IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 5666 OF 2007

Dr. Panjabrao Deshmukh Urban
Co-operative Bank Ltd.,
Irwin Chowk, Amravati,
through its In-charge Managing Director. :: **PETITIONER**

-: Versus :-

1. The State Information Commissioner,
Vidarbha Region, Nagpur and the
2nd Appellate Authority having its office
at Commissionerate, Nagpur.

2. First Appellate Authority and
the Commissioner of Co-operation and
Registrar of Co-operative Societies,
Maharashtra State, New Secretariat Bldg.,
Pune – 1.

3. Gajanan s/o Madhaorao Wankhede,
aged adult, R/o 8, Samartha Colony-B,
Post Rukmini Nagar, Amravati.

4. The State of Maharashtra,
Department of Co-operation,
Mantralaya, Annex, Mumbai,
through its Secretary. :: **RESPONDENTS**

Shri U. S. Dastane, Advocate for the Petitioner.
Shri A. D. Sonak, A. G. P. for respondent Nos. 1, 2 & 4.
None for respondent No. 3.

CORAM: J. H. BHATIA, J.
DATED: 13TH JANUARY, 2009.

JUDGMENT

1. As per order dated 07/7/2008 the parties were put to notice that petition would be disposed of at the admission stage and the parties were also directed to file brief submissions in support of their contentions, which they have done. However, none appears for respondent No. 3. Heard Mr. Dastane, learned Counsel for the petitioner and Mr. Sonak, learned Assistant Government Pleader for respondent Nos. 1, 2 and 4.

2. Admittedly, the petitioner is Urban Co-operative Bank registered under the Maharashtra Co-operative Societies Act, 1960 (for short, Societies Act) and is controlled in respect of certain matters by the Reserve Bank of India under Section 110-A of the Societies Act and certain provisions of Banking Regulations Act. Respondent No. 3 is a share holder of the petitioner-Bank. He made two applications before the Bank on different dates seeking certain information under the provisions of the Right to Information Act, 2005. Both the applications were rejected by the petitioner contending that Right to Information Act is not applicable to the petitioner-Bank, however, he could seek information as per the provisions of the Societies Act. In view of this, he preferred two appeals before the Commissioner of Cooperation and Registrar of

Cooperative Societies, Pune. As the appeals were dismissed, he preferred second appeal before the Commissioner of State Information, Vidarbha region. The State Commissioner allowed the appeals by impugned order dated 19/10/2007 and directed the petitioner-Bank to supply the information within thirty days and also directed the petitioner to appoint Information Officer and First Appellate Officer for the said Bank. The directions given by the said Information Commissioner are challenged in the present writ petition.

3. According to the petitioner the Bank is not a "public authority" within the meaning of Section 2(h) of the Right to Information Act, and therefore, this Act is not applicable to the Bank. It is contended that the learned Information Commissioner has misdirected himself while holding that because there is public interest in the funds of the Bank, the provisions of the Right to Information Act should be applicable to the Bank.

4. The learned Counsel for the petitioner vehemently relied upon the definitions of the "appropriate Government" and a "public authority" under Section 2(h) to support his contention that the legislature never intended that the cooperative bank, which is not

established by the Constitution or Central/State Legislation or the notification issued by the appropriate Government and it is also not owned or controlled or financed by the Government shall be covered by Right to Information Act. In support of this contention he also placed reliance upon certain authorities from the Supreme Court as also Full Bench of this High Court.

5. To begin with, The preamble of the Right to Information Act states that this Act was enacted to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. Section 2(a) defines "appropriate Government" as follows:

> (a) "appropriate Government" means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly-
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> (i) by the Central Government or the Union territory administration, the Central Government;
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> (ii) by the State Government, the State Government;

In view of this definition the appropriate Government means the Central Government, Union territory administration or

the State Government depending on as to whether the concerned public authority is established, constituted or controlled or substantially financed by funds provided directly or indirectly to the Central Government, Union territory or the State Government. Words, "Public Authority" are material in this definition.

Section 2(h) runs as under:

> 2(h) "public authority" means any authority or body or institution of self government established or constituted -
> (a) by or under the Constitution;
> (b) by any other law made by Parliament;
> (c) by any other law made by State Legislature;
> (d) by notification issued or order made by the appropriate Government, and includes any -
> (i) body owned, controlled or substantially financed;
> (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.

Admittedly, the petitioner-Bank was not established or constituted under the constitution or any enactment of Parliament or State Legislature or by any notification or order by the Government. It is also admitted that the petitioner-Bank is not owned or substantially financed by the State Government. Even if it is treated as a Non-Government organisation, it is not substantially

financed by the Government. The only question which needs to be considered is whether the petitioner-Bank is controlled by the State Government as admittedly, it is not controlled by the Central Government.

6. The learned Counsel for the petitioner vehemently contended that the petitioner is Cooperative Bank registered under the Maharashtra Cooperative Societies Act and for the proper functioning of the same as per provisions of law, the Commissioner of Cooperative Societies and the Registrar and other functionaries under the Registrar have some control on all the Cooperative societies, including the Cooperative Banks. Registrar is a statutory authority and his orders may be challenged before the Government by way of appeal or revision and the Government has only statutory control for the purpose that cooperative societies are functioning as per the provisions of law and public interest and they are not deviated from the cooperative spirit for which they have been established. Otherwise, neither the Government nor any its officer has any direct control in the administration of the Bank.

7. Admittedly not a single Director on the Board of Directors is appointed by the Government. All the Directors are elected by the

share holders of the petitioner-Bank. In Shamrao Vithal Co-operative Bank Ltd. & another Vs. Padubidri Pattabhiram Bhat & another – 1993 Mh. L. J. -1 question was whether writ petition would lie against the Cooperative Bank and for that purpose it had become necessary to find out whether the Bank is a "State" or "State instrumentality" within the meaning of Article 12 of the Constitution of India. The following issue was referred to the Full Bench for determination;

> "Whether a co-operative society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 and under the Multi State Co-operative Societies Act, 1984 falls within the expression "State" under Article 12 of the Constitution of India."

After referring to the provisions of the Mah. Cooperative Societies Act as also Multi State Cooperative Societies Act under which Shamrao Vithal Cooperative Bank was registered, the Full Bench drafted the question whether merely because a public function was being discharged by the cooperative Bank, it amounts to a "State". The Full Bench observed as follows in para 19.

> "It is, however, submitted that a co-operative bank, as in the present case, performs an important public function and that itself is sufficient for coming to the

conclusion that it is "State" under Article 12. It is submitted before us 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 under Article 12. In our view, this is too broad a proposition. We have to bear in mind the note of caution sounded by the Supreme Court in the cases of *Ajay Hasia (supra) and Tekraj Vasandi (re, the Institute of Constitutional and Parliamentary Studies* supra). Every organisation which carries out a function which is of public importance does not necessarily become "State" under Article 12. Conferment of "Statehood" depends upon various other factors also, such as the nexus of such organisations with the State, the extent of State control, whether it is entirely financed by the State or by private individuals, whether the same function was originally carried out by a Department of the State and so on. There may be many functions of public importance which can be performed by private organisation also. We have a large number of organisations doing important social work vital to the community. There are, for example, organisations which look after, educate and train handicapped persons or the blind, provide them with jobs and rehabilitate them. There are private charitable organisations which may provide free or subsidised housing to the poor or free medical aid. They may supply text books to poor students, freeships and scholarships. There may be private organisation engaged in transport of goods and men.

They perform functions which are, undoubtedly of public importance, and they sub serve a public need. But this does not necessarily make such organisations "State" under Article 12. Banking is undoubtedly a function of public importance. In fact, the nationalised banks do carry out these functions under the control of the State. But that does not mean that banks which are not so controlled, or banks which are set up by private organisations or co-operative societies become "State" under Article 12. In a welfare State, many activities which are often carried on by private organisations are undertaken by the State. In such cases the Supreme Court has said that we must look at the overall position of the organisation in the light of the other tests also, especially when the function of the organisation is not such as can be carried on only by the State or is not connected with governmental functions."

After referring to the several authorities from the Supreme Court, the issue was answered by the Full Bench as follows in para 28:

"A co-operative society, registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 and under the Multi State Cooperative Societies Act, 1984, which carries on the business of banking, and is therefore governed by the Banking Regulation Act, 1949 does not thereby fall within the expression "State" under Article 12 of the Constitution of India. The appellant-Bank cannot, therefore, be considered as "State" under Article 12."

Thus, it was held that the cooperative Bank is not a "State" or "State instrumentality".

8. In S. S. Rana Vs. Registrar, Co-op. Societies & another – (2006) 11 Supreme Court Cases 634 again the question arose whether the Kangra Central Cooperative Bank Ltd. which was registered society was "State" within the meaning of Article 12 of the Constitution and whether writ petition would lie. Their Lordships held that it is settled position that to treat such an institution as a State, it is necessary to show that there was deep and pervasive control of the Government over it and observed as follows:

> "10. It has not been shown before us that the State exercises any direct or indirect control over the affairs of the Society for deep and pervasive control. The State furthermore is not the majority shareholder. The State has the power only to nominate one Director. It cannot, thus, be said that the State exercises any functional control over the affairs of the Society in the sense that the majority Directors are nominated by the State. For arriving at the conclusion that the State has a deep and pervasive control over the Society, several other relevant questions are required to be considered, namely, (1) How was the Society created? (2) Whether it enjoys any monopoly character? (3) Do the functions of the Society partake to statutory functions or public

functions? And (4) Can it be characterised as public authority?

11. Respondent 2, the Society does not answer any of the aforementioned tests. In the case of a non-statutory society, the control there over would mean that the same satisfies the tests laid down by this Court in *Ajay Hasia v. Khalid Mujib Sehravardi*.

12. It is well settled that general regulations under an Act, like the Companies Act or the Cooperative Societies Act, would not render the activities of a company or a society as subject to control of the State. Such control in terms of the provisions of the Act are meant to ensure proper functioning of the society and the State or statutory authorities would have nothing to do with its day to day functions.

13. The decision of the seven Judge Bench of this Court in *Pradeep Kumar Biswas* whereupon strong reliance has been placed, has no application in the instant case. In that case, the Bench was deciding a question as to whether in view of the subsequent decisions of this Court, the law was correctly laid down in *Sabhajit Tewary v. Union of India* and if not whether the same deserved to be overruled. The majority opined that the Council of Scientific and Industrial Research (CSIR) was "State" within the meaning of Article 12 of the Constitution of India. This Court noticed the history of the formation thereof, its objects and functions, its management and control as also the extent of financial aid received by it. Apart from the said fact it was noticed by reason of an appropriate notification issued by the Central Government that CSIR was amenable to the jurisdiction

of the Central Administrative Tribunal in terms of Section 14(2) of the Administrative Tribunal Act, 1985. It was on the aforementioned premises, this Court opined that *Sabhajit Tewary* did not lay down the correct law. This Court reiterated the following six tests laid down in *Ajay Hasia v. Khalid Mujib Sehravardi.*

> "(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.
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> (2) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
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> (3) It may also be a relevant factor... whether the corporation enjoys monopoly status which is State-conferred or State-projected.
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> (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
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> (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.
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> (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."

This Court further held : (*Pradeep Kumar Biswas case*)

> "....The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* 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.*"

9. In the present case, admittedly, the share capital of the petitioner bank was not provided by the Government nor it is getting any financial assistance by the Government. No director of the petitioner-Bank is appointed by the Government nor the Government has any direct control or interference in functioning and management of the Bank. There are number of cooperative banks/societies in the State of Maharashtra and they are registered under the Maharashtra Co-operatives Societies Act. Admittedly, the petitioner-Bank does not have any monopoly nor it has any State

protection. As stated in *Shamrao Vithal Co-op. Bank vs. Padubidri* (supra), the cooperative bank is not discharging any governmental function and the functions of the bank can be carried out by any private individual or by institution registered under the appropriate law. Admittedly, the petitioner-Bank was also not originally government department which was reregisterd as Bank. In the present case, there is nothing to show that the State exercises any direct or indirect control over the affairs of the Bank for deep and pervasive control on the basis of which it can be said that the petitioner-bank is "State" or "public authority". As pointed out earlier in the present matter we have to find out whether the petitioner-Bank is controlled by the government, if 'yes', it will be "public authority" , and, if 'no', it will not be "public authority" because none of the other requirements to make a institution a "public authority" are available in the present case. 'Control' does not mean 'regulatory or statutory control'. In the case of *Ajay Hasia vs. Khalid Mujib Sehravardi* reported in AIR 1981 SC 487 three Judges' Bench of the Supreme Court had laid down the law and it was reiterated by the Constitution Bench of the Supreme Court in the case of *Pradeep Kumar Biswas vs. Indian Institute of Chemical*

Biology – (2002) 5 SCC 111and the observations of the Supreme Court in *Pradeep Kumar vs. Indian Institute* were reiterated in the case of *S.S. Rana vs. Registrar, Co-Op. Societies*, as quoted above. Thus, it is clear that the control must be particular to the body in question and it must be deep and pervasive. If this is found then such body is "State" within the meaning of Article 12 of the Constitution of India or a "public authority" within the meaning of Section 2(h) of the Right to Information Act. When the control is merely regulatory; whether under statute or otherwise, it would not serve to make the body a "State" or "public authority". In view of the full Bench authority of this Court in the case of *S. V. Co-Op. Bank Vs. Padubidri* and in view of law laid down by the Supreme Court in several authorities, it is clear that in absence of existence of deep and pervasive control with reference to the institution, it cannot be called a "State" or "public authority" within the meaning of the Right to Information Act.

10. The State Information Commissioner referred to the case of *Prabhu Shriram Cooperative Milk Society Vs. State of Maharashtra* – 1999 (1) Mh. L. J. -619. However, on perusal of the observations made in the said judgment and referred to by the State Information

Commissioner, it is clear that this Court was dealing with the question in what circumstances the cooperative Societies are registered and in that reference it was observed that Section 4 of the Societies Act permits registration of a society having its objects, the promotion of economic interest or general welfare of its members or of the public in accordance with the co-operative principles and proviso to Section 4 prohibits registration of any society if it is likely to be economically unsound or if the registration of such a society might have an adverse effect on the development of the cooperative movement. Further the Court considered what amounts to a public interest. In that case the Court was not considering whether the Cooperative Bank is a "public authority" within the meaning of Section 2(h) of the Right to Information Act or a "State" within the meaning of Article 12 of the Constitution. The learned State Information Commissioner also noted that Justice P. B. Sawant, a retired Judge, had made certain recommendations in draft proposal submitted to the Central Government so as to include "public interest" as one of the criteria of the public authority under the Right to Information Act and in view of the said recommendation in the draft proposal and in view of the meaning of the public interest

as elaborated by this Court in the case of *Prabhu Shriram Cooperative Milk Society Vs. State of Maharashtra*, the State Information Commissioner came to conclusion that the public interest is relevant because the cooperative banks are dealing with the deposits from the public and it is necessary that the cooperative banks should function in the best interest of the public funds and it will be in the public interest to know if there is is any misappropriation, etc.

11. In my considered opinion, the State Information Commissioner had mislead himself. He was not required to find that what would be in the public interest. He was to first find out whether the petitioner is a "public authority" within the definition of Section 2(h) of the Right to Information Act. If, yes, then only the Act would be application and if, no, the said Act is not application.

12. Observations in *Prabhu Shriram Cooperative Milk Society* were not relevant for decision of this matter. Mere recommendation or suggestion to amend the law, does not change

the law unless the amendment is actually made by the legislature. In view of the fact and legal position discussed earlier, it must be held that the petitioner-Bank is not a "public Authority" within the meaning of Section 2(h) of the Right to Information Act.

13. Section 4 and 5 of the Right to Information Act provide about obligations of public authorities and it directs the public authority to appoint Public Information Officer, etc. Under Section 6 request for obtaining information can be made from the public authority. If it is not a public authority, the information cannot be sought under the Right to Information Act. The learned Counsel for the petitioner conceded that respondent No. 3 being the share holder and member of the petitioner-Bank is entitled to make an application for getting information under Section 32 of the Societies Act and if he makes such an application, the Bank would be statutorily obliged to provide information as per law. That is totally a different point. Right to seek information is given to the share holders of the cooperative societies under the Societies Act but certainly respondent No. 3 could not seek information about the petitioner-Bank under the Right to Information Act.

14. In view of the facts and legal position stated above, I find that the State Information Commissioner committed error in allowing the appeals filed by respondent No. 3. Therefore, it is necessary to intervene and set aside the impugned order.

15. Writ petition is allowed. The impugned order passed by the State Information Commissioner is hereby set aside.

JUDGE

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