

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 03.04.2023

Pronounced on:13.04.2023

WP(C) No.2163/2019

GHULAM RASOOL DAR

...PETITIONER(S)

*Through: - Mr. Jahangir Iqbal Ganai, Sr. Advocate,
with Mr. Junaid Bin Azad and Ms. Mehnaz Rather,
Advocates.*

Vs.

J&K STATE COOPERATIVE BANK LTD & ANR.

...RESPONDENT(S)

Through: - Ms. Mahira Bhat, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged order No.7127-38 dated 20.01.2018, whereby his suspension period has been treated as on leave whatsoever kind due to him.

2) It is the case of the petitioner that he came to be appointed as a Clerk on 01.03.1986 in the respondent Bank, whereafter he was promoted as Assistant Accountant on 31st March, 1993. It seems that the petitioner was placed under suspension by respondent No.2 in terms of order No.1995-99 dated 22.06.2016 and was charge sheeted in terms of order No.2453-57 dated 03.08.2016 issued by respondent No.2. The aforesaid action of the respondents was challenged by the petitioner by way of a writ petition bearing SWP No.1689/2017.

3) The petitioner is stated to have responded to the charge sheet by filing his reply, whereafter he was reinstated vide order No.4246-61 dated 22.11.2016. However, after submission of his reply to the charge sheet, nothing was heard by the petitioner as regards the fate of the enquiry. It has been submitted that in answer to the earlier writ petition filed by the petitioner, the respondents filed their objections in which they claimed that the period of suspension of the petitioner has been treated as on leave whatever kind due to him. The petitioner is stated to have attained the age of superannuation on 31st July, 2018 and prior to the said date, he was promoted retrospectively against the post of Deputy General Manager with effect from 01.04.2017.

4) It is submitted by the petitioner that his retiral benefits were not released because of pendency of the writ petition. The petitioner claims that on the assurance given by the respondents, he withdrew the petition with a liberty to file fresh petition in case cause survives.

5) According to the petitioner, the respondents have released leave salary and gratuity in his favour, however, no decision has been taken by the respondents with regard to his request for review of the decision taken in respect of treatment of his period of suspension. Thus, the grievance of the petitioner is that once he has superannuated from service, while the enquiry against him was yet to conclude, he is deemed to have been exonerated of the charges and, as such, his period

of suspension has to be treated as on duty. According to the petitioner, the impugned order dated 20th January, 2018, treating his period of suspension as on leave is, therefore, not sustainable in law. It is claimed that the respondents have released leave salary in favour of the petitioner only for five months on the strength of the impugned order which has compelled the petitioner to file the instant writ petition.

6) The writ petition has been contested by the respondents by filing a reply thereto. It has been contended by the respondents that the instant writ petition is not maintainable as the J&K State Cooperative Bank Ltd. is a Society registered under the J&K Cooperative Societies Act and it does not fall within the definition of “state” or “any other Authority” for the purpose of Article 12 of the Constitution of India. On merits, it has been submitted that whatever was payable by the respondents to the petitioner at the time of his superannuation has been paid to him as per the decision of the Board of Directors. However, the respondents have not stated anything as regards the fate of the enquiry that was initiated against the petitioner.

7) I have heard learned counsel for parties and considered the material on record.

8) At the very outset, learned counsel for the respondents has vehemently raised the issue of maintainability of the writ petition on the ground that the respondent Bank is a Society registered under the

Jammu and Kashmir Cooperative Societies Act and, as such, the instant writ petition is not maintainable. It has been contended that the respondent Bank, being a Cooperative Society, is an autonomous institution, whose affairs are controlled by an elected Board of Directors, without any control from the Government. It has been further submitted that the conditions of service of the employees of the Bank are governed by the rules approved by the Board of Directors of the Bank in accordance with the byelaws and, as such, the dispute between the petitioner and the respondent Bank is not amenable to the writ jurisdiction of this Court.

9) *Per contra*, learned Senior Counsel appearing for the petitioner, has contended that the respondent Bank, even though registered as a Cooperative Society, is, in effect, controlled by the Government, inasmuch as the Government has the power to supersede the elected Board of the Bank in terms of the provisions contained in the J&K Cooperative Societies Act. It has been further contended that the Government has pervasive control over the affairs of the Bank and it owns a certain percentage of share capital of the Bank and, as such, it cannot be stated that the Government does not have any control over the affairs of the Bank. In order to buttress his argument, the learned Senior Counsel has relied upon the judgment of this Court in the case of **Zia us Din Chantal vs. Kashmir Mercantile Cooperative Bank** (SWAP No.1755/2007 decided on 21.12.2021) as also the judgment of

the Supreme Court in the case of **UP. State Cooperative Land Development Bank Ltd. Vs. Chandra Bhanu Dubey and others**, (1999) 1 SCC 741.

10) Before we proceed to determine the question as to whether the respondent Bank qualifies to be a “State” or “an instrumentality of the State” within the meaning of Article 12 of the Constitution of India, it would be apt to notice the legal position on the subject.

11) In **Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology**, (2002) 5 SCC 111, the Supreme Court summarized the tests for determining as to when a Corporation will be said to be an instrumentality or agency of the Government in the following manner:

- 1) *One thing is clear that if the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (Ramana Dayaram case [**Ramana Dayaram Shetty v. International Airport Authority of India**, (1979) 3 SCC 489], SCC p. 507, para 14)*
- 2) *Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (SCC p. 508, para 15)*
- 3) *It may also be a relevant factor...whether the corporation enjoys monopoly status which is State conferred or State-protected. (SCC p. 508, para 15)*
- 4) *Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)*

- 5) *If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (SCC p. 509, para 16)*
- 6) *Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference“ of the corporation being an instrumentality or agency of Government. (SCC p. 510, para 18)” [Ed.: As observed in **Ajay Hasina v. Khalid Mujib Suhrawardy, (1981) 1 SCC 722**, p. 737, para 9: 1981 SCC (LIS) 258.]*

12) From the foregoing analysis of the law on the subject, it is clear that if it is shown that there exists a deep and pervasive State control over the respondent Bank that would give an indication that the said Bank is a State agency or an instrumentality of the State. In this regard, we will have to go to the provisions of the J&K Cooperative Societies Act so as to determine as to whether the respondent Bank, which is a Society registered under the said Act, is controlled in running of its affairs by the Government.

13) So for as the management of the Cooperative Societies registered under the J&K Cooperative Societies Act is concerned, the same is governed by the provisions contained in Chapter IV of the Act. Section 26 of the Act provides that final authority in a Co-operative Society shall vest in the General body of members. As per Section 27 of the Act, programmes of the activities of the Society, consideration of the audit report and the annual report, disposal of the net profits and matters relating to election have to be considered in an annual general meeting. Section 29 of the Act provides for election and nomination of

members of the Committees whereas Sections 29-A and 29-B govern the matters relating bar to election, nomination and continuation as member of Committees, qualification and disqualification for membership of the Committees. Section 32-A of the Act provides that a Cooperative Society shall have autonomy in all financial and internal administrative matters including the areas relating to interest rates on deposits and loans, borrowing and investments, loan policies, personnel policy, staffing, recruitment, posting and compensation to the staff and internal control systems, appointment of auditors and compensation for the staff. Section 33 of the Act, which falls in Chapter V, provides that final registration of a Cooperative Society shall render it a body corporate by the name under which it is registered, having perpetual succession and a common seal with power to hold property, enter into contracts, institute and defend suits and other legal proceedings.

14) That takes us to the provisions of the Act which provide for role of the Government in running of the affairs of the Cooperative Society. Sub-section (7) of the Section 17 of the Act gives power to the Government to declare that any person or class of person engaged in or carrying on any profession, business or employment shall be disqualified from being admitted or for continuing as members of any specific Society. Clause (iii) of Proviso to Section 20, which deals with votes for members, provides that in a case where Government is a member of a Cooperative Society, each person nominated by the

Government on the Committee of the Cooperative Society shall have one vote. Section 22 of the Act provides that in a Cooperative Society, no member other than the Government can hold share capital of the Society exceeding one-fifth thereof. Sub-section (4) of Section 29 of the Act gives power to the Government or the Registrar to appoint a Board of Management or Administrator where any Committee has ceased to hold office and no Committee has been constituted in accordance with the provisions of the Act. Sections 30 and 30-A of the Act vest power with the Government or the Registrar to appoint an Administrator or Transitory Board in certain contingencies. Section 43 entitles the Government to subscribe directly to the share capital of a Cooperative Society but it provides that the Government shall not be entitled to a dividend on the shares of any such Cooperative Society at a rate higher than that at which such dividend is payable to other shareholders of the Society. It further provides that share capital contribution by the Government cannot exceed 25% of the share capital and it can even be reduced by the Government or by such Society. Section 55 of the Act provides that the Government may grant advance loans, guarantee the repayment of principal and payment of interest on debentures issued by a Cooperative Society, guarantee the repayment of share capital of a Cooperative Society and dividends thereon at such rates as may be specified by the Government, guarantee the repayment of principal and payment of interest on loans and given financial

assistance in any other form including subsidies to any Cooperative Society.

15) Byelaw 12 of the Byelaws of the respondent Bank provides for distribution of profits to the Government share capital redemption fund. Byelaw 13 provides that there shall be one Government nominee in the General Body of the Bank and every member shall have one vote. As per Byelaw 15 of the respondent Bank, the strength of Board of Directors has not to exceed 13 including one Government nominee. The funds of the Bank, as per the Byelaws, would include loans, grant-in-aid, subscriptions from the Government. As per the Byelaws, the share capital of the respondent Bank has been fixed as Rs.10,00,00,000/ made up of 1,00,000/ shares of Rs.1000/ each allotted to the members. As per Byelaw 15, the Board of Directors shall be the Governing Body of the Bank to whom the management of the affairs of the Bank shall vest. Byelaw 35 provides that the strength of office establishment shall be determined by the Board. It further provides that the pay scales, conditions of service, postings and transfer policy shall be within the competence of the Board and it is the Board which has to frame and approve the Service Rules.

16) From a detailed analysis of the provisions contained in the Jammu and Kashmir Cooperative Societies Act and the Byelaws of the respondent Bank, it emerges that the said Bank, being a Cooperative

Society, is governed by a Board of Directors in the management of its affairs and the said Board of Directors in normal course of events is an elected Board. Thus, the respondent Bank has a democratic control. The final authority of the respondent Bank vests in the General Body of its members and any person can become a member of the Bank subject to the qualifications laid down in the Act. The programmes and the activities of the respondent Bank are to be approved in the general meeting, its audit reports are to be considered in the general meeting, the matters relating to disposal of net profits are to be decided in the annual general meeting, the balance sheet, profit and loss and other statements etc. are also to be considered in the annual general meeting. The management of the respondent Bank is accountable to its own members. Thus, affairs of the respondent Bank are administered by the management in accordance with the democratically expressed will of its members. Even the service conditions of the staff of the respondent Bank, as per Byelaw 35 of the Byelaws, are to be decided and approved by the Board of Directors of the Bank. It is in pursuance to the provisions contained in Byelaw 35 that the respondent Bank has framed the J&K State Cooperative Bank Employees Service Rules, 2012, which governs the service conditions of its employees.

17) Having regard to the aforesaid provisions contained in the J&K Cooperative Societies Act and the Byelaws of the respondent Bank, it can safely be stated that the respondent Bank is an autonomous body

upon which the Government has no pervasive or deep control, with regard to running of its affairs.

18) Learned Senior Counsel appearing for the petitioner has submitted that there are certain provisions in the Act which provide for supersession of elected Board of Directors of the Bank by the Government and nomination of a Board in its place and there are also provisions in the Act which provide that the Government can own share capital of the Bank and provide loans and grants to the Bank, which clearly shows that the Government has a pervasive control over the respondent Bank.

19) It is true that as per the provisions of the Act, in certain situations, the Government or the Registrar has power to remove the elected Board and to nominate a Transitory Board in its place. It is also correct that the Government can lay down qualifications and disqualifications of the members of the Cooperative Society and it can contribute towards the share capital of the Cooperative Society. The provisions of the Act also provide for nomination of a Government member in the Board of Directors of the respondent Bank and it is also provided that the Government can advance loans, grants and guarantee the repayment of loans etc. in respect of a Cooperative Society but then these circumstances do not afford an indication that the Government enjoys a deep and pervasive control over the affairs of the respondent Bank.

20) So far as the share capital of the respondent Bank is concerned, as has been already noted, the Government cannot contribute more than 25% in the share capital of the Bank. In fact, the Government or the Society has the power to reduce the Government subscription even below 25%. Thus, the Government can never be a majority share holder of a Cooperative Society in terms of the provisions of the Act. Only one Government nominee, out of 13 members, is on the Board of Directors of the respondent Bank. Therefore, the Government does not have any overwhelming control over the functioning of the Board of Directors of the respondent Bank.

21) So far as the provisions relating to supersession of Board of Directors by a Transitory Board, to be nominated by the Government, is concerned, these provisions are only regulatory in nature and come into play only in emergent situations contemplated in these provisions. The existence of these provisions would not lead to an inference that the Government has a pervasive control over the running of affairs of the respondent Bank, nor the fact that the Government advances loans, grants etc. to the respondent Bank would lead to the inference that the Bank is regulated by the Government. I am supported in my aforesaid view by the judgment of Allahabad High Court in the case of **Vijay Behari Srivastava vs. U.P. Postal Cooperative Bank Ltd.** (2003) 6 SLR 384, wherein it was held that mere fact that the Registrar has a power to control the affairs of the society itself will not make a society a

‘State’. The Court further held that the supervision of the Societies is to be treated as regulatory and shall not be taken as a control by a State Authority. It was further observed that a society to be an ‘authority’ is to be financially, functionally and administratively dominated by or under the control of the Government. The mere fact that certain provisions of the Act provide that the Government may extend certain aid to the Cooperative Society in one or the other way specified in Section 55 of the Act itself cannot lead to the inference that the respondent Bank is a public authority.

22) The judgements relied upon by the learned Senior counsel for the petitioners do not apply to the facts of the instant case. In **Zia ud din Changal’s** Case (supra) the respondent Cooperative Society was headed by District Development Commissioner, Baramulla, as its Chief Executive Officer/chairman. It was in these circumstances that the Court held that the respondent was controlled by the Government and as such, a State within the meaning of Article 12 of the Constitution.

23) So far as the judgement of the Supreme Court in **U.P. State Cooperative Land Development Bank’s** Case (supra) is concerned, the ratio laid down in the said case is also not applicable to the present case. In the said case the Bank was constituted under U.P Cooperative Societies Act as well as U.P Cooperative Land

Development Act. Section 122 of the latter Act gave the State authority for recruitment, training and disciplinary control of the employees of the Cooperative Societies and also an authority to frame regulations regarding recruitment, terms of conditions of service, pay etc. The State Government constituted U.P. Cooperative Institutional Service Board with the approval of the Government and regulations were published governing the service conditions of the employees. It is in these circumstances that the Supreme Court held that the State exercised all pervasive control over the Bank and the U.P. Cooperative Land Development Bank was held to be “State”. This is not the situation at hand. The respondent Bank is neither a creature of the Statute nor is it having any statutory power so as to qualify as “State”. The respondent Bank does not have the brooding presence of the Government from which it can be inferred that the Government has pervasive control over it. The respondent Bank has an independent existence flowing from its status as a registered Society under the Act. Thus, it cannot be termed as ‘State or an instrumentality of the State’ within the meaning of Article 12 of the Constitution.

24) However, there is yet another respect of the matter which is required to be considered. The respondent Bank may not be a ‘State’ or ‘an instrumentality of the State’ but it is certainly ‘a person’ or ‘an

authority' within the meaning of Article 226 of the Constitution. The words 'any person or authority' used in Article 226 of the Constitution not only includes the statutory authorities and instrumentalities of the State but it also includes 'any person or authority' performing public duties. Since the respondent Bank performs the public functions of banking business, it may be amenable to writ jurisdiction of this Court. The question, however, arises as to whether in the instant case a writ can be issued by this Court against the respondent Bank to determine a service dispute between the petitioner, who happen to be an employee of the Bank, and the respondent Bank.

25) The Supreme Court in the case of **St. Mary's Education Society & anr. vs. Rajendra Prasad Bhargava & Ors.** 2022 SCC Online SC 109, after noticing its previous judgments on the issue and while considering the question whether a writ petition would be maintainable against a private body, held while a private body would be amenable to writ jurisdiction of the High Court under Article 226 of the Constitution but the judicial review of its actions by the High Court would be confined to only those actions which have the element of public duty and its actions which have the character of private law rights are not amenable to the writ jurisdiction of the High Court.

26) Now coming to the facts of the instant case, the petitioner is seeking a Writ of Certiorari in respect of an order which has been passed by the respondent Bank relating to a service matter between the

parties. So far as the service conditions of the petitioner, who happened to be an employee of the respondent Bank, are concerned, the same are governed by the Rules of 2012 which have been adopted by the respondent Bank in terms of Byelaw 35. The Byelaws made by a Cooperative Society registered under the Act do not have force of law. These are in the nature of a contract between the Society and its members. Therefore, service conditions of the employees of a Society governed by the Byelaws cannot be enforced through a writ petition. The High Court of Delhi in the case of **Sushil Kumar vs. Central Registrar of Cooperative Society and Ors.**, 2022 SCC Online Del. 2088, while considering this issue has held that Byelaws constitute a contract between Society and its members and a mere infraction of those Byelaws would not justify invocation of writ jurisdiction under Article 226 of the Constitution. The Court further held that the contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by a statutory provision.

27) A Coordinate Bench of this Court in the case of **Showkat Ahmad Rather & Ors. Vs. Government of J&K & Ors.** (WP(C) No.2197/2021 decided on 11.10.2022) has, after discussing the law on the subject, held that in the absence of violation of statutory provision or breach of public duty by a body or person, writ petition for enforcement of private contract of service is not maintainable.

28) In view of the foregoing analysis of the law on the subject, it is clear that even though a writ petition may be maintainable against the respondent Bank in respect of the matters that fall within the ambit of public law acts, yet those actions of the respondent Bank which fall within the sphere of private law, which includes a service dispute between the Bank and its employees, are not amenable to the writ jurisdiction of this Court.

29) For what has been discussed hereinabove, the objection to the maintainability of the writ petition raised by the respondents is upheld and the writ petition is held to be not maintainable. The same is, accordingly, dismissed, leaving it open to the petitioners to work out appropriate remedy.

30) Since the petition has been dismissed on technical grounds of maintainability, as such, notwithstanding the dismissal of the writ petition, the respondent Bank shall be at liberty to consider review of the impugned order in case no adverse finding has been recorded against the petitioner in the enquiry proceedings that were initiated against him.

(Sanjay Dhar)
Judge

SRINAGAR
13.04.2023
"Bhat Altaf, PS"

Whether the order is reportable: Yes