

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.119 of 2015
Arising out of
Civil Writ Jurisdiction Case No. 4951 of 2011

- =====
1. The Chairman, Bihar State Co-operative Marketing Union Employees Provident Fund Trustee Committee -cum- Managing Director, Bihar State Co-operative Marketing Union Ltd., West Gandhi Maidan, Patna
 2. Board of Trustee, Bihar State Co-operative Marketing Union Ltd. Employees Provident Fund through its Chairman, Biscomaun Bhawan, Patna

.... Appellant/s

Versus

1. Ram Swarath Singh, son of Late Bishun Singh, resident of Mohalla B -62, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
2. Ram Ratan Pandey, son of late Bishwanath Pandey, resident of Mohalla B -19, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
3. Nageshwar Prasad, son of late Krishan Prasad, resident of Mohalla B -72, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
4. Yogendra Prasad, son of late Sonelal Saha, resident of Mohalla B -25, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
5. Harihar Sharma, son of late Siya Ram Sharma, resident of Mohalla B -49, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
6. Parmanand Rai, son of late Dayali Rai, resident of Mohalla B -89, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
7. Akhauri Bipin Bihari, son of late Akhauri Indradeo Prasad, resident of Mohalla B - 92, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
8. Nand Kishore Sahay, son of late Shivrath Sahay, resident of Mohalla B -09, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
9. Ram Shankar Kumar, son of late Ram Yagya Singh, resident of Mohalla B -52, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
10. Nand Kishore Prasad Singh, son of Late Ram Autar Prasad, resident of Mohalla B - 04, Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna

11. Sadhu Sharan Singh, son of late Prayag Singh, resident of Mohalla B -81,
Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
12. Rajendra Raut, son of late Jay Govind Raut, resident of Mohalla C -06,
Biscomaun Colony, Patna 7, P.S. Alamganj, District Patna
13. Kedarnath Verma, son of late Bhuneshwar Prasad resident of village
Gajaragarh, P.S.- Barayahi, District- Gaya
14. The State of Bihar through Secretary, Co-operative Department, Govt. of Bihar,
Patna
15. Regional Provident Fund Commissioner, 'Bhavishya Nidhi Bhawan' "R"
Block, Road No. 6, Bihar, Patna

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Y.V. Giri, Sr. Advocate
Mr. Ishwari Prasad, Advocate
Mr. Rajendra Prasad, Advocate
Mr. Ashish Giri, Advocate

For Respondents Nos. 1 to13: Mr. Arbind Kumar Singh, Advocate.

For the State : Mr. Sunil Kumar Singh, A.C. to S.C.-27

=====

CORAM: HONOURABLE MR. JUSTICE HEMANT GUPTA
and
HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE HEMANT GUPTA)
Date: 27-10-2016

The challenge in the present Letters Patent Appeal is to
an order passed by the learned Single Bench of this Court on 28th of
January, 2013 in C.W.J.C. No. 4951 of 2011 whereby, the amended
Rule 10(a) of the BISCOMAUN Employees' Provident Fund Rules
(hereinafter referred to as "the Rules") was found to be bad in law

inasmuch as such rule could not have retrospective effect and that no recovery could be made by the authorities from the writ-applicants on the strength of new rules which have come into existence as per the decision taken by the Trust Committee.

2. The said order arises out of the fact that the respondents, the writ applicants, are the former employees of Bihar State Co-operative Marketing Union Ltd. (for short "BISCOMAUN"). The writ-applicants have taken loan from their Provident Fund Account when in service. Such loan amount was deducted from their retiral benefits.

3. The employees of the BISCOMAUN are governed by the provisions of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "the Act"). Though under the scheme framed under the said Act, BISCOMAUN was bound to make deduction from the salary of the employees towards Provident Fund but the authorities under the Act permitted the BISCOMAUN to have its own Provident Fund Rules which were notified as BISCOMAUN Employees' Provident Fund Rules by the Trust constituted for the purpose of managing the Provident Fund on 22nd of February, 2003. The relevant part of the un-amended Rules reads as under:-

“CHAPTER-III

(a) Subject to the provisions hereinafter contained the custody control, management and administration of the Fund shall vest in a Board of Trustees constituted for the purpose. There shall be not less than four or more than eight trustees on the Board. Half of the number of Trustees shall be nominated by BISCOMAUN and the remaining half shall be nominated by the recognized Union/Unions or shall be elected from among the members according to the rules of Election prescribed by the Provident Fund Commissioner.

10 (a) The BISCOMAUN after consulting the Board of Trustees or the Board of Trustees after consulting and with the concurrence of BISCOMAUN and subject to the approval of the Commissioner of Income-Tax and/or Regional Provident Fund Commissioner concerned, as the case may be, may from time to time delete, repeal, vary or alter these Rules, and frame such other Rules as may be necessary, provided that no addition, alteration or repeal, which may affect the employees adversely shall have retrospective effect; provided further amendment suggested by the Regional Provident Fund Commissioner and/or Commissioner of Income-Tax, from time to time, in conformity with the employees Provident Fund Act, 1952 and the scheme made there under or any other statutory enactment shall always be affected by the Board of Trustees.”

4. The Board of Trustees in its meeting held on 11th of September, 2009 decided to change the existing system of refund of loan taken from the Provident Fund by its employees. Under the previous system, the employees were granted loan against their

Provident Fund Account as advance but the same were not deducted from the amount of Provident Fund Account and the employees used to get compound interest on their Provident Fund amount whereas, a separate account used to be maintained for the loan on which Trust Committee used to take 1 per cent extra simple interest on the said loan. But now, it has been decided to deduct the loan amount from the Provident Fund itself and to give interest on the remaining amount only. The relevant extract from the resolution as translated reads as under:-

Sl.	Proposal	Decision
3.	To discuss on the issue of calculation of interest to be paid on the P.F. after deducting the amount of advance taken by the Retired Employees/ Working employee on the balance amount.	The issue of loan/advance against the P.F. contribution was discussed. During the discussion it has come to light that due to non-payment of regular salary since 1996-97 the recovery of advance taken by the employees against P.F. is obstructed. It is also not looking feasible for getting regular salary in the near future. It has been noticed that as per old method of calculation, the advance taken by the employees against the P.F. Contribution was not deducted and the Principal amount remained pending as it is and Biscomaun was paying compound interest on the Principal amount and Biscomaun used to pay simple interest on the advance taken by the employees. On a comparative study it is found that in three years the amount of P.F. with compounding interest became very huge. The present method of calculation is not practical viewing the Economical Global Recession. Hence it is decided to amend the By-Laws No-68/B to 68/N. It was agreed that the date on which the advance was taken will be deducted from the principal. The amount repaid against advance taken against P.F. will be added in

		the principal amount and compound interest will be paid on the total. The Retired/ Dismissed/ Discharged/ Night Guard whose total P.F. has not been paid till now will be paid to them as per the new method of calculation. It has been also decided to pay the P.F. to the working employees as per the new method. Prior to this such Retired/ Dismissed/ Discharged/Dead employees whose P.F. Contribution has already been paid in total as per old method will now be calculated as per New Method. After calculation of the P.F. as per new method it is found that excess amount has been paid will be deducted from the remaining retiral dues of the employee.
--	--	---

5. It may be mentioned that there is a reference to Bye-Laws Nos. 68/B to 68/N but in fact it is not the Bye-Law but are the paragraphs from The Employees’ Provident Funds Scheme, 1952.

6. The learned Single Bench allowed the writ application holding that in terms of Clause 10(a) of the Rules, the amendment cannot have retrospective effect which affects the right of the employees adversely. Therefore, the amendment carried out from retrospective effect was set aside.

7. Before this Court, the learned counsel for the appellants has argued that the writ application itself is not maintainable before this Court in the light of five Judges’ Special Bench judgment reported as The Organizer, Dehri C.D. & C.M. Union Limited. Vs. The State of Bihar & Ors., 2014 (1) PLJR 695.

Thus, the order passed by the Writ Court cannot be sustained as it runs counter to the Special Bench judgment of this Court. The relevant extract from the judgment reads as under:-

“52. Here I may refer to a Division Bench judgment of this Court in the case of **Harendra Narain Banker vs. The State of Bihar**, since reported in 1985 P.L.J.R., 1078. The question was whether Bihar State Co-operative Marketing Union Limited (BISCOMAUN) is an instrumentality or agency of the State and consequently amenable to writ jurisdiction. Court analyzed the provisions and the constitution of BISCOMAUN. It held that even though almost 99% of the share holding was of the State Government, its Managing Director being appointed by the Government being a Government employee, its Apex Managing Committee and its Chairman all elected by other Co-operatives, as such in the Apex Managing Committee, the Government had hardly any say. It was not performing any public duty or public function for an on behalf of the Government. Thus, the cumulative effect was no deep and pervasive control nor public duty or public function and as such it was not ‘State’ or State instrumentality or agency and writ petition was not maintainable. In view of the judgments of the Apex Court as noticed above, the view taken by this Court in that case cannot be doubted.

xxx

xxxx

xxxx

67. That being so, I would answer the reference in the following terms:-

(i) Even though the nature of a private Co-operative, which is otherwise not State within meaning of Article 12 of the Constitution, it does not change by appointment of a Special Officer or an Administrator making Co-operative a “State” within the meaning of Article 12, but the very fact of appointment of Special Officer or Administrator in terms of Sections 4(1), 41(2), 41(3) or Section 41(5) makes the Special Officer/Administrator an “authority” under Article 12 of the Constitution, thus, amenable to writ jurisdiction and his action has to be consistent with Part-III Rights of the Constitution being a statutory authority. If such officer is a Government servant then he is “State” per se.

(ii) The Division Bench judgment of this Court in case of **Nand Kishore Rai** (supra) and the Full Bench judgment of this Court in case of **Rajendra Prasad Sah** (supra) are correct and do not require reconsideration.”

8. The Special Bench in The Organizer, Dehri C.D. & C.M. Union Limited's case (supra) returned a finding that BISCOMAUN is not performing any public duty or public function for and on behalf of the Government. The cumulative effect is that no

deep and pervasive control nor public duty or public function is being performed by the BISCOMAUN and the writ application is not maintainable.

9. In the light of the said judgment, which was announced subsequent to the order passed by the learned Single Bench, the invocation of jurisdiction against BISCOMAUN is not tenable.

10. But another argument was raised by the writ-applicants before this Court that the BISCOMAUN Provident Fund Rules contemplate contribution from the employer and the employees and that such Scheme is in lieu of statutory scheme framed under the Act i.e. The Employees' Provident Funds Scheme, 1952. Since the contribution is in lieu of statutory scheme, the Rules have statutory force. It was thus argued that in view of the contribution in terms of the Rules, the BISCOMAUN is performing a public function. Hence, the writ application would be maintainable before this Court.

11. We have heard learned counsel for the parties on the said question and unable to agree with the argument by learned counsel for the respondents and find that the writ application would not be maintainable before this Court even if contribution is being deducted in terms of the Rules in lieu of the Employees' Provident Funds Scheme, 1952.

12. The judgment reported as Binny Ltd. and another Vs. V. Sadasivan and others, (2005) 6 SCC 657 dealt with the issue when a private person performs public functions so as to be amenable to the writ jurisdiction of this Court. The Court said to the following effect:-

“11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between the public functions and private functions when they are being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. (Emphasis supplied) In a book on *Judicial*

Review of Administrative Action (5th Edn.) by de Smith, Woolf & Jowell in Chapter 3, para 0.24, it is stated thus:

"A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides 'public goods' or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to 'recognise the realities of executive power' and not allow 'their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted'. Non-governmental bodies

such as these are just as capable of abusing their powers as is Government."

13. In view of the above, a body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. When the Rules contemplate contribution from the employer and employee, the BISCOMAUN is not performing a public function as such collection of Provident Fund Dues is not for the benefit of public or a section of public but for its own employees. Therefore, the BISCOMAUN or the Trust who is responsible for ensuring contribution from the employer and the employee does not perform public function when it deducts the amount of provident fund while collecting the funds.

14. In the case reported as K.K. Saxena Vs. International Commission on Irrigation and Drainage and others, (2015) 4 SCC 670 the Court considered the Supreme Court judgment reported as G.Bassi Reddy V. International Crops Research Institute, (2003) 4 SCC 225 to hold that merely because the activity of the research institute enures to the benefit of the Indian public, it cannot be a guiding factor to determine the character of the Institute and bring the same within the sweep of "public function or public duty". The Court concluded as under:-

“45. On the other hand, even if a person or authority does not come within the sweep of Article 12 of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, as noted in *Federal Bank Ltd. v. Sagar Thomas*, (2003) 10 SCC 733, such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under liability to discharge any function under any statute, to compel it to perform such a statutory function.

xxx

xxx

xxx

47. It is clear from the reading of the impugned judgment that the High Court was fully conscious of the principles laid down in the aforesaid judgments, cognizance whereof is duly taken by the High Court. Applying the test in the case at hand, namely, that of ICID, the High Court opined that it was not discharging any public function or public duty, which would make it amenable to the writ jurisdiction of the High Court under Article 226. The discussion of the High Court is contained in paras 34 to 36 and we reproduce the same for the purpose of our appreciation (*K.K. Saksena v. International Commission on Irrigation and Drainage*, 2011 SCC OnLine Del 1894).

xxx

xxx

xxx”

15. In view of the judgment referred to above, we find that the BISCMAUN or the Trust cannot be said to be performing any public function making it amenable to the writ jurisdiction of this Court.

16. In view thereof, we need not examine the legality and validity of the amendment carried out on 11th of September, 2009

in view of our finding that the writ application is not maintainable.

17. Consequently, the findings recorded by the learned Single Bench is rendered redundant. As a consequence thereof, the Letters Patent Appeal is allowed and the order passed by the learned Single Bench is set aside. The writ-applicants are given liberty to avail such other remedy as is available to them for redressal of their grievances in accordance with law.

(Hemant Gupta, J)

Ahsanuddin Amanullah, J I agree.

(Ahsanuddin Amanullah, J)

P.K.P.

AFR/NAFR	A.F.R.
CAV DATE	19.10.2016
Uploading Date	27.10.2016
Transmission Date	