

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

WRIT PETITION NO. 3344 OF 2018

Shri. Kiran S/o. Rangnath Kale,
Age : 47 years, Occu. Service,
R/o. Jawahar Colony,
Behind Champawati School,
Nagar Road, Beed, Tq. & Dist. Beed.

.... Petitioner

Versus

1. The State of Maharashtra
Through its Principal Secretary
Co-operation and Textile Department,
Mantralaya, Mumbai – 32.

2. Commissioner for Co-operation and
Registrar of Co-operative Societies
2nd Floor, new Central Building,
Dr. Baba Saheb Ambedkar Rd, Pune,
Maharashtra.

3. The Beed District Central Cooperative Bank
Limited, Rajurives, Beed, Dist. Beed.
(Through its Chief Executive Officer)

..... Respondents

...

Ms Pradnya S. Talekar, Advocate for the petitioner
Mr K. B. Jadhavar, AGP for respondents No. 1 and 2
Mr V. N. Upadhye, Advocate for respondent No. 3

...

**CORAM : S. V. GANGAPURWALA
AND
A. M. DHAVALA, JJ.**

DATE OF RESERVING THE JUDGMENT : 30.04.2019
DATE OF PRONOUNCING THE JUDGMENT : 04.07.2019

JUDGMENT [PER A. M. DHAVALA, J.] :-

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties and taken up for final disposal.

2. The petitioner who was Manager of District Central Cooperative Bank Limited (R-3) assails the order of his termination dt. 07.07.2015, decision of dismissal of his appeal dt. 26.12.2017, order of revocation of his promotion dt. 07.07.2014 and seeks his reinstatement with continuity of service, back-wages with all increments and with interest. Apart from merits, the maintainability of the writ petition is challenged on the ground that, District Central Cooperative Society is not instrumentality of the State within the meaning of Article 12 of the Constitution.

3. The petitioner was employed as Clerk on daily wages in respondent No. 3 – DCC Bank on 09.01.1989. Thereafter he was regularized in service and in due course on 01.08.2012 he was promoted to the post of manager. During the period 2011-13, there was huge embezzlement of Rs. 1.45 crores in the respondent No. 3-Bank when the petitioner was the Manager. In all, 131 FIRs came to

be lodged in respect of the embezzlement. The petitioner was called upon by letter dt. 17.12.2013 to submit original proceeding book of the meetings as well as the proceeding books of administrative board of the bank which according to the petitioner were never with him. He was served with show-cause notices dt. 04.01.2014 and 05.02.2014. On 10.03.2014, the petitioner came to be suspended. He was served with charge-sheet dt. 22.05.2014 with allegations regarding securing loan by submitting false documents, taking benefit of wrongful promotion, negligence in work, and non-cooperation with the department by not accepting notices and directions. On 04.04.2015, the petitioner was held guilty for carelessness and negligence and was terminated. The writ petition filed by petitioner on 28.07.2015 challenging suspension and termination was disposed of with liberty to avail alternate remedy. The petitioner preferred appeal and thereafter filed writ petition as there was delay in deciding the appeal. The petitioner was called for hearing on 23.12.2017 before three member committee appointed by the Board of Directors. On 26.12.2017, The appeal of the petitioner was dismissed. Hence, this writ petition.

4. The petitioner challenges the order of termination on following grounds.

- (a) The petitioner was instrumental in filing various FIRs lodged against the Board of Directors and in view of his conduct, false allegations were levelled against him and *mala fide* action of dismissal was taken. The Board of Directors were the persons against whom he had made allegations and therefore they could not have taken action against him.
- (b) The appeal was preferred before the Board of Directors and they had no authority to sub-delegate its power to three member committee. The Committee had no authority to hear the appeal. The petitioner had good credentials and professional record.
- (c) The petitioner was from time to time promoted on account of his credentials and record. He had taken effective steps to enhance the recovery process and huge amount of Rs.245 crores was recovered from the defaulters and successfully distributed amongst the depositors. One of the Directors sitting as a member of the Committee hearing appeal was shown as accused in the FIRs while son of the present Chairman was also shown as the accused. Mr. Solanke and Mr. Pandit, who are the political leaders, were controlling and managing the DCC Bank. They filed frivolous complaints against the petitioner to secure his dismissal. Wife of one of the Directors namely Lata Sanap was also a member of the Committee hearing the appeal. The Board of Directors were involved in the scam of Rs. 145 crores by way of fraudulent loans. The petitioner and the Administrator – Shivanand Taksale took steps to ensure

fair recovery rates. Thus, the action taken against the petitioner was *mala fide* and with intention to pressurize the petitioner so that he should not prosecute criminal action. He was denied leave even when he was genuinely ill and his absence was made a ground for inquiry. There was no question of misappropriation or recovery of economic loss.

5. In the alternative, it is claimed that, proper procedure was not followed and no opportunity of hearing was given and it was claimed that, the punishment was disproportionate to the charge that was held to be proved. There was no previous complaint whatsoever against the petitioner. The petitioner therefore claimed for setting aside his termination, suspension, revocation from promotion and claimed reinstatement with consequential benefits.

6. Respondent No. 3 filed affidavit of Legal Officer – Mr. Sharad Thombre dt. 09.07.2018. He has admitted the factum of appointment, and promotions of the petitioner, his suspension and submission of charge-sheet. He claimed that, regular domestic enquiry was conducted through independent Inquiry Officer. He was given proper opportunity to defend himself. The petitioner had secured loan of Rs. 2,50,000/- by executing Mortgage Deed and again obtained additional loan on the same Mortgage Deed but the

property mortgaged was not owned by him. Due procedure was followed in the enquiry and the report of Enquiry Officer was served on the petitioner, his explanation was taken and thereafter order of termination came to passed against him. Even in the appeal he was given personal hearing and thereafter the appeal was dismissed on merits. The petitioner was held guilty for charges grave in nature and therefore he was dismissed. There was no failure of justice nor basic principles of natural justice were flouted and therefore this is not a fit case to invoke jurisdiction under Article 226 and 227 of the Constitution. Findings are not recorded on the basis of no evidence nor they are perverse. Respondent No. 3 is not instrumentality of the State as per Article 12 of the Constitution. Hence, the petition be dismissed.

7. Ms Pradnya Talekar, learned counsel for the petitioner besides oral arguments submitted written notes of arguments. She claimed that, the State Government has substantive control in finances, administration and management of respondent No. 3 – Bank. There was no proper enquiry as the persons against whom the allegations were made were conducting the enquiry and there was bias and prejudice. The petitioner was instrumental in lodging several FIRs against the Board of Directors or their relatives. The

appeal was heard by three member committee, which should have been heard by Board of Directors and there was no power for them to sub-delegate the powers. The arguments advanced by the petitioner were not considered nor recorded. The orders are without reasoning and without application of mind. The Enquiry Officer had absolved the petitioner of two charges and held him guilty of seven charges primarily of negligence. There was no charge of misappropriation or fraud proved against the petitioner. The punishment is disproportionate. The reasons and explanation given by the petitioner to the authorities were not considered. He was not heard on the point of quantum of penalty. She relied on following judgments.

- (i) ***U.P. State Cooperative Land Development Bank Ltd. Versus Chandra Bhan Dubey and others*** reported in (1991) 1 SCC 741

The petitioner was held to be instrumentality of State. It is also observed that, even if it is not a State instrumentality, still if it is discharging public functions, powers under Article 226 of the Constitution can be invoked. (Para 27)

- (ii) ***Ram Sahan Rai Versus Sachiv Samanaya Prabandhak and another*** reported in (2001) 3 SCC 323 (Para 4)

- (iii) ***Bombay Stock Exchange Versus Jaya I. Shah and another*** reported in (2004) 1 SCC 160 & ***Vijay Shivaji Kokate vs. Divisional Joint Registrar, Co-operative Societies, Nashik and others*** reported in 2007(3) Mh.L.J. 539 (Para 36)

Bye-laws have statutory flavour.

- (iv) **P. Pramila and others v. State of Karnataka and another** reported in (2015) 17 SCC 651, Sub-delegation not permissible.
- (v) **M. J. Sivani and others Versus State of Karnataka and others** reported in (1995) 6 SCC 289
Reasons are sine qua non for valid orders, even if it is administrative.
- (vi) **Shri Bhagwan Lal Arya Versus Commissioner of Police, Delhi and others** reported in (2004) 4 SCC 560
The Court can look into the proportionality of the sentence.

8. Per contra, Mr Upadhye, learned counsel for respondent No. 3 and Mr K. B. Jadhavar, learned Assistant Government Pleader for respondents No. 1 and 2 support the impugned order of termination and order of the appellate Court. Mr Upadhye argued that, the petitioner had fully participated in the departmental inquiry and had not raised any objection to the constitution of the committee. The allegations are made for the first time. He relied on following rulings to submit that, respondent No. 3 – Cooperative Bank is not a State.

- (i) **Shamrao Vithal Co-operative Bank Ltd. & another vs. Padubidri Pattabhiram Bhat & another** reported in 1993 (1) Mh.L.J. 1 (Full Bench)
- (ii) **General Manager, Kisan Sahkari Chini Mills Limited, Sultanpur, U. P. Versus Satrugan Nishad** reported in 2003 (8) SCC 639
- (iii) **Sudam Vanaji Shirsat Versus Shetkari Sahakari Sangh Ltd., and others** reported in 1993 (1) Bom.C.R. 543

- (iv) *Banabihari Tripathy v. Registrar of Co-operative Societies and another* reported in *AIR 1989 Orissa 31* (Full Bench)
- (v) *P. Bhaskaran and others Versus Additional Secretary, Agricultural (Co-operation) Department, Trivandrum and others* reported in *AIR 1988 Kerala 75*

9. Mr. Upadhye, learned counsel for respondent No. 3 argued that, the inquiry was duly conducted and the procedure prescribed was followed. There was independent Enquiry Officer appointed with mutual convenience. He held the petitioner guilty of seven charges levelled against him as per the charge-sheet. The charges are of grave misconduct. Thereafter due procedure was followed, notice was given, explanation was taken and then the impugned order was passed. There is no substance in the allegations of *mala fides*. The defence of *mala fides* is afterthought. The petitioner had not lodged a single FIR. This Court cannot consider the issue of proportionality as the powers in writ petition are of limited judicial review and in this regard reliance was placed on **CEO Krishna DCC Bank V. K. Hanumanthrao 2017 (2) SCC 528**. The petitioner was Bank Manager. The post required higher standard of honesty, integrity as he was dealing with money of depositors and customers. He was supposed to take all the possible steps to protect the interest of the depositors. The punishment awarded is not perverse, not based on no evidence and is not disproportionate.

10. Shri. K. B. Jadhavar, learned Assistant Government Pleader for State supported the impugned order.

11. Considering the arguments advanced in the light of the controversy raised, points for our consideration with our findings are as follows:

- (i) Whether respondent No. 3 – Cooperative Bank is an instrumentality of the State?
- (ii) If not, whether this Court can exercise powers under Article 226 of the Constitution of India against respondent No. 3 in the facts of the case?
- (iii) Whether the inquiry is vitiated by not following the principles of natural justice?
- (iv) Whether the punishment imposed is disproportionate shocking to the judicial conscious?
- (v) What order?

REASONS

12. Ms. Talekar relied on Apex Court judgment in ***U.P. State Cooperative Land Development Bank Ltd. Versus Chandra Bhan Dubey and others reported in (1991) 1 SCC 741***, wherein the petitioner-Bank was held to be instrumentality of the State. The Apex Court observed in that case that, the Bank was constituted under Section 122 of the U.P. Cooperative Societies Act as well as

under U.P. Cooperative Land Development Bank Act. Section 122 gives the State Government authority for the recruitment training and disciplinary control of the employees of the Cooperative Societies and authority to frame regulations regarding recruitment, emoluments, terms and conditions of service. Accordingly, the State Government constituted U. P. Cooperative Institutional Service Board and said Board with the approval of the Government promulgated regulations which were published in the Gazette. Those were applicable to the service conditions of the employees. Regulations 84 & 85 provided for penalties, disciplinary proceedings and appeals. It was further observed in para 20 that, there was only one State Land Development Bank for the whole State of U. P. and it was the petitioner. Registrar of Co-operative Societies for the State of U. P. was the trustee for securing fulfillment of obligations of the Bank to the holders of debentures and his powers were governed by the provisions of the Bank Act. U/s. 9 of the Bank Act, the State Government constituted guarantee fund for meeting losses likely to occur to the beneficiaries. Finance Department of the State was to maintain the guarantee fund. It was also observed that, the Government officials were sent on deputation by the State to the appellant as Managing Director and Chief General Manager. In the context, it was held that the affairs of the appellant were controlled

by the State Government and though it was a cooperative society, it was an extended arm of the State and therefore, it is an instrumentality of the State as per Article 12.

13. In the present case, the District Central Cooperative Bank is not shown to be constituted by the State. The employees are governed by the Standing Orders framed under Section 35(2) of the Maharashtra Industrial Relations Act, 1946. Following facts are pleaded to disclose the control of the State Government in the affidavit of the petitioner dt. 21.02.2019.

- (i) The bye-laws of respondent No. 3 were drafted according to model bye-laws prepared by Registrar, Cooperative-Societies Act, Pune, Maharashtra. Those were submitted for approval of the Divisional Joint Registrar.
- (ii) The rules require prior approval from the Government.
- (iii) The Bank is required to provide credit under various Government Schemes.
- (iv) The State has power to appoint any person as Board of Director, in the capacity as Government representative.
- (v) The District Registrar was appointed as Board of Director as Government representative under Model Law No. 30.

(vi) The Divisional Joint Registrar was appointed as Administrator by the Government in place of Board of Director when certain irregularities were noticed.

(vii) Respondent No. 3 is required to contribute the stabilization and liquidity fund.

(viii) There was checks and control over the limits of administrative and establishment expenses and there is auditing of the Bank accounts by Registrar approved by the State Government u/s 81.

14. In Ram Sahan Rai's case (supra) relied upon by Ms. Talekar, the petitioner was a clerk in District Cooperative Bank constituted under the Statute and the State Government was exercising all pervasive control over it. He was removed from service for misconduct without affording an opportunity to defend himself. His suit challenging the order of removal was decreed by the Lower Appellate Court. The High Court set aside the order holding that it was passed without jurisdiction and contrary to Regulation 85. The Apex Court in the context observed :

4. The status of the said bank is no doubt of a Co-operative Society, registered under the U.P. Co-operative Societies Act, 1965 and is constituted under the U.P. Co-operative Land Development Bank Act, 1964. But an examination of different provisions of the rules, bye-laws and regulations, unequivocally indicate that the State Government exercises all-pervasive control over the bank and its employees and the service conditions of such

*employees are governed by statutory rules, prescribing entire gamut of procedure of initiation of disciplinary proceedings by framing a set of charges and culminating in inflicting of appropriate punishment, after complying with the requirements of giving a show cause and an opportunity of hearing to the delinquent. This being the position and in view of the judgment of this Court in U.P.State Co-operative Land Development Bank Ltd. vs. Chandra Bhan Dubey and Ors., 1999(1) SCC 741, the conclusion is irresistible that the defendant bank is undoubtedly an instrumentality of the State. Once it is held that the defendant is a statutory body and is a State and in the matter of passing an order of dismissal of an employee, it did not follow the mandatory provisions of the rules and regulations and the order was passed in gross violation of principle of natural justice, then the third exception to the general principle that contract of personal service cannot ordinarily be specifically enforced, as indicated in *S. R. Tiwaris case* 1964(2) SCR 55 which has also been relied upon in *Vaish Degree College case* 1976(2) SCC 58 would apply and, therefore, the conclusion of the High Court must be held to be erroneous in the facts and circumstances of the present case.*

15. In Satrughan Nishad's case (supra), the petitioner mill was a cooperative Society registered under U.P. Cooperative Societies Act. The respondents were Class-III and IV employees. The Sugar Factories Federation Limited was the apex body of the Cooperative Sugar Mills. The Chairman-cum-Managing Director of the Federation who was the Secretary to the Government of U.P., sent letter to the General Manager of the Mill that there were 401 surplus staff and their services were required to be dispensed with. Accordingly, their services were dismissed. The respondents filed Writ Petitions. A single Judge of the High Court held that, the mill was a State within the meaning of Article 12. He allowed the writ and quashed the termination. The aggrieved Mill approached the Apex Court. The

Apex Court quoted with approval the parameters laid down in

Ramana Dayaram Shetty vs. International Airport Authority of

India reported in 1979 (3) SCC 489, para 6 of which read thus:

"The tests for determining as to when a corporation can be said to be an instrumentality or agency of government may now be culled out from the judgment in the International Airport Authority case. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it 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. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority case as follows:

(1) *One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government (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) If on a*

consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out in the International Airport Authority case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12”.

16. It was observed in para 7 that, the Constitution Bench of 7 judges have in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and others* reported in *(2002) 5 SCC 111*, quoted with approval in extenso the aforesaid tests and again this was approved in *Ajay Hasia Vs. Khauid Mujib Sehravardi and others* reported in (1981) 1 SCC 722. After referring to the ratios laid down in several judgments, the Apex Court observed in para 8 as follows.

8. *From the decisions referred to above, it would be clear that the form in which the body is constituted, namely, whether it is a society or co-operative society or a company, is not decisive. The real status of the body with respect to the control of government would have to be looked into. The various tests, as indicated above, would have to be applied and considered cumulatively. There can be no hard and fast formula and in different facts/situations, different factors may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution. In this context, Bye Laws of the Mill would have to be seen. In the instant case, in one of the writ applications filed before the High Court, it was asserted that the Government of Uttar Pradesh held 50% shares in the Mill which fact was denied in the counter affidavit filed on behalf of the State and it was averred that majority of the shares were held by cane growers. Of course, it was not said that the Government of Uttar Pradesh did not hold any share. Before this Court, it was stated on behalf of the contesting respondents in the counter affidavit that the Government of Uttar Pradesh held 50% shares in the Mill which was not denied on behalf of the Mill. Therefore, even if it is taken to be admitted due to non traverse, the share of the State Government would be only 50% and not entire. Thus, the first test laid down is not fulfilled by the Mill. It has been stated on behalf of*

the contesting respondents that the Mill used to receive some financial assistance from the Government. According to the Mill, the Government had advanced some loans to the Mill. It has nowhere been stated that the State used to meet any expenditure of the Mill much less almost the entire one, but, as a matter of fact, it operates on the basis of self generated finances. There is nothing to show that the Mill enjoys monopoly status in the matter of production of sugar. A perusal of Bye-Laws of the Mill would show that its membership is open to cane growers, other societies, Gram Sabha, State Government, etc. and under Bye-Law 52, a committee of management consisting of 15 members is constituted, out of whom, 5 members are required to be elected by the representatives of individual members, 3 out of co-operative society and other institutions and 2 representatives of financial institutions besides 5 members who are required to be nominated by the State Government which shall be inclusive of the Chairman and Administrator. Thus, the ratio of the nominees of State Government in the committee is only 1/3rd and the management of the committee is dominated by 2/3rd non-government members. Under the Bye-Laws, the State Government can neither issue any direction to the Mill nor determine its policy as it is an autonomous body. The State has no control at all in the functioning of the Mill much less deep and pervasive one. The role of the Federation, which is the apex body and whose ex-officio Chairman-cum-Managing Director is Secretary, Department of Sugar Industry and Cane, Government of Uttar Pradesh, is only advisory and to guide its members. The letter sent by Managing Director of the Federation on 22nd November, 1999 was merely by way of an advice and was in the nature of a suggestion to the Mill in view of its deteriorating financial condition. From the said letter, which is in the advisory capacity, it cannot be inferred that the State had any deep and pervasive control over the Mill. Thus, we find none of the indicia exists in the case of Mill, as such the same being neither instrumentality nor agency of government cannot be said to be an authority and, therefore, it is not State within the meaning of Article 12 of the Constitution.

17. In **Shamrao Vithal Bank's** case, Full Bench of this Court observed that the appellant was a multi-state cooperative society deemed to be registered under Maharashtra Cooperative Societies Act as well as multi-State Cooperative Societies Act. Referring to the various supreme court judgments and the guidelines for determining

whether the appellant was instrumentality of the State or not and the factual matrix about the control of the State over the appellant, it was observed that, as held in Tekraj Vasandi alias K. L. Basandhi v. Union of India reported in AIR 1988 SC 469, there cannot be indeed a straight-jacket formula. It is also not necessary that all the tests should be satisfied for holding an institution to be State. In a given case some of the features may emerge so boldly and prominently that a second view may not be possible. There may be other cases where the matter would be on the border line. The principles which have come to be recognized as fundamental to Co-operative organisation were considered and it was observed that, in case of societies registered under Maharashtra Societies Act and Multi-State Cooperative Societies Act, the affairs of the society are administered by the management democratically expressed by will of the members. The management of the society was accountable to its own members. The Central Government may have power to give directions in the public interest or for all the purposes for securing proper implementation of the cooperative production and other development programmes approved or undertaken by the Central Government. U/s. 72, the final authority of the society registered shall vest in the general body of the members and the management u/s 73 shall vest in the Committee. The bye-laws under Multi-State

Cooperative Societies Act deal with powers of Board of Directors to make appointments of salaried employees and to incur expenditure for carrying on business. There is power for constitution of reserved fund. Considering all the facts it was held that the Government had no deep and pervasive control over the bank. The reliance was also placed by Mr. Upadhey in *Banabihari Tripathy v. Registrar of Cooperative Societies* reported in *A.I.R. 1989 Ori. 31 (FB)*, wherein it was held that, the society registered under the Cooperative Societies Act does not acquire status of authority to render it amenable to writ jurisdiction. The supervisory powers given to Registrar are with a view to securing better working for societies and to give them well trained officers. Similar view was taken by the Full Bench of Madras High Court in *R. Tnamilarasan v. Director of Handlooms and Textiles, Madras* reported *1989(1) L.L.J. 388* and *P. Bhaskaran v. Additional Secretary, Agricultural (Co-operation) Department, Trivandrum* reported in *A.I.R. 1988 Ker. 75 (FB)*. While following the same views, the Full Bench of this Court held that, in a welfare State the definition of governmental function has to be widened to include within its scope all functions which are of public importance. Hence any organisation which performs a public function must be considered as State is a too broad a proposition. Relying on *Som. Prakash Rekhi vs. Union of India* reported in *A.I.R. 1981 SC 212*, it

was held that, merely because an organization carries on function of public importance closely related to Government functions, would not be a reason to hold it as an instrumentality of the State. In the case, the appellant Bharat Petroleum Corporation was held to be not a State.

18. In Sudam Shirsath's case (supra), the Marketing Manager of the Cooperative Society had challenged his termination. It was observed that, his appointment was subject to approval of Registrar and the Government has authority of opening new branch of the society. In the context, it is observed;

8. The character of the control which has to be considered in this context is the plenary control which is clearly different from some control or a few controls. In one sense, no individual or any institution, in modern times, is free from controls of the Statute. As Duncan Merrit has put such regulation from statutes the cradle to the grave and even beyond. That does not, however, make out a plenary control in the sense in which the Apex Court intended to put. In the present case, having regard to the area of its functions, plenary control vests with the Managing Committee, over activities primarily, principally and proximately, associated with the society. The control exercised by the Government is indirect and remote and of an attenuated character. Counsel drew our attention to two propositions wherein, the society is discharging the functions of a sovereign character such as that in connection with grading of agricultural produce and its position as a licensing authority under the Warehousing Act. These are only some individual activities which the society is empowered to undertake. They are not main or essential functions of the society. There has not been any exterior entity with necessary proximity to Art. 12 of the Constitution which got transmitted to the present position of co-operative society. There is no case of a Government department or authority under Art. 12, which has undergone a change, only in its exterior garb, in the present case. The society was born as society and functions as such.

19. In Satrughan Nishad's case (supra), it was laid down that, every state has different laws and different principles to govern and control the various authorities. The laws provide certain controls to the Government, even on private institutes or corporations, for securing the public interest and achieving the objects and the movement. If the control of the Government is to the extent of pervasiveness then only such corporation/institute undertaking public function will become instrumentality of the State.

20. In case of U. P. State Cooperative Societies Land Development Bank, the rules are quite different than the rules framed by Maharashtra State under the various cooperative societies legislation. The State Government of Maharashtra does not hold all pervasive control over the management activities of the cooperative societies. The examples of control cited by Ms. Talekar (quoted in para 14) indicate only supervisory control for safeguarding the public interest. The State is not carrying out the activities of respondent No. 3. Here we have to consider the control in normal circumstances. If the management is carrying out its functions as per the provisions of the law and in spirit of the objects, then the Government will have no control but when any serious defects are noticed in the management and in the interest of public the Government retains and exercises the

powers to appoint Administrator to prevent losses to the public at large, it cannot be said that, the control of the Government is all pervasive. In the light of these facts, we follow the Full Bench Judgment of this Court in **Shamrao Vitthal Bank's** case to hold that the appellant is not an instrumentality of the State and Article 12 is not attracted.

21. Ms Talekar then made submissions that, even if respondent No. 3 is not a State, still when injustice is done to the petitioner, this court can exercise powers under Article 226. She relied on following passages from **Chandrabhan Dubey's** case (supra).

22. *The language of [Article 226](#) does not admit of any limitation on the powers of High Court for the exercise of jurisdiction thereunder though by various decisions of this Court with varying and divergent views it has been held that jurisdiction under [Article 226](#) can be exercised only when or authority, decision of which is complained, was exercising its power in the discharge of public duty and that writ is a public law remedy. In Rohtas Industries Ltd. v. Rohta Industrial Staff Union (1976) 2 SCC 82, it was submitted before the Constitution Bench that an award under [Section 10A](#) of the Industrial Disputes Act, 1947 savours of a private arbitration and was not amenable to correction under [Article 226](#) of the Constitution. The Court said as under (SCC pp. 88-89, paras 9-10) :*

9. *"The expansive and extraordinary power of the High Courts under [Article 226](#) is as wide as the amplitude of the language used indicates and so can affect any person even a private individual - and be available for any (other) purpose - even one for which another remedy may exist. The amendment to [Article 226](#) in 1963 inserting [Article 226 \(1A\)](#) reiterates the targets of the writ power as inclusive of any person by the expressive reference to any person by the expressive reference to one thing to affirm the jurisdiction, another to authorise*

its free exercise like a bull in a china shop". This Court has spelt out wise extraordinary remedy and High Courts will not go beyond those monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights. We hold that the award here is not beyond the legal reach of [Article 226](#), although this power must be kept in severely judicious leash.

10. May rulings of the High Courts, pro and con, were cited before us to show that an award under [Section 10A](#) of the Act is insulated from interference under [Article 226](#) but we respectfully agree with the observations of Gajendragadkar, J. (as he then was) in Engineering Mazdoor Sabha [1963 Supp.(1) SCR 625, 640] which nail the argument against the existence of jurisdiction. The learned Judge clarified at p.640 :

"[Article 226](#) under which a writ of certiorari can be used in an appropriate case, is, in a sense, wider than [Article 136](#), because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued courts or tribunals. Under [Article 226\(1\)](#), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore, even if the arbitrator appointed under [Section 10A](#) is not a tribunal under [Article 136](#) in a proper cases.' a writ may lie against his award' under [Article 226](#)".

- (ii) **Shri Anadi Mukta S.M.V.S.J.M.S. Trust v. V. R. Rudani** reported in (1989) 2 SCC 691

"issue (of) a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or direction or order directing the appellant-Trust and its trustees to pay to the respondents their due salary and allowances etc. in accordance with the Rules framed by the University and to pay them compensation under a certain Ordinance of the University".

- (iii) The court noted the observations of Subba Rao, J. in **Dwarka Nath v. ITO** reported in AIR 1966 SC 81.

"This article is couched in comprehensive phraseology and it

ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

- (iv) The Court also noted the observations of this Court in **Praga Tools Corpn. v. C.A. Imanual** reported in (1969) 1 SCC 585.

"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statutes under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities.

The court then said:

20. The term 'authority' used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental right. 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.”

And finally it said as under.

“22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states; 'To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract. We share this view. The judicial control over the fast-expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition.”

- (iv) In **Air India Statutory Corpn. v. United Labour Union** reported in (1997) 9 SCC 377, this Court speaking through a Bench of three Judges said.

“60. The public law remedy given by Article 226 of the Constitution is to issue not only the prerogative writs provided therein but also any order or direction to enforce any of the fundamental rights and 'for any other purpose'. The distinction between public law and private law remedy by judicial adjudication gradually marginalized and became obliterated. In LIC v. Escorts Ltd. reported in (1986) 1 SCC 264, this court in para 102 had pointed out that the difficulty will lie in demarcating the frontiers between the public law domain and the private law field.

21. It is evident that, in this case the State Development Bank was held to be instrumentality of the State and thereafter it is held that, Article 226 can be issued even against any person or authority which is not a State, provided it is carrying out public function. In para 22, it was observed that there are various apex court judgments which lay down that the powers under Article 226 can be exercised only when a body or authority, the decision of which is complained, was exercising its power in the discharge of public duty and that writ is a public law remedy.

22. In Satrughan Nishad's case (supra), when similar arguments were advanced, it was observed,

9. Learned counsel appearing on behalf of the contesting respondents submitted that even if the Mill is not an authority within the meaning of Article 12 of the Constitution, writ application can be entertained as mandamus can be issued under Article 226 of the Constitution against any person or authority which would include any private person or body. Learned counsel appearing on behalf of the appellant, on the other hand, submitted that mandamus can be issued against private person or body only if infraction alleged is in performance of public duty. Reference in this connection may be made to the decisions of this Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Samarak Trust and others v. V.R.Rudani and others (1989) 2 SCC 691 in which this Court examined the various aspects and distinction between an authority and a person and after analysis of the decisions referred in that regard came to the conclusion that it is only in the circumstances when the authority or the person performs a public function or discharges a public duty that Article 226 of the Constitution can be invoked.

23. We hold that, while dealing with the management of taking action against the employee indulging in misconduct, respondent No. 3 was not performing any public function. The service conditions of the petitioner were governed by standing orders framed under Section 35(2) of the Maharashtra Industrial Relations Act. Those are contractual terms between the employer and the employee. The Government does not hold any control over the appointments, service conditions or holding of any DE or any action to be taken against the employee in case of misconduct, the forum for redressal of grievances for the aggrieved employee, the Government is not concerned with the employment, continuous management, control over the employee, service conditions and removal of the employee. In the light of these facts, we are not inclined to exercise our jurisdiction under Article 226 of the Constitution in the present case.

24. In view of the above, we do not want to enter into the challenge on the merits of the order of termination and the legality of the constitution of the first appellate forum and the proportionality of the sentence. The petitioner can avail any other remedies if available under the law.

25. With these observations, the petition deserves to be and is hereby dismissed.

[A. M. DHAVALA]
JUDGE

[S. V. GANGAPURWALA]
JUDGE

Punde