clear that only from the provisions of the said Act it cannot be held that every cooperative t society acts as an agency of the Government and in our view whether a particular cooperative society is an instrumentality of the State or not would depend on the basis of facts which have to be examined keeping in view the law laid down as referred to above. At the time of hearing a copy of the notification of the Government of Assam in Co operation Department dated 22.4.86 bearing No. Coop:267/85/25 was made available to us. By the said notification the Government of Assam reconstituted the adhoc Board of Directors of the respondentBank with Sri Prabin Hazarika as Chairman and Secretaries to the Government of Assam, Cooperation Department and Finance Department, Registrar of Cooperative Societies, Managing Director of the respondentBank and the General Secretary of the Employees Union of the respondentBank as Directors.

11. Situated thus from the record of this case, relevant Act, annual reports, memorandum of association and byelaws, staff rules and the above notification of the Government of Assam dated 22. 4.86, we can safely hold that (1) the State Government is the chief funding source for financial resources of the Bank; (2) composition of the Administrative Council and the Board of Directors of the Bank is dominated by representative appointed by the State Government , (3) important rules and regulations for management of Bank and also regulation of the conditions of services of the members of the staff require approval of the State (4) the Bank has to comply with direction of the State Government on important matters (5) the Chief Executive of the Bank, namely, the Managing Director is appointed by the State (6) the State Government has got power to reconstitute the Board of Directors as has been done in the year 1986.

Thus there is existence of deep and perversive State control over the respondentBank. We have also noted that the respondentBank gets subsidies on various accounts from the State Government and also undertakes some activities on instructions of the Government including part of the governmental activities such as financing of Cooperative Societies and Cooperative Banks, extending cash credit for distribution of essential commodities by cooperative sector and making available loans for agricultural purpose. Applying the tests as indicated above we hold that the respondentBank namely, the Assam Cooperative Apex Bank Limited in an instrumentality of the State and as such amenable to the writ jurisdiction of this Court.

12. Now let us consider the decisions on which reliance has been placed by Mr. Sarma, learned counsel for the respondents. Our attention has been drawn to the decision of the Apex Court in Nayagarh Cooperative Central Bank vs. Narayan, A.I.R. 1977 S.C. 112. On perusal of the said decision, we find that the Apex Court did not specifically laid down whether a cooperative society can be an instrumentality of the State though it was observed that the decision of the High Court that a writ petition is maintainable against a cooperative society was not strictly in accordance with the decision of the Supreme Court. We may point out here that this observation was made before the landmark decision of the Apex Court in Ajoy Hasia (supra).

13. Mr. Sarma has forcefully urged that in view of the decision of the Supreme Court in S.S. Dhanoa vs. Municipal Corporation, Delhi, A.I.R. 1981 S.C. 1395 a

Cooperative Society or for that matter a Corporation can not be treated as an instrumentality of the State. As stated earlier Mr. Sarma has urged that in view of the law laid down in that decision, decision of this Court in Civil Rule No. 338/79 may need reconsideration. The decision rendered in S.S. Dhanoa (supra) was duly considered by the Apex Court in the case of Central Inland Water Transport Corporation Limited, A.I.R. 1986 S.C. 1571. In this decision their Lordships considered whether the Central Inland Water Transport Corporation Ltd is "the State" within the meaning of Article 12 of the Constitution i.e. whether the said Corporation is an instrumentality of the State and this question was answered in the affirmative. In deciding this point their Lordships also consider the ratio laid down by the Apex Court in S.S. Dhanoa (supra). In paragraph 56 of the report, their Lordships observed that though at the first blush it may appear that the case of S.S Dhanoa (supra) may run counter to the trend set in the authorities cited in the said report regarding the factors to be considered whether a society, Cooperative Society or a Corporation is an instrumentality of the State or not, but on a closure scrutiny it turns out not to be so. Their Lordships held that in S.S Dhanoa''s case the Court was not called upon to decide and did not decide whether a Government Company can be an instrumentality or agency of the State for the purposes of PartsIll and [V of the Constitution and thus, ''the State'' within the meaning of the expression as used in Article 12 of the Constitution. Thus we are unable to accept the contention of Mr. Sarma regarding applicability of the ratio laid down in S.S. Dhanoa''s case to the case in hand. Incidentally we may mention that in S.S. Dhanoa''s case the question which came up for consideration was whether a civil servant working on deputation with a Cooperative Society is a public servant under section 21 of the I.P.C. and whether sanction for prosecution under section 197 Cr.P.C. is necessary and this question was answered in the negative. We may add here that if any Society, Cooperative Society or a Corporation is declared as an instrumentality of the State coming within the ambit of Article 12 of the Constitution, it would be subject to the constitutional limitation of fundamental rights for the purpose of all its function. Consequently, the employees of such authorities will get protection under fundamental rights but they will not be entitled for protection available to a Government servant under Article 311 of the Constitution.

14. Mr. Sarma has drawn our attention to a Full Bench decision of Punjab and Haryana High Court in Ajmar Singh vs. The Registrar, Cooperative Societies, A. I. R. 1981 P & H 107. But the law laid down in the said decision was modified by another Full Bench in Pritam Singh Gil vs. State of Punjab, A. I. R. 1982 P & H 228 and it was held that a Cooperative Society registered under the Punjab Act is amenable to writ jurisdiction if it is an instrumentality of the State. This was done in view of the subsequent law laid down by the Apex Court in Ajoy Hasia''s case. Mr. Sarma has also drawn our attention to a decision of the Orissa High Court in Chakradhar Pattel vs. SamaSingha Service Cooperative Society Ltd. A.I.R. 1982 Orissa 38. This decision is of no help as we do not find the facts on the basis of which it was held that the Cooperative Society in question was not

an instrumentality of the State.

15. Mr. Mahanta has drawn our attention to two decisions of Rajasthan and A. P. High Courts in Rajasthan Cooperative Board Federation Limited vs. Monoharlal, 1983 Lab. I. C. 1782 and Krishna Rao vs. The Andhra Pradesh Cooperative Central Agricultural Development Bank Limited, 1984, Lab I. C. 131. It was held by both the High Courts that the said cooperative societies are an authority within the meaning of Article 12 of the Constitution.

16. Now coming to the facts of the case two points have been urged, namely, that the departmental proceeding is vitiated as the principle of natural justice was violated and that reduction in rank of the petitioner from the post to in which he was initially appointed, namely, Asstt. Cashier of the respondentBank to the post of peon is absolutely illegal, arbitrary and violative of the principle of natural justice.

17. We have perused the records and also gone through the counter filed on behalf of the respondents and we find that no witness was examined and the enquiry officer found the petitioner guilty only on the alleged admission which according to the petitioner was extracted from him by crossexamining him by the Enquiry Officer. Though this point may have considerable force we need not enter into this controversy as we are of the opinion that on the second point the petition can be disposed of.

18. By rule 7 (a) of the Staff Rules classifications of the permanent staff have been made. We find that the post of Asstt. Cashier falls within the category of ministerial staff whereas the post of peon comes under subordinate staff. Rule 46 of the Staff Rules specifies the penalties that can be imposed and ''reduction to a lower post or grade on a fixed pay or a time scale or to a lower stage in a time scale'' is one of the penalties.

19. In a recent decision of the Apex Court in Nydar Singh vs. Union of India and others, 1988 (III) SVLR (L) 72 their Lordships considered whether a Disciplinary Authority can under the provisions of rule 11 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 impose the penalty of reduction on a Government servant recruited directly to a particular post, to a post lower than that to which he was so recruited.

20. The Apex Court noted that there was a divergence of decisions amongst the High Courts on the pointOrissa and Karnataka High Courts have held that such a reduction is not possible at all (See Babaji Outran Root vs. State of Orissa, 1982 (1) SLJ 496 ; Shivalingas wamy vs. State of Karnataka, 1985 ILR (Kar) 1453). Whereas Madras, Andhra Pradesh and Allahabad High Courts have held that there is no limitation of power to impose such a penalty (See Gopa4 Rao ts. Cit. 1976 (2) MLJ 508, Mahendra Kumar 1984 (1) All India Service Law Journal 34 ; S. N. Dey, 1983 (2) SLJ (All) 114. Their Lordships also noted that there is a third view as laid down in P.V. Srinivasa Sastry, 1979 (3) S.L.R. 509 that such a reduction in rank is permissible provided that promotion from the post to which

the Government servant is reduced to the post from which he was so reduced is permissible, or, as it has been put, the post to which the Government servant is reduced is ''in the line of promotion'' and is a ''feeder service''. Their Lordships rejected the contend in that the power to impose penalty in reduction of the rank is wide enough so as to enable the disciplinary authority to reduce the rank of an employee to a post which is lower than the post to which he was initially recruited. However, it was held that power should of course be available to reduce a civil servant to any time scale, grade, service or post from which he has subsequently earned his promotion. Their Lordships noted the anomalies that would create if the rule is pushed to its logical limits and in that context the Court noted the observation of the learned Judge of the Karnataka High Court in Srinivasha Sashtri''s case. In the said case the learned Judge observed that acceptance of the contentions urged for the respondents would lead to incongrous and absurd results inasmuch a doctor could be reduced to a post of a compounder, an engineer to the post of a fitter, a teacher to the post of a peon or a scientific officer to a post of ministerial officer. In this context, their Lordships observed that "but an overall view of the balance ofthe relevant criteria indicates that it is reasonable to assume that the rule making authority did not intend to clothe the disciplinary authority with the power which would produce such anomalous and unreasonable situations"

21. From the service rules, we find that the post of Assistant Cashier to which the petitioner was appointed was in the category of ministerial staff whereas the post of peon comes under the category of subordinate staff. The initial appointment of the petitioner was to the post, of Assistant Cashier We have perused the Staff Rules and we do not find that the posts under subordinate staff is in the line of promotion or is a feeder service to the posts of ministerial staff. We, therefore, hold, in view of the above law laid down by the Apex Court in Naydar Singh (supra), that reduction of the petitioner to the rank of Peon which is not in line of promotion or is a feeder service, is arbitrary, illegal arid violative of principle of natural justice.

22. Now the question is to what relief the petitioner is entitled to. Following the decision of the Apex Court in the above case of Naydar Singh (supra) we do not propose to remit the case to the disciplinary authority for reconsideration but the penalty imposed on the petitioner is set aside and he shall be restored to the post which he held before imposition of the penalty i.e. the post of the Assistant Cashier. We further direct that the period of service in the reduced post i.e. peon be treated as service in the post held by him prior to the imposition of the penalty, subject to the condition, that the petitioner shall not be entitled any difference of salary for and during the period of reduction. Disciplinary proceeding shall come to end and the above order shall be implemented forthwith.

23. In the result, the appeal is allowed to the extent indicated above. No costs.

S. P. Rajkhowa, J. I agree.

