SUPREME COURT OF INDIA

Federal Bank Ltd.

Vs.

Sagar Thomas

C.A.No.106 of 2001

(Brijesh Kumar and Arun Kumar, JJ.)

26.09.2003

JUDGMENT

BRIJESH KUMAR, J. –

1. The respondent No. 1 Sagar Thomas was working as a Branch Manager in Karunagappally branch of the appellant Bank, namely, the Federal Bank, having its registered office at Alwaye, Kerala. He was, however, suspended on 29.5.1982, since a disciplinary enquiry was ordered into some charges against him for having exceeded his authority in grant of loans and advances to different parties. The inquiry officer found him guilty of the charges and ultimately punishment of dismissal was awarded to the respondent.

2. The respondent No. 1 challenged the order of his dismissal by filing a writ petition in the High Court. A preliminary objection about maintainability of writ petition seems to have been taken in defence by the Federal Bank, saying that it is private bank and not a State or its agency or instrumentality, within the meaning of Article 12 of the Constitution of India, hence a writ petition under Article 226 of the Constitution is not maintainable against it. The learned single Judge, however, found that the Federal Bank performs public duty and observed thus :

"As per statutes, the Reserve Bank and the Central Government exercise all pervading functional, fiduciary and managerial control over the banking industry. Every banking company is duty bound to carry on banking business as per the banking policy under stringent control of the Reserve Bank in the interest of the depositors. The activities carried on by the bank are vital to public interest and have potential to affect the socio-economic development and growth of the nation. Banking companies are, therefore, public institutions, accepting deposits from public, financial assistance from the State through its agencies/instrumentalities, for the purpose of lending or investment, pursuing banking policy and engaged in matters of high public interest or performing public functions, ensuring monetary stability, sound economic growth, equitable allocation of various funds to efficient use, for the promotion and growth of economy and welfare of the State. The first respondent is, thus, performing a public duty and a positive obligation towards its employees and customers exists. Therefore, it is amenable to writ jurisdiction."

Ultimately the order passed by the learned single Judge is :

".....In the light of the above decisions of the Apex Court, I can very well find that the Federal Bank Ltd. is performing public duty and as such it comes under the definition of `other authority' within

the meaning of Article 12 of the Constitution of India and as such the writ petition is maintainable before this Court. "

Aggrieved by the aforesaid judgment of the learned Single Judge, the appellant preferred a writ appeal but referring to a decision of this Court in ***U.P. State Co-operative Land Development Bank Ltd. v. Chandra Bhan Dubey & Ors., AIR 1991 SC 753 : 1999(1) SCT 593 (SC),*** the Division Bench, observed that in an identical fact situation it was held that writ application would be maintainable, minor distinctions on facts, here and there, would not make the aforesaid decision inapplicable to scheduled banks. With such observations the appeal was dismissed providing that the learned single Judge shall decide writ petition on merits. The Federal Bank Ltd. has preferred this appeal, against the aforesaid judgment of the High Court.

3. Learned senior counsel appearing for the appellant, so as to indicate the structure of the appellant, submits that the Federal Bank Ltd. is a `company' incorporated under the Indian Companies Act, 1913, now replaced by the Companies Act, 1956. Its activities are regulated by the provisions of the Banking Regulation Act, 1949. The entire shareholding of the company is held by private individuals and entities. The finances of the banks are raised by its own resources and efforts, and the profits of the bank are utilized by the bank for its own purposes. It does not perform any sovereign function nor does exercise any authority over a third person. The nature of the activity of the bank is that of a commercial undertaking which receives deposits from the individuals and advances loans and performs other ancillary monetary transactions. The management of the bank is in the hands of the Board of Directors. There are 10 Directors, out of which 7 are selected by the General Body of the shareholders. Two members are co-opted by the Board of Directors and one of them is nominated by the Reserve Bank of India. The Board of Directors exercise the powers of superintendence and control over the bank, The bank is, therefore, merely a private limited company; it is neither a `State' nor any `authority' within the meaning of Article 12 of the Constitution nor it is amenable to writ jurisdiction of the High Court. It is also the case of the appellant bank that services of an employee or an officer of a private body, cannot be imposed or thrust upon it nor a relief of reinstatment can be granted. In this connection, the appellant has referred to the reliefs prayed for in the writ petition, which are follows :

"i) a writ of Certiorari or any other appropriate writ, order or direction quashing Exhibit P3 Enquiry Report and P6 an P7 orders of the disciplinary authority and the Board of Directors as illegal and unsustainable in law;

ii) a writ of Mandamus or any other appropriate writ, order or direction commanding the respondents to reinstate the petitioner with all wages and increments in the salary applicable to him as if he had continued in service from the date of his suspension;

iii) any other appropriate writ, order or direction as this Hon'ble Court may deem fit and necessary on the facts and in the circumstances of the case and allow this petition with all costs."

In the light of the prayer made for issue of a writ of *certiorari* for quashing of inquiry report and the order of punishment and further for issue of a writ of *mandamus* or any other appropriate writ or direction for reinstatement of the petitioner will all wages and increments etc. as if, he had been continued in service, a plea in reply has been raised by the appellant that it being a private body incorporated under the Companies Act, it is not amenable to writ jurisdiction of the High Court. It is in the above background that the learned Single Judge considered the matter and held that the Federal Bank Limited is performing public duty as such it is covered under the expression of `other

authority', within the meaning of Article 12 of the Constitution, hence the writ petition is maintainable before the High Court.

4. The question thus, which falls for consideration is as to whether the appellant bank is a private body or falls within the definition of the State or local or other authorities under the control of the Government. A body or organisation which is an instrumentality or agency of the State or a company owned and controlled by the State are all included in the expression "the State". If it is found that the petitioner falls within the later category, there would be no hurdle in holding that such a body or organization would undoubtedly be amenable to the writ jurisdiction under Article 226 of the Constitution of India. On the other hand, if it is found that the appellant is a private body in that event it may have to be examined whether a writ petition would be maintainable or not and the extent to which such powers can be exercised.

5. In support of their respective contentions learned counsels placed reliance upon certain decisions of this Court as well as on some decisions of the High Court.

6. On behalf of the appellant, a decision in the case of ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology & Ors., (2002) 5 SCC page 111 : 2002(2) SCT 1067 (SC)*** decided by a 7 Judges Bench has been referred. The majority judgment considered a catena of decisions on the point and it has been observed in paragraph 25 of the judgement : "The tests propounded by Mathew, J. in ***Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421*** were elaborated in ***Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489*** and reformulated two years later by a Constitution Bench in ***Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722.*** What may have been technically characterized as *obiter dicta* in Sukhdev Singh (supra) and Ramana (supra) (since in both cases the "authority" in fact involved was a statutory corporation), formed the ratio decidendi of Ajay Hasia (supra)". Thereafter the court has extracted para 11, at page 737-38 of the case of Ajay Hasia (supra), as follows : "The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression `authority' in Article 12". It is then observed that Ramana's case (supra) noted with approval in Ajay Hasia (supra) and quoted the tests laid down in the case of Ajay Hasia (supra) at page 737 in para 9. It reads 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-confered 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) `Specially, 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)"

This Court has observed in paragraph 31 as follows :

"The tests to determine whether a body falls within the definition of "State" in Article 12 laid down in Ramana (supra) with the Constitution Bench imprimatur in Ajay Hasia (supra) form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited."

After considering a number of decisions it has been observed in para 40 of Pradeep Kumar Biswas (supra) as follows :

"The picture that ultimately emerges is that the tests formulated in Ajay Hasia (supra) are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi,* be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

The appellant then refers to a decision in ***Bank of Baroda Ltd. v. Jeewan Lal Mehrotra, 1970(3) SCC page 677,*** which is a decision of a three Judge Bench, wherein it has been laid down that a contract of service could not be enforced on a private employee. Needless to say that the case is related to the services of an employee of a Scheduled bank. Our attention has been particularly drawn to paragraph 3 of the judgment where it is observed :

".....The law as settled by this court is that no declaration to enforce a contract of personal service will be normally granted. The well recognized exceptions to this rule are (1) where a public servant has been dismissed from service in contravention of Article 311, (2) where reinstatement is sought of a dismissed worker under the industrial law by labour or industrial tribunals, (3) where a statutory body has acted in breach of a mandatory obligation imposed by statute....."

However, so far the above proposition is concerned, learned counsel for the respondent submitted that the point relates to the merits of the matter which is yet to be gone into by the learned Single Judge in case it is found that a writ petition is maintainable.

7. U.P. State Co-operative Land Development Bank Ltd. (supra) has been relied upon by the Division Bench while passing the impugned order dismissing the appeal. We may examine the position as involved in that case in some detail. It is registered as a Co-operative society under the provisions of the U.P. Co-operative Societies Act. While holding it to be an instrumentality of the State, the Court took note of the fact that though registered as a co-operative society, it was constituted under the provisions of the U.P. Co-operative Land Development Bank Act, 1964. The Managing Director and the Chief General Manager of the Bank are officials of the State, who are at the helms of the affairs of the Bank. The service rules for the employees and officers of the Bank

were framed by the State Government in exercise of powers under Section 30 of the U.P. Co-operative Land Development Bank Act, 1964. The rules are called the U.P. Co-operative Land Development Banks Rules, 1971, which lay down the conditions of services of the employees. The Institutional Service Boards constituted under Section 122 of the Co-operative Societies Act has also framed service rules according to which dismissal of an employee can be ordered only after its approval by the Institutional Service Board. The U.P. Co-operative Land Development Bank Ltd. is the only bank constituted under the provisions of the U.P. Co-operative Land Development Bank Act and there cannot be any other State level Land Development Bank for the whole of the State. Apart from the fact that the Bank had exclusive jurisdiction over the whole of the State of Uttar Pradesh, the other Land Development Banks could also be made members of the U.P. State Co-operative Land Development Bank, in any number, as the Registrar of the Co-operative Societies may deem it necessary. It is further found that the Registrar of the Co-operative Societies, U.P. is the trustee for the purpose of the securing the fulfillment of the obligations of the State Land Development Bank to the holders of debentures issued by the Board of Directors. The Board of Directors are entitled to issue debentures from time to time with the previous sanction of the State Government and the trustee, against the unconditional guarantee by the State Government for the repayment in full of the principal and interest thereon, or on the security of mortgages, charges or hypothecations etc. The State Government constitutes a Guarantee Fund under Section 9 of the Act for the purpose of meetings losses that might accrue on account of loans advanced by the Land Development Banks. The Guarantee Fund is maintained by the Finance Department of the State Government. On the basis of the facts noted above, the Court took the view that the U.P. Co-operative Land Development Bank Ltd., though registered as a Co-operative society, is an instrumentality of the State and its employees have a statutory protection under the statutory rules.

8. It is quite apparent that the decision in the case of U.P. Co-operative Land Development Bank Ltd. (supra) would in no way be applicable to the case in hand. The participation and control of the State in the whole activity of the U.P. Land Development Bank Ltd. is all pervasive. Its officers head the institution. U.P. Co-operative Land Development Bank is constituted as the only State level Bank in the State. Under the statutory provision there cannot be any other Land Development Bank at the State level. The government guarantees repayment in the event of losses suffered by the Bank and with the approval of the State, the Bank may also issue debentures. To cap it all the service conditions of the employees are governed by the statutory rules. It is submitted by the appellant that this case will have no application to the present case and the same has been wrongly followed and relied upon by the High Court to dismiss the appeal.

9. Shri Rajinder Sachar, learned senior counsel appearing for the respondent, refers to a Constitution Bench decision ***All India Bank Employees' Association v. National Industrial Tribunals & Ors., 1962(3) SCR page 265***. Our attention has been particularly drawn to the observations made at page 299 of the report wherein it is observed as follows :-

".....If it was not the Reserve Bank of India, the only other authority that could be entrusted with the function would be the Finance Ministry of the Government of India and that department would necessarily be guided by the Reserve Bank having regard to the intimate knowledge which the Reserve Bank has of the banking structure of the country as a whole and of the affairs of each bank in particular.....".

It has been referred to indicate that the control of the Reserve Bank of India over all the banks would be as if the control is in place of Finance Ministry, Government of India.

10. A reference has then made to ***Air India Statutory Corporation & Ors. v. United Labour Union & Ors., 1979(9) SCC page 377,*** a decision of a three Judge Bench. It has been held that the industry carried on by Air India under authority of central government would involve public law element even though its activity may be commercial in nature. It was held that the Air India was being run by the Airport Authority of India of the Central Government and there was element of deep and pervasive governmental control. Initially it was a statutory authority under the International Airports Authority of India Act, 1971. Later it was amalgamated with National Airports Authority and thereafter it is constituted as a Company under the Companies Act. In the context, it has been held, if the company is run wholly or partially by the share capital floated from public exchequer, it gives indication of its control by the appropriate government. On consideration of a number of decisions on the point, the Court found the following principles which may be considered, for coming to a conclusion whether any public element is involved or not, the paragraph 26 of the decisions, reads as under :

"(1) The constitution of the corporation or instrumentality or agency or corporation aggregate or corporation sole is not of sole material relevance to decide whether it is by or under the control of the appropriate Government under the Act.

(2) If it is a statutory corporation, it is an instrumentality or agency of the State. If it is a company owned wholly or partially by a share capital, floated from public exchequer, it gives indicia that it is controlled by or under the authority of the Appropriate Government.

(3) In commercial activities carried on by a corporation established by or under the control of the appropriate government having protection under Articles 14 and 19(2), it is an instrumentality or agency of the State.

(4) The State is a service corporation. It acts through its instrumentalities, agencies or persons - natural or juridical.

(5) The governing power, wherever located, must be subject to the fundamental constitutional limitations and abide by the principles laid in the Directive Principles.

(6) The framework of service regulations made in the appropriate rules or regulations should be consistent with and subject to the same public law, principles and limitations.

(7) Though the instrumentality, agency or person conducts commercial activities according to business principles and are separately accountable under their appropriate bye-laws or Memorandum of Association, they become the arm of the Government.

(8) The existence of deep and pervasive State Control depends upon the facts and circumstances in given situation and in the altered situation it is not the sole criterion to decide whether the agency or instrumentality or person is by or under the control of the appropriate Government.

(9) Functions of an instrumentality, agency or person are of public importance following public interest element.

(10) The instrumentality, agency or person must have an element of authority or ability of effect the relations with its employees or public by virtue of power vested in it by law, Memorandum of Association or bye-laws or Articles of Association.

(11) The instrumentality, agency or person renders an element of public service and is accountable to health and strength of the workers, men and women, adequate means of livelihood, the security for payment of living wages, reasonable conditions of work, decent standard of life and opportunity to enjoy full leisure and social and cultural activities to the workmen.

(12) Every action of the public authority, agency or instrumentality or the person acting in public interest or any act that gives rise to public element should be guided by public interest in exercise of public power or action hedged with public element and is open to challenge. It must meet the test of reasonableness, fairness and justness.

(13) If the exercise of the power is arbitrary, unjust and unfair, the public authority, instrumentality, agency or the person acting in public interest, though in the field of private law, is not free to prescribe any unconstitutional conditions or limitations in their actions."

One of the important factors to be considered is, if it is a statutory corporation, an instrumentality or agency of the State or a company owned wholly or partially by a share capital floated from public exchequer, it gives indicia that it is controlled by and under the authority of the Appropriate Government. We find that it is this factor which brings in public element. Paragraph 61 of the judgment reads. -

"The legal right of an individual may be founded upon a contract or a statute or an instrument having the force of law. For a public law remedy enforceable under Article 226 of the Constitution, the action of the authority needs to fall in the realm of public law - be it a legislative act of the State, an executive act of the State or an instrumentality or a person or authority imbued with public law element. The question requires to be determined in each case. However, it may not be possible to generalise the nature of the action which would come either under public law remedy or private law field nor is it desirable to give exhaustive list of such actions ..... The distinction between public law and private law remedy has now become thin and practically obliterated."

11. Shri Sachar then referred to a decision of this Court in ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. v. V.R. Rudnai & Ors., 1989(2) SCC page 691*** case. It has been held in this case that the college in question which was managed by a trust registered under the Bombay Trusts Act was amenable to writ jurisdiction and a direction could be issued to the institution to make the payment of arrears of salary and other benefits to the teacher. It is further submitted that if a private body discharges a public duty it would be amenable to the writ jurisdiction. Paragraph 17 of the judgment has been particularly referred to, which reads as under :

"There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The `public authority' for them mean every body which is created by statute - and whose powers and duties are defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all `public authorities'. But there is no such limitation for our High Courts to issue the writ `in the nature of mandamus'. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English Law. Under Article 226, writs can be issued to "any person or authority". It can be issued "for the enforcement of any of the fundamental rights and for any other purpose".

Shri Sachar has also stressed upon the observation made in the later part of para 19 and para 20

where it has been observed :

".....Any attempt to equate the scope of the powers 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....."

Para 20

"..... 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. .....What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party....."

12. While making his submissions in reply, the appellant referred to paragraph 15 of the above judgment wherein it has been observed that if the rights are purely of a private character, no mandamus can be issued. It is further observed that if the management of the college is purely a private body with no public duty, mandamus would not lie. But it has been held that the college run by a private trust was affiliated to the university to which public money is paid as government aid. It is then observed" :-

".....Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff....The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party."

On the basis, it is submitted in reply that those features by reason of which it has been held that a writ of mandamus would lie against a private management, are not present in the case in hand. A reference to para 12 of the Andi Mukta's case (supra) has been made, where it has been held that no writ would issue where dismissal was not in violation of any statutory provision. No reinstatment could be ordered.

13. Shri Sachar then refers to ***Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors., 1993(2) SCT 511 (SC) : 1993(1) SCC page 645*** a Constitution Bench judgment. In reference to para 79 it is submitted that educational institutions discharge public duties irrespective of the fact they receive aid or not. The absence of aid does not detract from the public nature of the duty. The submission, therefore, is that even though a body or institution may be a private body but if the duty that it discharges is that of a public nature, a writ would lie.

14. In this connection ***Life Insurance Corporation of India & Anr. v. Customer Education & Research Centre & Ors., 1995(4) SCT 678 (SC) : 1995(5) SCC page 482*** also has been referred to, which in turn refers to ***Kumari Shrilekha Vidyarthi v. State of Uttar Pradesh, 1991(1) SCT 575 (SC) : 1991(1) SCC page 212,*** holding that arbitrariness, even in contractual obligation of public

character is violative of Article 14 of the Constitution, the Court held that rates of premium must be reasonable and acceptable. It cannot be unjust and excessive. Thus the touchstone of test is the reasonableness and non-arbitrariness of the action even in the contractual matters of the State or its agencies and instrumentalities.

15. The appellant in reply also referred to ***The Praga Tools Corporation v. Shri C.A. Imanaul & Ors., 1969(1) SCC page 585*** where it was held that a company registered under the Companies Act is neither statutory nor any public duty is imposed on it by any statute in respect of which enforcement would be sought by means of a mandamus. Mandamus lies to secure the purpose of a public or statutory duty. No mandamus or order of reinstatement of an office which is essentially of a private character can be issued. A mandamus can be issued to compel the official of a society to carry out the terms of the statute 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 authorizing their undertakings.

16. ***Executive Committee of Vaish Degree College, Shamli & Ors. v. Lakshmi Narain & Ors., (1976) 2 SCC 58*** was also referred to on the proposition that contract of personal service cannot ordinarily be enforced.

17. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Govt.); (ii) Authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; (viii) a person or a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function.

18. Learned senior counsel appearing for the respondent has drawn our attention to the various provisions of the Reserve Bank of India Act, 1934 (for short `the RBI Act'), the Banking Regulation Act, 1941 and the Industries (Development and Regulation) Act, 1951 so as to emphasise that there is deep and all pervasive statutory control and the control of the Central Government over the Scheduled Banks. It is submitted that these banks discharge functions of public nature and owe the statutory responsibilities, hence there is an element of public law, involved in the activities of the Bank. Section 22 of the Banking Regulation Act provides for Licensing of banking companies. No company can carry on banking business in India unless it holds a licence issued by the Reserve Bank subject to such conditions as may be imposed. Before issuing any licence the Reserve Bank may satisfy itself about the conditions as laid down under sub-section (3) of Section 22 as to whether the company fulfills those conditions or not.

19. The appellant is one of the Scheduled Banks, definition of which as provided in the Reserve Bank of India Act, has been referred to which says :

"2(e) scheduled bank" means a bank included in the Second Schedule;"

Sub-section (6) of Section 42 of the RBI Act has been referred to indicate the control which is exercised by the Reserve Bank of India on the banking companies. It reads as under :

"(6) The Bank shall, save as hereinafter provided, by notification in the Gazette of India, -

(a) direct the inclusion in the Second Schedule of any bank not already so included which carries on

the business of banking [in India] and which -

(i) has a paid-up capital and reserve of an aggregate value of not less than five lakhs of rupees, and

(ii) satisfies the Bank that its affairs are not being conducted in a manner detrimental to the interests of its depositors, and

(iii) [is a State co-operative bank or a company] as defined [section 3 o the Companies Act, 1956 (1 of 1956), or an institution notified by the Central Government in this behalf] or a coloration or a company incorporated by or under any law in force in any place [outside India];

(b) direct the exclusion from that Schedule of any scheduled bank, -

(i) the aggregate value of whose paid-up capital and reserves becomes at any time less than five lakhs of rupees, or

(ii) which is, in the opinion of the Bank after making an inspection under section 35 of the Banking Regulation Act, 1949 (10 of 1949), conducting its affairs to the detriment of the interests of its depositors, or

(iii) which goes into liquidation or otherwise ceases to carry on banking business :

xxx xxx xxx

20. The Preamble of the RBI Act has also been referred to, which reads as follows :

"An Act to Constitute a Reserve Bank of India : Whereas it is expedient to constitute a Reserve Bank of India to regulate the issue of Bank notes and the keeping of reserves with a view to securing monetary stability in [India] and generally to operate the currency and credit system of the country to its advantage;

And whereas in the present disorganization of the monetary systems of the world it is not possible determine what will be suitable as permanent basis for the Indian monetary system;

But whereas it is expedient to make temporary provision on the basis of the existing monetary system, and to leave the question of the monetary system, and to leave the question of the monetary standard best suited to India to be considered when the international monetary position has become sufficiently clear and stable to make it possible to frame permanent measures."

Section 46-A of the Banking Regulation Act provides as under :-

"46A. *Chairman, director, etc., to be public servants for the purposes of Chapter IX of the India Penal Code.* - [Every Chairman who is appointed on a whole-time basis, managing director, director, auditor] liquidator, manager and any other employee of a banking company shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code (45 of 1860)]."

A reference is also made to Section 35 of the Banking Regulation Act which provides for inspection of any banking company and its books of accounts by the Reserve Bank on the direction issued by the Central Government. Under sub-section (1A) it is provided that without prejudice to sub-section

(1) it may at any time cause a scrutiny to be made by any one or more of its officers, of the affairs of any banking company. The report of the inspection or the scrutiny are to be furnished to the banking company. Sub-section (4) of Section 35 provides as under :

"(4) The Reserve Bank shall, if it is of opinion after considering the report that the affairs of the banking company are being conducted to the detriment of the interests of its depositors, may, after giving such opportunity to the banking company to make a representation in connection with the report as, in the opinion of the Central Government, seems reasonable, by order in writing -

(a) prohibit the banking company from receiving fresh deposits;

(b) direct the Reserve Bank to apply under section 38 for the winding up of the banking company :

Provided that the Central Government may defer, for such period as it may think fit, the passing of an order under this sub-section, or cancel or modify any such order, upon such terms and conditions as it may thinks fit to impose."

Section 35-A empowers the Reserve Bank to give directions, which reads as under :

"35A. *Power of the Reserve Bank to give directions.* - (1) Where the Reserve Bank is satisfies that :-

(a) in the [public interest]; or

[(aa) in the interest of banking policy; or]

(b) to prevent the affairs of any banking company being conducted in manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company; or

(c) to secure the proper management of any banking company generally,

it is necessary to issue directions to banking companies generally or to any banking company in particular, it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.

(2) The Reserve Bank may, on representation made to it or its own motion, modify or cancel any direction issued under sub-section (1), and in so modifying or cancelling any direction may impose such conditions as it thinks fit, subject to which the modification or cancellation shall have effect."

Section 36 of the Banking Regulation Act which enumerates further powers and functions of Reserve Banks has also been referred to. The relevant part of Section 36 reads as under :

"36. *Further powers and functions of Reserve Bank.* - (1) The Reserve Bank may -

(a) caution or prohibit banking companies or any banking company in particular against entering into any particular transaction or class of transactions, and generally give advice to any banking company;

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) xxx xxx

(i) require the banking company to call a meeting of its directors for the purpose of considering any matter relating to or arising out of the affairs of the banking company; or require an officer of the banking company to discuss any such matter with an officer of the Reserve Bank;

(ii) xxx xxx

(iii) xxx xxx

(iv) appoint one or more of its officers to observe the manner in which the affairs of the banking company or of its offices or branches are being conducted and make a report thereon;

(v) require the banking company to make, within such time as may be specified in the order, such changes in the management as the Reserve Bank may consider necessary.]

(2) & (3) xxx xxx"

Section 36AA deals with Power of Reserve Bank to remove managerial and other persons from office. The relevant part of the provisions is quoted below :

"(1) Where the Reserve Bank is satisfied that in the public interest or for preventing the affairs of a banking company being conducted in a manner detrimental to the interests of the depositors or for securing the proper management of any banking company it is necessary so to do, the Reserve Bank may, for reasons to be recorded in writing, by order, remove from office, with effect from such date as may be specified in the order, [any chairman, director], chief executive officer (by whatever name called) or other officer or employee of the banking company.

(2) to (5) xxx xxx

(6) Where an order under sub-section (1) has been made, the Reserve Bank may, by order in writing, appoint a suitable person in place of [the chairman or director] or chief executive officer or other officer or employee who has been removed from his office under that sub-section, with effect from such date as may be specified in the order.

(7) to (8) xxxx xxxx"

Section 36AB of the Banking Regulation Act empowers the Reserve Bank to appoint additional directors of the banking company in the interest of the company or its depositors. Sub-section (1) reads as under :

"36AB. *Power of Reserve Bank to appoint additional directors.* - (1) If the Reserve Bank is of [opinion that in the interest of banking policy or in the public interest or] in the interests of the banking company or its depositors it is necessary so to do, it may, from time to time by order in writing, appoint, with effect from such date as may be specified in the order, one or more persons to hold office as additional directors of the banking company;

xxx xxxx"

Section 36AE has also been referred to which empowers the Central Government to acquire

undertakings of banking companies in the interests of the depositors, the banking policy or for the better provision of credit generally or of credit to any particular section of the community or in any particular area. Lastly, our attention has been drawn to provisions contained in Section 45 of the Banking Regulation Act which empowers the Reserve Bank to apply to Central Government for suspension of business by a banking company and to prepare scheme of reconstitution of amalgamation of a banking company.

21. In view of the aforesaid provisions it is submitted that the control of the Reserve Bank of India and the Central Government is all pervasive over the banking companies, they can cause an inspection to be made, can make scrutiny of the working and accounts of the banking company, can remove the Chairman or appoint additional directors, the functioning of the banking company can also be suspended, the undertaking can also be acquired. It is further submitted that the Reserve Bank of India has been constituted to regulate issue of bank notes and for keeping reserves with a view of secure and maintain monetary stability in the country. It is with that end in view that powers have been vested in the Reserve Bank of India to keep proper check on the working and functioning of the banking companies as also in the interest of the depositors and the own interest of the banking company. Such a nature of control indicates that the Banking Companies discharge functions of public nature.

22. As against the submission made on behalf of the respondent regarding control of the Reserve Bank of India over the banking companies, the appellant submits that such measures as indicated by reference to the provisions of the Banking Regulation Act are only regulatory in nature. Such regulatory control in also exercised over other companies as well, registered under the Companies Act, 1956. In this connection, a reference has been made to Section 233A of the Companies Act which empowers the Central Government to direct special audit of the companies in certain eventualities. For example as indicated in sub-clauses (a) to (c) of sub-section (1) of Section 233A, which reads as under :

"233A. (1) *Where the Central Government is of the opinion* -

(a) that the affairs of any company are not being managed in accordance with sound business principles of prudent commercial practices; or

(b) that any company is being managed in a manner likely to cause serious injury or damage to the interests of the trade, industry or business to which it pertains; or

(c) that the financial position of any company is such as to endanger its solvency; ....."

The report of the special audit is to the submitted to the Central Government by the Chartered Accountants deputed for special audit. The special auditor, in the audit report shall include all the matters required to be included in an auditor's report under Section 227 of the Companies Act and the matters as the Central Government may, also direct to include. The Central Government is also authorized to direct any particular person to furnish such information to the auditor and failure to do so shall render such persons liable to be punished by imposition of fine. The Central Government, on consideration of the report is empowered to take such action as provided under the Act or any other law for the time being in force. Section 235 of the Companies Act empowers the Central Government to appoint one or more competent persons as inspectors to investigate the affairs of any company on the application of the shareholders and submit the report to the Central Government. Similar power for investigation is also vested under Section 237 of the Act. The company by a

special resolution or court by an order can declare that affairs of the company ought to be investigated by an inspector appointed by the Central Government, where the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for fraudulent or unlawful purpose. Then a reference has been made to Section 250 of the Companies Act which empowers the Central Government to impose restriction upon the transfer of shares and debentures of the company. Any transfer of shares made during the period of the restriction, would be void under clause (a) of sub-section (2). Such actions are permissible to be taken in the public interest. Section 255 falls in the Chapter II pertaining to directors and constitution of Board of Directors which mandates for retirement of directors in given proportion by rotation. Section 267 places restrictions on appointment of Managing Directors. Such persons who are undischarged insolvents or at any time have been adjudged so or having been convicted by a Court of an offence involving moral turpitude. So far the financial aspect is concerned, the Central Government has powers in that regard as well and in that connection our attention has been drawn to Section 58-A. Sub-sections (1) and (2) of Section 58-A read as under :

"58 A. (1) The Central Government may, in consultation with the Reserve Bank of India, prescribe the limits up to which, the manner in which and the conditions subject to which deposits may be invited or accepted by a company either from the public or from its members.

(2) No company shall invite, or allow any other person to invite or cause to be invited on its behalf, any deposit unless -

(a) such deposit is invited or is caused to be invited in accordance with the rules made under sub-section (1), and

(b) an advertisement, including therein a statement showing the financial position of the company, has been issued by the company in such from and in such manner as may be prescribed....."

Under Section 388B the Central Government is empowered to state a case and refer to the High Court where in certain circumstances it considers that any person concerned in conduct and the management of the affairs of the company is not fit to hold the office of Director or any other office, to make an inquiry into the case and record its decisions in that regard. On the basis of the report of the High Court the Central Government has power to remove such a person as the Director or as the case may be.

23. A reference has also been made to certain provisions of Industries (Development and Regulation) Act, 1951. Section 15 empowers the Central Government to cause investigation to be made into the affairs of the industrial undertaking in certain eventualities. The same reads as under :

"15. *Power to cause investigation to be made into scheduled industries or industrial undertakings.* - Where the Central Government is of the opinion that -

(a) in respect of any scheduled industry or industrial undertaking or undertakings -

(i) there has been, or is likely to be, a substantial fall in the volume of production in respect of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings as the case may be, for which, having regard to the economic conditions prevailing, there is no justification; or

(ii) there has been, or is likely to be, marked deterioration in the quality of any article or class of

articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, which could have been or can be avoided; or

(iii) there has been or is likely to be a rise in the price of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which there is no justification; or

(iv) it is necessary to take any such action as is provided in this chapter for the purpose of conserving any resources of national importance which are utilized in the industry or the industrial undertaking or undertakings, as the case may be; or

(b) any industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest];

the Central Government may make or cause to be made a full and complete investigation into the circumstances of the case by such person or body of person as it may appoint for the purpose."

Section 15-A also empowers the Central Government to investigate into the possibility of running or restarting the industrial undertaking which is being wound up by or under the supervision of the High Court and to make an application in that regard to the High Court. Chapter III-A provides for direct management or control of industrial undertakings by Central Government in certain cases. Relevant part of Section 18-A, which falls under Chapter III-A, reads as under :

"18-A. *Power of Central Government to assume management or control of an industrial undertaking in certain cases* - (1) If the Central Government is of opinion that -

(a) an industrial undertaking to which directions have been issued in pursuance of Section 16 has failed to comply with such directions, or

(b) an industrial undertaking in respect of which an investigation has been made under Section 15 (whether or not any directions have been issued to the undertaking in pursuance of Section 16), is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest,

The Central Government may, by notified order, authorize any person or body of persons to take over the management of the whole or any part of the undertaking or to exercise in respect of the whole or any part of the undertaking such functions of control as may be specified in the order....."

Section 18-AA empowers the Central Government to take over the industrial undertaking without investigation in the given circumstances.

24. In view of the provisions indicated above under the Companies Act and the Industrial (Development and Regulation) Act, it is submitted that the nature and the control over the companies is more or less of the same degree and nature as the control exercised over the banking companies under the Banking Regulation Act. There is control and supervision over the functioning and working and the conduct of business of the companies. A watchful eye is kept over the interest of the share holders, the interest of the company itself as well as over the production of company, even managing director can be removed by the Central Government. It has also the powers, as indicated above, to take over the management of a company. Such powers are drastic; nonetheless they remain regulatory in nature in the interest of the industry, the company, the shareholders and in

the general interest since production of goods of importance is most essential for proper economic growth and stability of the country.

25. A company registered under the Companies Act for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and a commercial activity, the primary motive behind it can well be said to earn returns and profits. Since time immemorial, such activities have been carried on by individuals generally. It is a private affair of the company though case of nationalized banks stands on a different footing. There may, well be companies, in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or dominant participation of the State in managing the affairs of the company. But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its shareholders. It works like any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lacs will become a scheduled bank. All the same, banking activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The Banking companies have not been set up for the purposes of building economy of the State on the other hand such private companies have been voluntarily established for their own purposes and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are provided by the Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier, these are all regulatory measures to keep a check and provide guideline and not a participatory dominance or control over the affairs of the company. For the companies in general carrying on other business activities may be manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement or the interest of the shareholder or people generally may not be jeopardized for that reasons. Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private companies. The care is taken in regard to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production which is important for the economy may not go down yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies.

26. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment say Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such

private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance of those provisions. For instance, if a private employer dispense with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and have issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

The six factors which have been enumerated in the case of Ajay Hasta (supra) and approved in the later decisions in the case of Ramana (supra) and seven Judges Bench in the case of Pradeep Kumar Biswas (supra) may be applied to the facts of the present case and see as to those tests apply to the appellant bank or not. As indicated earlier, share capital of the appellant bank is not held at all by the government nor any financial assistance is provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant bank does not enjoy any monopoly status nor it can be said to an institution having State protection. So far control over the affairs of the appellant bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant bank nor anyone of them is a member of the Board Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the mal-functioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purposes of maintaining the healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by the Reserve Bank in India under a Statute or the Central Government. Even if it was with the Central Government in place of the Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Bank Employees' Association (supra) does not advance the case of the respondent. It is only in case of mal-functioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In the times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general.

27. There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity, may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, are such which do have impact on the economy of the country in general. But such activities cannot be classified one falling in the category of discharging duties, functions of public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia (supra). Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the government and transferred to the appellant company. For the sake of argument even if it may be assumed that one or the other test as provided in the case of Ajay Hasia (supra) may be attracted that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this

contention, observations made in the case of Pradeep Kumar Biswas (supra) quoted earlier would also be relevant.

28. We may now consider the two decisions i.e. Andi Mukta (supra) and the U.P. Co-operative Land Development Bank Ltd. (supra) upon which much reliance has been played on behalf of the respondents to show that a writ would lie against the appellant company. So far the decision in the case of U.P. Co-operative Land Development Bank Ltd. (supra) is concerned, it stands entirely on a difficult footing and we have elaborately discussed it earlier.

29. The other case which has been heavily relied upon is Andi Mukta (supra). It is no doubt held that a Mandamus can be issued to any person or authority performing public duty, owing positive obligation to the affected party. The writ petition was held to be maintainable since the teacher whose services were terminated by the institution was affiliated to the university and was governed by the Ordinances, casting certain obligations which it owed to that petitioner. But it is not the case here. Our attention has been drawn by the learned counsel for the appellant to paragraphs 12, 13 and 21 of the decision (Andi Mukta) to indicate that even according to this case no writ would lie against the private body except where it has some obligation to discharge which is statutory or of public character.

30. Merely because the Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business of or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. Provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that party whose property is acquired is performing or discharging any function or duty of public character though it would be so for acquiring authority.

31. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such statutes upon the company nor puts any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. Respondents's service with the bank stands terminated. The action of the Bank was challenged by the respondent by filling a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed.

In the result, the appeal is allowed and the judgment and order passed by the High Court is set aside and the writ petition is held to be not maintainable. There will, however, be no order as to costs.

Appeal allowed.