

John Vs. Liquidator

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Court : Kerala

Decided On : Nov-15-2005

Reported in : III(2007)BC115; 2006(1)KLT11

Judge : K.A. Abdul Gafoor,; K. Thankappan and; K. Hema, JJ.

Acts : Kerala Co-operative Societies Act, 1969 - Sections 69 and 69(1); Kerala Co-operative Societies Rules; [Constitution of India](#) - Article 226

Appeal No. : O.P. No. 612 of 2003

Appellant : John

Respondent : Liquidator

Advocate for Def. : A.K. Chinnan, Adv. and; B.S. Swathikumar, Spl. Government Pleader

Advocate for Pet/Ap. : Renjith Thampan, Adv.

Disposition : Petition dismissed

Judgement :

K.A. Abdul Gafoor, J.

1. Is the Writ Petition seeking a direction to a Co-operative Society to return the title deeds of the properties mortgaged by the petitioners to obtain housing loan

maintainable? This is the point arising for decision before us.

2. The petitioners, to get such a direction, mainly relied on Ext.P5 judgment of a learned Single Judge of this Court, wherein a similar direction was issued and Ext.P6 judgment, whereby Ext.P5 was confirmed by a Division Bench. But the learned Single Judge, who heard this matter, was of the view that a civil dispute of this nature should be resolved, at the instance of the party concerned, by a civil court or by an arbitrator. This aspect was not considered in Ext.P5 and P6 judgments, according to the learned single Judge. Therefore, the learned single Judge adjourned the matter for being heard by a Division Bench. The Division Bench noticed the contention of the third respondent that the powers vested in this Court under Article 226 of the [Constitution of India](#) could not be exercised for the purpose of such matter, as there was no violation of any statutory rules or byelaws; and therefore, thought that the matter be heard by a Full Bench. Thus, the Writ Petition has come up for consideration before us.

3. The petitioners, for the purpose of house construction, availed of loans from the second respondent -- a primary housing Co-operative Society, by depositing their title deeds as security for the loan amount and also executing registered mortgage deeds. They have repaid the entire loan amount with interest, according to them, to the second respondent. The second respondent is now facing liquidation. The first respondent is the liquidator. The second respondent obtained finance from the third respondent -- the Apex Co-operative Housing Federation and it was out of that amount, the second respondent disbursed the loan to the petitioners. For the purpose of getting refinance, the second respondent had, in turn, handed over the title deeds of several loanees, including the petitioners to the third respondent. The second respondent has not cleared the liability to the 3rd respondent so far. The third respondent is withholding the entire title deeds deposited as security for the payment of the amount due from the second respondent. Therefore, the request of the petitioners was not acceded by the third respondent. It was in the above circumstances, they have approached this Court with this Writ Petition seeking a direction to the respondents to return the title deeds and further seeking a direction to the second respondent to execute release deeds.

4. It is contended by the petitioners that factual aspects are not in dispute in this case and that the second respondent, who advanced the loan amount, has conceded that the entire amount had been remitted by the petitioners and that nothing is due from them. In such circumstances, as there is no direct contract between them and the third respondent, the third respondent cannot, any more, keep in its custody the title deeds in respect of the properties of the petitioners. Such retention is unauthorised illegal and without the sanction of the law. Merely because some amount is due from the second respondent to the third respondent, the third respondent cannot retain the title deeds of the properties of the petitioners. So a direction shall be issued as prayed for, to the respondents, they submit. The 2nd and 3rd respondents Co-operative Societies, being public bodies governed by the Kerala Co-operative Societies Act, 1969 and the Rules framed thereunder, are amendable to the extraordinary jurisdiction of this Court, they submit.

5. A direction can be issued, exercising the power vested in this Court under Article 226 of the [Constitution of India](#), even to a co-operative society, the counsel submits. In support of this connection, the decision reported in U.P. State Co-operative Land Development Bank Ltd. v. Chandra Bhan Dubey, : (1999)ILLJ633SC , is mainly relied on. It is contended, based on the said decision, that a Writ Petition is maintainable even against a person. Relying on the decision in ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd., : (2004)3SCC553 , it is contended that when no disputed question of facts is involved, a direction of this nature can be issued to the third respondent, a Co-operative Society governed by the Co-operative Societies Act and the Rules. The decision in Suter Paul v. Sobhana English Medium High School, : 2003(3)KLT1019 , is also relied on.

6. It is submitted by the respondents that though a Co-operative Society is governed by the statute, the transaction between the parties leading to the lis is of a civil nature. There is no statutory obligation to accede to the demands of the petitioners to return the documents. The document is retained on valid reasons of the amount advanced to the 2nd respondent which made use of it to advance loan to the petitioners. The amount is still due from the 2nd respondent to the 3rd

respondent. This is, therefore, not a matter where this Court shall exercise the jurisdiction under Article 226 of the [Constitution of India](#).

7. It is further submitted by the respondents that the petitioners cannot plead ignorance of the arrangement of the third deed being deposited with the third respondent because, the second respondent is a member of the third respondent, Apex Society and the third respondent is advancing amounts for disbursement to the members of the second respondent on certain specified conditions as mentioned in the loan application and also in the Regulation for granting of loans framed in terms bye-law 21 of the third respondent. As per the procedure contained therein, every application from the member loanee of, the primary society, along with the document to prove the title, has to be forwarded to the Apex Society. Then alone the Apex Society will sanction necessary amount to the primary society for being disbursed to the member loanee. Clause 30 of the said Regulations specifically provides that the third respondent shall have charge on the property on which the house is put up, purchased or repaired with the loan amount and it shall remain the property of the third respondent till the loan amount is fully paid off. It is further submitted that even the application for loan -- Ext.R3(a), submitted by the petitioners contained a declaration that at any point of time, the mortgaged property can be inspected by any official of the third respondent. Thus, the involvement of the third respondent in the transaction is well known to the petitioners. The matter being a civil dispute, has to be resolved by the machinery set up under Section 69 of the Kerala Co-operative Societies Act, 1969 which provides for resolving a dispute between the members of the society and the Apex Society to which the primary society is constituted as well. Therefore, there is an efficacious alternate remedy available to the petitioners and by reason of that, this Court shall not interfere in a matter of civil dispute like this, invoking the jurisdiction vested in this Court under Article 226 of the [Constitution of India](#). In support of this contention, the decision of the Apex Court reported in *Supriyo Basu v. W.B. Housing Board*, 2005 (4) KLT 116 (SC), is relied on.

8. Article 226 does not admit any of the limitation on the powers of the High Court to exercise the jurisdiction vested in that article. It is now trite that the writ proceeding is a public law remedy and it can be exercised when a body or

authority is exercising its power in discharge of a public duty resulting in infringement of the right of another. Exercise of this extra ordinary jurisdiction vested in the High Court is restricted by wise and clear restraints evolved through judicial decisions and therefore, ordinarily a High Court exercising the jurisdiction under Article 226 of the Constitution will not go beyond those wholesome inhibitions except in such situations which justify a 'timely judicial interdict or mandate' as held in *Rohtas Industries Ltd. v. Rohtas Industries Staff Union*, : (1976)ILLJ274SC . The mentor of law is justice and a potent drug should be judiciously administered. Thus under Article 226 in appropriate situations, writ can be issued, as held in *Engineering Mazdoor Sabha v. Hind Cycles Ltd.*, : (1962)ILLJ760SC , even 'to any person or authority'. It is not, however, necessary that the person or authority on whom the statutory duty is imposed, need be a public authority or an official. Mandamus would also lie even against a company constituted by a statute, for the purpose of fulfilling public responsibilities as held in *Praga Tools Corporation v. C.A. Imanual*, : (1969)ILLJ479SC . The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists, mandamus cannot be denied, as held in *Praga Tools Corporation's case*. In other words, to be enforceable by mandamus, a public duty does not necessarily have to be one imposed by statute. A mandamus can be issued even in a case of breach of duties imposed by Charter, common law, custom or even contract, because, mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found' and technicality should not be an impediment in the granting of a relief to undo injustice. It is also now trite, as held in *AIR India Statutory Corporation v. United Labour Union*, : (1997)ILLJ 1113 SC , that though the public law remedy under Article 226 of the Constitution can be made use of not only in the cases of violation of fundamental rights or any other rights, but also 'for any other purpose' as well.

9. Even though it is different for determining the dividing line between the public law domain and the private law field, the question posed must be decided in each case with reference to a particular action, the activity in which the State or the instrumentality of the State is engaged while performing the action complained of, the public law or the private law character of the question and a host of other relevant circumstances, as held by the Apex Court in Air India Statutory Corporation's case. Thus what is material is the nature of the duty placed on the authority concerned.

10. In respect of the instrumentalities of the State engaged in functions of different nature, touching the public law domain as well as private law field, a difference has to be drawn between the two. The Apex Court in L/C of India v. Escorts Ltd., : 1986(8)ECC189 , held:

If the action of the State is related to contractual obligations or obligations arising out of the tort, the Court may not ordinarily examine it unless the action has some public law character attached to it.

xxx xxx xxxWhen the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to State its reasons when it seeks to change the management, by a resolution of the company, like any other shareholder.

Even then, Article 226 of the [Constitution of India](#), as held by the Apex Court in Dwarka Nath v. I.T.O., : [1965]57ITR349(SC) , is couched in comprehensive phraseology and it, ex facie, confers a wide power to meet injustice wherever it is found.

11. It is considering these precedents that the Apex Court in the decision in U.P. State Co-operative Land Development Bank's case found that a Writ Petition by an employee, whose service conditions were governed by the statutory rules, was maintainable. Though thus, the Writ Petition was found to be maintainable against a Co-operative Society under such circumstances, that decision, as contended by

the counsel for the petitioners, is not an authority for a proposition that in each and every case, a writ will lie against a Co-operative Society. In other words, a writ will lie against a Co-operative Society only when the duty owed by the Co-operative Society is of a public nature or when there is infringement of any statutory rules by such a Cooperative Society.

12. The Apex Court, noting the decision in U.P. State Co-operative Land Development Bank's case held in *Supriyo Basu v. W.B. Housing Board*, 2005 (4) KLT 116, as follows:

As observed by this Court in *U. P. State Co-op. Land Development Bank Ltd. v. Chandra Bhan Dubey*, : (1999)ILLJ633SC , in relation to the question whether a Writ Petition would lie against a co-operative society the question to be considered is what is the nature of the statutory duty placed on it and the Court is to enforce such statutory public duty.

13. Thus, the position still remains as *Martin B. said*, about one hundred and fifty years ago in *Mayor of Rochester v. Regina*, 1858 EB & E 1024 that:

Court has power, by the prerogative writ of mandamus, to amend all errors which tend to the oppression of the subject or other misgovernment, and ought to be used when the law has provided no specific remedy; and justice and good government require that there ought to be one for the execution of the common law or the provision of a statute.

14. The petitioners have not been able to point out to us any bye-law, regulation, rule or any provision in the Act by which a duty is cast on the third respondent to return the title deeds deposited with it by the primary co-operative society on demand by a member of the primary co-operative society who had availed of a housing loan from the primary society which had been ultimately sanctioned by the Apex Society, on his mere showing that he had remitted the entire loan amount to the primary society. The petitioners also do not dispute the declaration that they had made in the application for loan -- Ext.R2(a), wherein it had been undertaken to permit all the officials of the third respondent to inspect the property at any point of time. Thus a relation with the third respondent is created by this conduct. Added

to this, is the provisions in the Regulations mentioned supra, governing the grant of loan as availed of by the petitioners, which mandated the documents being deposited with the third respondent. The petitioners cannot, therefore, plead ignorance of an eventuality of a sub-mortgage of the properties, which they had mortgaged to the second respondent, in favour of the third respondent. Thus, when there is such a knowledge about the sub-mortgage, they cannot contend that the third respondent is a party unconnected with the transaction and the retention of the title deeds by the third respondent is unauthorised. In such circumstances, the remedy is not by way of Writ Petition, but lies elsewhere, where the rights and liabilities of the parties are to be examined closely on evidence. So this Writ Petition cannot be entertained, as the reliefs sought for fall outside the scope of writ proceedings.

15. Another contention raised in this case is whether writ could be denied when the facts involved are not disputed at all. Even in a case where facts are admitted, the jurisdiction will not be exercised unless the authority, against whom a writ is sought for, owes a public duty or a statutory duty to act in a particular manner towards the person who asks for such a writ. Therefore, the decision in *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.* (2004) 3 SCC 533, does not have any application. On the other hand, as again held in *U.P. State Co-op. Land Development Bank's* case itself:

When any citizen or person is wronged, the High Court will step into protect him, be that wrong be done by the State, an instrumentality of the State, a company or a Co-operative society or association or body of individuals, whether incorporated or not, or even an individual. Right that is infringed may be under Part III of the Constitution or any other right which the law validly made might confer upon him. But then the power conferred upon the High Courts under Article 226 of the Constitution is so vast, this Court has laid down certain guidelines and self-imposed limitation have been put there subject to which the High Courts would exercise jurisdiction, but those guidelines cannot be mandatory in all circumstances. The High Court does not interfere when an equally efficacious alternative remedy is available or when there is an established procedure to remedy a wrong or enforce a right. A party may not be allowed to by pass the

normal channel of civil or criminal litigation. The High Court does not act like a proverbial 'bull in a china shop' in the exercise of its jurisdiction under Article 226.

16. Admittedly, the petitioner is a member of the second respondent primary Cooperative Society, which is a member of the third respondent Apex Society. Section 69 of the Kerala Co-operative Societies Act provides for resolution of a dispute between a person and a Co-operative society and that includes a dispute between a member of the primary society and the Apex Society to which the primary society is a member as per Clause (e) of Section 69(1) of the Act. This is a fair and efficacious remedy available to the petitioners, where the rights and liabilities of the parties will be decided at length by an arbitrator invested with certain powers of the Civil Court.

17. Necessarily, the petitioners can avail themselves of that remedy which is an established procedure to remedy the wrong said to be done against them by the 3rd respondent Apex Society.

Admittedly, we answer the question posed in the negative. This results in dismissal of the Writ Petition. We do so.

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