

(2009) 11 MAD CK 0153

Madras High Court

Case No: Writ Petition No. 7063 of 2009

V.M. Palanisamy

APPELLANT

Vs

The Manager Erode
District Central Co-op.
Bank Ltd. and The
Special Officer Erode
District Central Co-op.
Bank Ltd.

RESPONDENT

Date of Decision: Nov. 27, 2009

Acts Referred:

- Constitution of India, 1950 - Article 12, 14, 226
- Contract Act, 1872 - Section 70, 72

Hon'ble Judges: P. Jyothimani, J

Bench: Single Bench

Advocate: N. Jothi, for N. Manokaran, for the Appellant; R. Murali, Additional Government Pleader for Respondent 1 and M.R. Raghavan, for Respondent 2, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

P. Jyothimani, J.

This writ petition is for a direction against the respondents to furnish the calculation sheet with statement of accounts prepared in terms of the rate of interest fixed as per G.O.(2D) No. 12, dated 28.2.2009 to enable the petitioner to pay the loan dues in respect of loan Nos. 100 and 286 under the Non Farming Sector Loan Interest Waiver Scheme by considering the legal notice dated 21.3.2009.

2.1. The brief facts leading to the filing of this writ petition are that the writ petitioner has borrowed Term Loan of Rs. 10,00,000/- on 25.6.2002 and also availed Cash Credit Loan of Rs. 25,00,000/- on 4.5.2002 from the first respondent/Bank and it is stated that he has been repaying the loan with interest periodically between 10.7.2002 and 18.7.2008 in

respect of the Term Loan No. 286 and also repaying the amount with interest from 6.5.2002 and 13.8.2008 towards the Cash Credit Loan No. 100. It is the complaint of the petitioner that in spite of the repayment many of the amounts have not been given given credit to and irregularities have been committed.

2.2. The first respondent/Bank has introduced "Non-farming Sector Loan Interest Waiver Scheme" which was propounded by G.O.Ms. No. 327, dated 27.2.2006, by which the defaulters have been granted waiver of penal interest on payment of 25% of the loan amount on or before 31.3.2007 and for payment of the remaining amount of 75% time was granted up to 30.6.2007. Subsequently, the time for payment of 25% as well as 75% was extended up to 30.6.2007 and 31.12.2007 respectively by G.O.Ms. No. 96, dated 29.3.2007. It is stated that the Government has extended from time to time the said period and ultimately, the State Government in G.O.Ms. No. 11, dated 23.1.2008 has permitted the persons who availed loans to remit the due in one lumpsum or instalments on or before 31.3.2008 by way of waiver of penal interest of 3%.

2.3. At the request of the Registrar of Co-operative Societies, the said period has been extended by the Government up to 30.6.2008 for giving one more opportunity to the borrowers to clear their dues to the Bank and that was by G.O.Ms. No. 73, dated 25.4.2008. It is stated that the first respondent/Bank has accordingly intimated the petitioner to avail such interest waiver scheme in respect of both the loans stating that in respect of Cash Credit Loan No. 100, 25% comes to Rs. 8,47,554/- and the balance amount 75% comes to Rs. 25,42,660/-, to a total extent of 33,90,214/- and in respect of the Term Loan No. 286, 25% comes to Rs. 2,17,032/- and the balance 75% comes to Rs. 6,51,097/-. By subsequent demand notice dated 26.2.2008, the first respondent has demanded the following amounts, viz., in respect of Cash Credit Loan No. 100 a sum of Rs. 26,55,109/- and in respect of Term Loan No. 286 a sum of Rs. 4,25,210/-.

2.4. It is stated that now the Government has issued G.O.(2D) No. 12, dated 28.2.2009 by extending the time to pay the amount under Non-Farming Sector Loan Interest Waiver Scheme till 30.6.2009 and the petitioner has been ready and willing to avail the said benefit. It is stated that the respondents have not furnished proper statement of accounts to enable the petitioner to make payment under the Non-Farming Sector Loan Interest Waiver Scheme.

2.5. The first respondent, by notice dated 13.3.2009, has made the following demands, viz., in respect of Cash Credit Loan No. 100 a sum of Rs. 30,08,109/- and in respect of Term Loan No. 286 a sum of Rs. 4,59,566/-. The petitioner is stated to have sent a representation under the Right to Information Act requesting the first respondent to furnish the details of disbursement of the loan amount and the amount payable by him under the Non-Farming Sector Loan Interest Waiver Scheme, for which the first respondent has furnished a copy of the statement with incorrect particulars. It is stated that the first respondent has made a further demand, viz., in respect of Cash Credit Loan No. 100 a sum of Rs. 27,35,305/- and in respect of Term Loan No. 286 a sum of Rs.

5,84,013/-.

2.6. It is stated that the statements given by the first respondent on various occasions are different and contradictory. The petitioner has issued a legal notice on 21.3.2009. However, the first respondent has not chosen to give any details. It is stated that the petitioner is prepared to pay the amount under the Non-Farming Sector Loan Interest Waiver Scheme if proper statement of accounts are given, of course after adjustment of the payment of 25% made already. Therefore, it is the case of the petitioner that 25% of the amount has already been paid and he is liable to pay the balance as per the said scheme and the present writ petition is filed for a direction as stated above.

3.1. In the counter affidavit filed by the respondents dated 11.7.2009, while questioning the maintainability of the writ petition against the co-operative society and stating about the non-maintainability of the writ petition in contractual matters, the respondents have admitted that the petitioner has taken the said two loans and the same were renewed on 31.3.2004 and 31.3.2005. It is stated that subsequent to 1.2.2004, the petitioner has not honoured the commitments and the loan was treated as a non-performing asset and not renewed. It is stated that the passbook of the petitioner has been updated periodically without any omission.

3.2. It is stated that since the Cash Credit Loan has exceeded Rs. 25,13,193/- as on 31.12.2003, the petitioner was prevented from operating the account and as per the Government notification, a notice was issued by the respondents/Bank calling upon the petitioner to deposit 25% of amount on or before 31.3.2007. While it is stated that 25% has been deposited, the remaining 75% was not remitted before 30.6.2007 and therefore, it is stated that the petitioner was not entitled to concessional rate of interest. It is also stated that though time was extended up to 31.3.2008, the petitioner failed to remit the amount and even thereafter, when the scheme was extended up to 30.6.2008, the petitioner has not remitted the amount.

3.3. It is stated that insofar as Cash Credit Loan No. 100 is concerned, as on 31.3.2007, the petitioner had to deposit Rs. 33,90,214/-. It is stated that as per the scheme 25% of the amount, viz., Rs. 8,47,544/- has been remitted and the total amount due is Rs. 25,42,486/-. It is also stated that interest between 31.3.2007 and 31.3.2008 works out to Rs. 3,43,224/- and as on 31.3.2008, the total amount payable is Rs. 28,85,710/-. It is stated that concessional interest works out to Rs. 2,30,601/- and if that is taken into consideration, the amount payable by the petitioner as on 31.3.2008 is Rs. 26,55,109/-.

3.4. In respect of Term Loan No. 286, it is stated that the petitioner has remitted Rs. 8,68,129/- as on 31.3.2008. As per the Government scheme, 25% amount works out to Rs. 2,17,032/- and the petitioner has remitted Rs. 2,29,262/-. As on 30.6.2007, it is stated that the petitioner owes a sum of Rs. 6,38,867/- and he has remitted a sum of Rs. 1,74,904/-. Interest between 31.3.2007 and 31.3.2008 works out to Rs. 88,473/- and therefore, as on 31.3.2008, the total amount payable is Rs. 5,49,436/-. The concessional

rate of interest as announced by the Government works out to Rs. 1,24,226/- and if that is taken into consideration, as on 31.3.2008, the petitioner is liable to pay Rs. 4,25,210/-. It is stated that the above said particulars have been given to the petitioner. A notice was issued on 23.1.2007, calling upon the petitioner to remit the amount on or before 31.3.2007 and subsequently, on 26.2.2008, a notice was issued calling upon the petitioner to remit the amounts due as on 31.3.2008.

3.5. It is stated that the Government has issued a further scheme for persons who have not discharged their debt utilizing the scheme in G.O.2(D) No. 12, dated 28.2.2009 and as per the scheme, the debtors were permitted to remit 25% of the amount on or before 31.3.2009 and the remaining 75% on or before 30.6.2009. On 13.3.2009, notice was sent to the petitioner calling upon him to deposit Rs. 30,08,109/- with regard to Cash Credit Loan No. 100 and Rs. 4,59,566/- with regard to Term Loan No. 286. The petitioner has deposited Rs. 4,19,109/- towards Term Loan No. 286 and Rs. 27,05,000/- towards Cash Credit Loan No. 100. The petitioner requested details of remittances and the same was communicated on 30.6.2009 and even under the Right to Information Act, particulars were furnished to the petitioner. Therefore, it is stated that the petitioner has not discharged his debts in terms of the loan agreements. All other averments made by the petitioner were denied.

4.1. In the reply affidavit filed by the petitioner dated 28.7.2009, the petitioner has explained the various discrepancies of demand made by the respondents as follows:

Sl.No.	Date of Demand Notice	Amount Demanded in Loan No.100	Amount Paid
1	26.02.2008	Rs.26,55,109.00	Rs.4,19,109.
2	24.05.2008	Rs.25,42,660.00	Rs.6,51,097.
3	25.07.2008 with penal of 1=%	Rs.27,35,305.00	Rs.5,84,613.
4	13.03.2009	Rs.30,08,109.00	Rs.6,51,097.

1. Demand Notice dated 26.02.2008
Loan No. 100 - Rs. 26,55,109.
Loan No. 286 - Rs. 4,25,210.

2. Demand Notice dated 24.05.2008
Loan No. 100 - Rs. 25,42,660.
Loan No. 286 - Rs. 6,51,097.

3. Demand Notice dated 25.07.2008
with penal of 1= %
Loan No.100 - Rs.27,35,305.
Loan No.286 - Rs. 5,84,613.

4 Demand Notice dated 13.03.2009
Loan No. 100 - Rs.30,08,109.

Loan No. 286 - Rs. 6,41,662.

4.2. It is stated that, after filing of the writ petition, the respondents have pressurized the petitioner to settle the dues by using coercive methods and during the pendency of the writ petition, the petitioner has stated that he has paid the following amounts in respect of the said loan accounts.

1. L.No.100 - Liabilities on 31.03.2008 with 12% Rs. 25,89,311.00
Amount paid on 05.05.2008 Rs.11,00,000.00
Amount paid on 29.06.2009 Rs.16,05,000.00

Total	Rs.27,05,000.00
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Whereas amount payable with 6% is Rs.22,54,324.00

Amount paid in excess is Rs.4,50,676.00

2. L.No.286 ■ Liability as on 31.03.2008 with 12% Rs.4,11,104.00
Amount paid on 05.05.2009 Rs.2,70,000.00
Amount paid on 29.06.2009 Rs.1,49,104.00

Total	Rs.4,19,104.00
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Whereas amount payable with 6% Rs. nil

Amount paid in excess Rs.6,45,483.00

and according to the petitioner, he has paid excess amounts.

5. In the meantime, the petitioner has filed M.P. No. 1 of 2009 for amendment of prayer in the writ petition to include a direction to refund an amount of Rs. 14,52,873/- stated to have been paid in excess towards loan account Nos. 100 and 286 along with interest.

6.1. Thereafter, the respondents have filed a counter affidavit in the said petition for amendment of prayer, in which, while reiterating the earlier stand taken by the respondents in the counter affidavit, it is stated that as per G.O.(2D) No. 77, dated 22.7.2009, the loan should be fully overdue on 31.3.2007 and therefore, according to the respondents, in respect of Term Loan No. 286, the petitioner is not entitled to the benefit of the scheme. However, it is stated that in respect of Cash Credit Loan No. 100, the petitioner is entitled to the benefit of the scheme.

6.2. It is stated that the calculation of interest at the rate of 6% from 1.6.2002 is not correct and that the loan was renewed from 1.4.2004 to 31.3.2005 and on 1.4.2005 it was not renewed and therefore, the interest at the rate of 6% could be calculated only from 1.4.2005. It is stated that as per G.O.Ms. No. 327, dated 27.2.2006, while the petitioner

has deposited 25% of 12% interest, he has not remitted the balance 75% amount on or before 30.6.2007. It is stated that while it is true that the petitioner is entitled to benefit of the government order insofar as it relates to Cash Credit Loan, there is no provision for refund of the excess amount paid. It is stated that even though the petitioner's business was in sound position, he did not remit the first instalment on 1.4.2005. It is also stated that as far as the refund of amount is concerned, it is only a contractual obligation which can be enforced by the civil court and not under Article 226 of the Constitution of India.

7.1. To the above said stand of the respondents, the petitioner has filed a reply affidavit stating that this Court by exercising the power conferred under Article 226 of the Constitution of India has jurisdiction when the respondents, being the instrumentality of the State, act contrary to public good and public interest.

7.2. It is stated that even the excess amount admittedly paid to the extent of Rs. 14,52,873/- is attempted to be retained by the respondents, while even under the Indian Contract Act there is an obligation imposed to return the amount to which the respondents are not entitled to, especially with reference to Section 70 of the Indian Contract Act. It is stated that the obligation u/s 70 of the Indian Contract Act is not based on contractual principle, but based on the concept of unjust enrichment, which is a principle of equity.

8. The fact of availing of two loans by the petitioner, viz., Term Loan for Rs. 10,00,000/- on 25.6.2002 and Cash Credit Loan for Rs. 25,00,000/- on 4.5.2002 is not in dispute. It is the case of the petitioner, as it is seen in the reply affidavit dated 28.7.2009, that after filing of the writ petition, the petitioner has made various payments in respect of both the accounts and stated that in respect of Cash Credit Loan No. 100, excess amount of Rs. 4,50,676/- has been paid and in respect of Term Loan No. 286, excess amount of Rs. 6,45,483/- has been paid and therefore, he has filed an amendment petition in M.P. No. 1 of 2009 for the purpose of refund of the amount.

9. In the counter affidavit filed by the respondents after the said reply affidavit filed by the petitioner, there is no specific denial of the said excess amount stated to have been paid by the petitioner, but it has been the stand of the respondents/Bank that under the scheme there is no provision for refund of excess amount paid.

10.1. Mr. N. Jothi, learned Counsel appearing for the petitioner, while meeting at the first instance the point raised on behalf of the respondents regarding the maintainability of the writ petition, would submit that the respondent, being a Co-operative Bank controlled by the Government in respect of giving effect to the beneficial schemes granted by the Government regarding repayment of loans, is performing public function and while performing the same, the respondents are expected to act with fairness and avoid arbitrariness in action. It is his contention, on the facts and circumstances of the case, that the respondents have not acted fairly and therefore, as a person entitled to the benefit of the scheme announced by the Government in respect of the repayment of loan,

the petitioner cannot be directed to go to the civil court and wait for the ordeal of delay.

10.2. On the other hand, in respect of the functioning of the respondents/Bank, it is his contention that the respondents/bank is "State" within the meaning of the term under Article 12 of the Constitution of India, inasmuch as the function performed by the respondents in this regard is a public function. He would also submit that even under the concept of quasi-contractual system, the amount paid in excess or by mistake has to be refunded, since the respondents cannot be expected to be an unjust beneficiary and he would rely upon various provisions of the Indian Contract Act, including Sections 70 and 72.

10.3. To substantiate his contention that writ petition will lie against co-operative society, he would rely upon the decisions in [ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others](#), and Corporation Bank v. Saraswati Abharansala and Anr. [2009] 1 SCC 540.

10.4. To substantiate his contention that excess amount paid has to be refunded, he would rely upon the decisions in [Gurcharan Singh Vs. Registrar, Co-operative Societies, Himachal Pradesh and Others](#), and M.D., Orissa Co-operative Housing Corporation Ltd. v. K.S. Sudarshan 2009 (2) TNCJ 663 (SC).

11.1. On the other hand, it is the contention of Mr. M.R. Raghavan, learned Counsel for the second respondent that the transaction between the parties is contractual in nature and it is stated that as per the provisions of the Act, the second respondent has obtained a decree against the petitioner on 21.2.2007 and when the same was to be executed, the Government passed Government orders which were extended periodically conferring certain benefits to the parties, who have obtained loans.

11.2. While admitting that as per the government orders the time has been extended from time to time, it is stated that the amendment petition has been filed by the petitioner only after the government order was passed on 22.7.2009. It is his submission that the schemes are Special Loan Repayment Schemes. To substantiate his contention that the petitioner can only go to the civil court, he would rely upon the decisions in [Tamil Nadu Industrial Investment Corporation Ltd. Vs. Millenium Business Solutions Pvt. Limited and Another](#), ; and [KNS Saw Mill, Proprietor, K. Naveenatha Kannan Vs. The Authorised Officer, Bank of India](#), . He would also rely upon the judgments of the Supreme Court in Ajay Hasia case 2 and 3 to substantiate his case that it is a contractual obligation which is sought to be enforced. It is also his contention that the writ petition is liable to be dismissed on the basis of laches.

12. At the outset, in the absence of any specific denial regarding the excess amount stated to have been paid by the petitioner during the pendency of the writ petition and after referring to the particulars given by the petitioner in the affidavit explaining about the details of the payments made, it has to be construed that the petitioner has, in fact, made

excess payment as per the scheme. In such view of the matter, M.P. No. 1 of 2009 stands ordered.

13.1. On the facts and circumstances of the case, on the basis of the pleadings it is clear that the respondents/Bank has obtained a decree against the petitioner and while the respondents attempted to enforce the decree, various schemes have been introduced by the State Government regarding the repayment of loan. The latest order issued by the Government in that regard is G.O.(2D) No. 77, Co-operation, Food and Consumer Department, dated 22.7.2009. The said government order, which has been captioned as Regularisation of Special Repayment Loan Scheme in respect of non-farming debts starting from G.O.Ms. No. 327, dated 27.2.2006 till G.O.(2D) No. 12, dated 28.2.2009, refers to the said scheme as a Special Repayment Scheme for non-farming loans. The said scheme under the government order makes it clear that the same is applicable in respect of debts by the co-operative societies like that of the respondents. It also specifically states that the scheme applies to cases where the repayment has not been made in full as on 31.3.2007 and therefore, the non-farming loans should be pending at that time, provided instalments have been correctly paid.

13.2. As per the said scheme, the person liable to repay the loan must pay 25% of the amount and enter agreement on or before 31.10.2009. He must undertake to pay the balance 75% of the amount within three months thereafter, in maximum of three instalments. The concession given is that in respect of the amount repayable, simple interest of 6% is to be paid from the date of obtaining loan till the date of agreement. It is stated in the said government order that the amounts already paid will not be refunded in the event of the debtor paying more amount. It is stated that to reimburse the loss which may be caused to the banks, Government shall bear the loss of interest to the extent of 4% and any further loss will have to be undertaken by the banks.

13.3. The operational guidelines issued by the Registrar of Co-operative Societies for implementation of the Special Loan Settlement Scheme, while speaking about the coverage, states as follows:

2. Coverage: All loans issued under the broad classifications of "NFS" (Non-farming Sector) i.e. SRTTO/Handloom/Powerloom/Industry and Business/ Document pledge loan etc. will be eligible for this scheme, subject to the conditions that

a) The loan should be fully overdue by 31.3.2007 (that is as per loan agreement date, time for paying last instalment is over by 31.3.2007).

b) Remains fully/partly uncollected on the date of issue of G.O.

Borrowers who have opted under previous OTS/IRS schemes and have paid a part thereof, will also be eligible for availing benefit under this scheme.

13.4. Again, the settlement formula is explained in Clause 3 as follows:

3. Settlement Formula.

3.1. To avail benefits under the scheme, borrower should repay 25% of the amount calculated under the scheme and enter into an agreement with the institution, before 31.10.2009. He should also undertake to repay remaining 75% of the amount within 3 months from the date of agreement in a maximum of 3 instalments.

3.2. Under the scheme, interest will be charged on the principal outstanding at 6% simple interest from the date of issue of loan upto the date of agreement. Overdue interest, penal interest and other charges already charged into the loan account will be waived. If any repayments have already been made, such will be appropriated into interest amount (calculated @ 6%) and principal outstanding on the respective day of repayment. Based on such principal, the final amount to be paid by the borrower is to be arrived at. A model working sheet has been given in Annexure II (For all institutions except PCARDB) and Annexure III (For PCARDB). The principle thereon should be followed without any deviation.

3.3. If the amount so calculated is less than the amount already repaid then the loan shall be treated as fully settled. At any cost, no amount should be repaid to a borrower.

3.4. On account of implementing the scheme, there will be interest loss to the institutions. Government as a gesture had come forward to bear the loss of interest to the extent of 4% on the principal outstanding. The method of calculating such has been illustrated in Annexure II & III.

3.5. Any further loss will have to be borne by the respective Cooperative Credit Structure/Institution. In case, the loan has been refinanced by any higher financing agency, then interest loss will be shared by the higher financing agency and by the concerned institution in the ratio of 75:25.

3.6. If a borrower after paying 25% and signing the agreement fails to pay remaining 75% within 3 months from the date of agreement, he is deemed to have forfeited his benefits and all benefits under this scheme shall be withdrawn.

13.5. The procedure for implementation of the Special Loan Settlement Scheme is explained in Clause 4. The relevant Clauses 4.4 and 4.9 are as follows:

4. Procedure for implementation of Special Loan Settlement Scheme.

* * * *

4.4. The respective institutions should prepare the notice in quadruplicate. First copy should be served in person to the individual borrower and in the second copy acknowledgment should be obtained from the borrower. The third copy of notice should be sent to all eligible borrowers by way of certificate of posting. The fourth copy has to be

kept as Office Copy. The Records connected with Despatch of notices, Office copy and the acknowledgment copy should be maintained in the Institution for verification by the Zonal Officers/Joint Registrars/Special Officers of the DCCBs/Circle Deputy Registrars. The notices should be sent to all eligible borrowers without any omission and any lapse will be viewed seriously. In respect of PACS, PCARDBS, UCCS, UCBs the Special Officer and the GM/Secretary shall be responsible for issue of notice in respect of all eligible borrowers.

* * *

4.9. Cooperative Credit Institution and banks will give wide publicity to the scheme and create awareness among the borrower so as to realize the object of providing relief to the borrowers.

13.6. The operative period of the scheme is stated under Clause 5, as follows:

5. Operative Period of the Scheme:

5.1. The Scheme shall come into operation immediately and shall be in force till 31.10.2009. The repayment period for remaining 75% shall be 3 months from the date of agreement.

5.2. The Special Officer, Tamil Nadu State Apex Cooperative Bank, Special Officer, Tamil Nadu Cooperative State Agriculture and Rural Development Bank, Additional Registrar/Joint Registrars of all Regions and Special Officers of the DCCBs are requested to devote full attention to this work and complete the task of preparation of individual borrower wise statement and sending of individual communication to the individual borrowers in a weeks time positively.

14. In the reply affidavit dated 28.7.2009, the petitioner has given the particulars regarding the payment made as on that date, even after the filing of the writ petition, which is as follows:

CASH CREDIT LOAN No. 100

4/5/02

- RS.25,00,000.00 was sanctioned by the bank

27.12.2006

- G.O.Ms. No. 327, dated 27.12.2006 issued by announcing the loan interest waiver scheme with 12% interest

27.12.2006

- Loan overdue payable by the petitioner

Rs. 32,71,888.00

12% interest as per G.O.327

Rs. 1, 18,326.00

Total

Rs. 33,90,214.00

As per G.O.327 dt.27.12.2006, 25% to be paid on or before 31.3.2007.
The remaining 75% is payable on or before 30.06.2007

30.03.2007	25% of the amount paid	Rs. 8,47,728.00
	Balance due of 75%	Rs. 25,42,482.00
	Interest concession	Rs. 2,30,601.00
	Amount payable	Rs. 23,11,885.00

In view of the recent waiver announced in the assembly, the loan is repayable with 6% interest on or before 31.12.2009 is Rs. 22,54,324.00

However, pending writ petition, the entire amount has been paid

Amount paid on 05.05.2009	Rs.11,00,000.00
Amount paid on 29.06.2009	Rs.16,05,000.00

Total	Rs.27,05,000.00
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Amount paid in excess	Rs. 4,50,676.00
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LOAN NO.286

25.06.2002

- RS.10,00,000.00 was sanctioned by the bank

27.12.2006

- G.O.Ms.No.327, dated 27.12.2006 issued by announcing the loan interest waiver scheme with 12% interest

27.12.2006

- Loan overdue payable by the petitioner	Rs.6,65,632.00
12% interest as per G.O.327	Rs.2,02,497.00

Total	Rs.8,68,169.00
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As per G.O.327 dt.27.12.2006, 25% to be paid on or before 31.3.2007.
The remaining 75% is payable on or before 30.06.2007

30.03.2007

25% of the amount paid	Rs.2,29,262.00
Balance due of 75%	Rs.6,38,867.00
Interest concession	Rs.1,24,226.00
Amount payable	Rs.5,14,641.00

In view of the recent waiver announced in the assembly, the loan is repayable with 6% interest on or before 31.12.2009 is
Rs.NIL

However, pending writ petition, the entire amount has been paid

Amount paid on 05.05.2009	Rs.2,70,000.00
Amount paid on 29.06.2009	Rs.1,49,104.00
Total	Rs. 4,19,104.00

Amount paid in excess	Rs.6,45,483.00
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Therefore, according to the petitioner, he has paid amount in excess.

15. In the counter affidavit, it is stated that the scheme is applicable in respect of the Cash Credit Loan No. 100. But the only defence is that, as per the government order, no excess amount will be refunded. Therefore, the factum of payment by the petitioner in respect of the said loans as per the scheme and discharge of the obligation on the part of the petitioner is not in dispute. The only dispute is that in respect of the refund of the amount, under the scheme there is no provision and moreover, the government order specifically states that such refund is not possible.

16. In [ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others](#), , while dealing with the maintainability of the writ petition under Article 226 of the Constitution of India and enforcement of contractual obligations, the Supreme Court, while holding that when writ petition involving serious disputed question of fact which requires appreciation of evidence will not normally be entertained under Article 226 of the Constitution of India, observed that that is not an absolute rule in all

cases. That was a case where the party entered into a contract with the State owned Corporation of Kazakhstan which provides for the mode of payment by barter of goods by the Corporation and assurance has been given by Ministry of Foreign Economic Relations of Kazakhstan for prompt payment of consideration and when such amount was not paid writ petition was filed. It was held that when once the State or its instrumentality is a party to the contract, it is expected to act fairly and justly to comply with the requirements of Article 14 of the Constitution of India. While dealing with the contention that the writ petition is filed for quashing the letter of repudiation, which in effect amounts to a money claim, which cannot be granted in a writ petition under Article 226 of the Constitution of India, the Supreme Court has held as follows:

25. The learned Counsel for the respondent then contended that though the principal prayer in the writ petition is for quashing the letters of repudiation by the first respondent, in fact the writ petition is one for a "money claim" which cannot be granted in a writ petition under Article 226 of the Constitution of India. In our opinion, this argument of the learned Counsel also cannot be accepted in its absolute terms. This Court in the case of U.P. Pollution Control Board and Ors. v. Kanoria Industrial Ltd. [2001] 2 SCC 49 while dealing with the question of refund of money in a writ petition after discussing the earlier case law on this subject held:

12. In the para extracted above, in a similar situation as arising in the present cases relating to the very question of refund, while answering the said question affirmatively, this Court pointed out that the courts have made distinction between those cases where a claimant approached a High Court seeking relief of obtaining refund only and those where refund was sought as a consequential relief after striking down of the order of assessment, etc. In these cases also the claims made for refund in the writ petitions were consequent upon declaration of law made by this Court. Hence, the High Court committed no error in entertaining the writ petitions.

* * *

16. In support of the submission that a writ petition seeking mandamus for mere refund of money was not maintainable, the decision in [Suganmal Vs. State of Madhya Pradesh and Others](#), was cited. In AIR para 6 of the said judgment, it is stated that-

We are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax.

17. Again in AIR para 9, the Court held:

We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction.

The judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax/cess as unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case.

26. Therefore, this objection must also fail because in a given case it is open to the writ court to give such monetary relief also.

27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:

- (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- (b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
- (c) A writ petition involving a consequential relief of monetary claim is also maintainable.

17. While dealing with the obligation for refund of excess tax paid, it was held in *Corporation Bank v. Saraswati Abharansala and Anr.* [2009] 1 SCC 540 that reasonableness is the basis as per the equality clause in Article 14 of the Constitution of India and a statute cannot be interpreted to mean and encourage defaulters and discourage law abiding citizens who pay tax promptly, as follows:

23. Furthermore, the notification having been given a retrospective effect must be construed on the touchstone of the purpose and object it sought to achieve. Principle of purposive construction should be applied in a case of this nature to find out the object of the Act. When a statute cannot be considered in such a manner which would defeat its object, the legislature is presumed to be aware of the consequences flowing therefrom. The statute should be considered in such a manner so as to hold that it serves to seek a reasonable result. The statute would not be considered in such a manner so as to encourage defaulters and discourage those who abide by the law.

24. The statute furthermore, it is trite, should be read in the manner so as to do justice to the parties. If it is to be held, without there being any statutory provision that those who have deposited the amount in time would be put to a disadvantageous position and those who were defaulters would be better placed, the same would give rise to an absurdity. Construction of the statute which leads to confusion must be avoided.

18. In [Gurcharan Singh Vs. Registrar, Co-operative Societies, Himachal Pradesh and Others](#), while dealing with the term "State" under Article 12 of the Constitution of India with reference to co-operative societies and other institutions, by referring to the Constitutional Bench judgment of the Supreme Court in [Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others](#), the Supreme Court has quoted the observation therein while remanding the matter to the High Court for fresh consideration as follows:

2. Learned Counsel for the appellant submitted with reference to a seven Judges Bench judgment of this Court in [Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others](#), that the writ petition is maintainable. By the said judgment, the decision of the Constitution Bench in the case of [Sabhajit Tewary Vs. Union of India \(UOI\) and Others](#), was overruled. The Constitution Bench judgment in the case of [Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others](#), was explained and multiple tests for determining whether a particular Corporation or Body can be held to be included within the definition of "State" under Article 12 of the Constitution, were laid down. It was inter-alia held as follows:

40. The picture that ultimately emerges is that the tests formulated in [Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others](#), 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.

It appears that the basic factual aspects were not placed before the High Court to determine the question whether the respondent-Society was "State" within the meaning of

Article 12 of the Constitution. In view of the aforesaid, we feel it would be appropriate for the High Court to examine the question regarding the maintainability in the background of what has been stated in Pradeep Kumar's case, [2002] 5 SCC 111. The parties shall be permitted to place materials in support of their respective stands in this regard. As the matter is pending since 1995 and involves the question of legality or otherwise of termination of services of the appellant, it would be in the interest of the parties if the writ petition is disposed of as early as practicable preferably within four months from the date of receipt of our order.

19. A Full Bench of this Court in [K. Marappan Vs. The Deputy Registrar of Co-operative Societies and The Special Officer Vattur Co-operative Agricultural Bank](#), while referring to the observation made by the Supreme Court in [Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others](#), has laid down the following tests:

21. From the above discussion, the following propositions emerge:

(i) If a particular co-operative society can be characterised as a "State" within the meaning of Article 12 of the Constitution (applying the tests evolved by the Supreme Court in that behalf), it would also be "an authority" within the meaning and for the purpose of Article 226 of the Constitution. In such a situation, an order passed by a society in violation of the bye-laws can be corrected by way of writ petition;

(ii) Applying the tests in *Ajay Hasia* it is held that a co-operative society carrying on banking business cannot be termed as an instrumentality of the State within the meaning of Article 12 of the Constitution;

(iii) Even if a society cannot be characterised as a "State" within the meaning of Article 12 of the Constitution, a writ would lie against it to enforce a statutory public duty cast upon the society. In such a case, it is unnecessary to go into the question whether the society is being treated as a "person" or "an authority" within the meaning of Article 226 of the Constitution and what is material is the nature of the statutory duty placed upon it and the Court will enforce such statutory public duty. Although it is not easy to define what a public function or public duty is, it can reasonably said that such functions are similar to or closely related to those performable by the State in its sovereign capacity;

(iv) A society, which is not a "State" would not normally 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 statutory provisions which need to be complied with by all concerned including societies. If they violate such statutory provisions a writ would be issued for compliance of those provisions;

(v) Where a Special Officer is appointed in respect of a co-operative society which cannot be characterised as a "State" a writ would lie when the case falls under Clauses (iii) and (iv) above;

(vi) The bye-laws made by a co-operative society registered under the Tamil Nadu Co-operative Societies Act, 1983 do not have the force of law. Hence, where a society cannot be characterised as a "State", the service conditions of its employees governed by its bye-laws cannot be enforced through a writ petition;

(vii) In the absence of special circumstances, the Court will not ordinarily exercise power under Article 226 of the Constitution of India when the Act provides for an alternative remedy; and

(viii) The decision in *M. Thanikkachalam v. Madhuranthagam Agricultural Co-operative Society* 2004 (5) CTC 556 is no longer good law, in view of the decision of the seven-Judge Bench of the Supreme Court in *Pradeep Kumar Biswas* case and the other decisions referred to here before.

20. Therefore, it is clear that even if the co-operative society carrying on banking business cannot be termed as an instrumentality of the State to cover under Article 12 of the Constitution of India, one has to see the statutory public duty which is cast on such society. On the facts of the present case, while it is true that in the absence of the scheme proposed by the Government for the purpose of giving relief regarding the non-farming sector certainly the relationship would continue to be contractual between the bank and the borrower, as in fact, as stated above, in the present case, the respondents/Bank has already got a decree from the civil court against the petitioner, but while the decree was to be executed, the scheme of the Government has come into operation. Therefore, thereafter the respondents/Bank has been implementing the scheme of the Government by giving concessions statutorily enumerated by the Government. Therefore, by applying the guidelines propounded by the Full Bench, as stated above, on the facts and circumstances of the present case, the conduct of the respondents/Bank in respect of the implementation of the said scheme has to be stated as a public duty and therefore, it cannot be said that the writ petition is not maintainable.

21. On the admitted pleading of the respondents/Bank that in respect of Cash Credit Loan No. 100 the scheme is applicable, it is the concrete case of the petitioner that, as on date, the petitioner has paid the entire amount as per the scheme and paid an excess of Rs. 4,50,676/-. In the absence of any repudiation of the said claim made by the petitioner, it has to be held that the Cash Credit Loan No. 100 stands discharged as per the said scheme. Even though in respect of this loan for which scheme is implemented the respondents have performed the public duty, a reading of the said scheme, as enumerated above, makes it clear that the scheme is subject to the condition that even if any excess amount is paid the same will not be refunded. The petitioner having availed the benefit of the scheme is bound to follow the scheme as a whole and in the light of the express provisions under the government order in the form of the scheme as per G.O.(2D) No. 77, Co-operation, Food and Consumer Department, dated 22.7.2009, it cannot be construed that the excess amount paid by the petitioner in respect of Cash Credit Loan No. 100 should be treated as an unjust enrichment so as to compel the

respondents/bank to refund the amount under the principles of quasi-contract. This contention of Mr. N. Jothi, learned Counsel for the petitioner would have been valid in the absence of the specific provision in G.O.(2D) No. 77, Co-operation, Food and Consumer Department, dated 22.7.2009 prohibiting the right of the petitioner to get back the excess amount when once the benefit under the scheme is availed. Therefore, the necessary consequence is to declare that in respect of Cash Credit Loan No. 100, the petitioner's obligation stands discharged as per the scheme.

22. As far as Term Loan No. 286 is concerned, it is stated that the petitioner has paid an excess amount of Rs. 6,45,483/-. But, it is the stand of the respondents/Bank that the scheme is not applicable to the said loan. If that is so, it is for the respondents to pass appropriate orders regarding the said loan, giving particulars and reasons for the said non-applicability of the scheme, so as to enable the petitioner to work out his remedy in the manner known to law. This observation has to be made necessarily for the reason that the writ petition is itself for a writ of mandamus and not challenging any order of the respondents/Bank.

In such view of the matter, this writ petition stands ordered in the following terms:

(i) Cash Credit Loan No. 100 availed by the petitioner stands discharged as per the Special Loan Settlement Scheme of the Government in G.O.(2D) No. 77, Co-operation, Food and Consumer Department, dated 22.7.2009, however with no right to the petitioner to claim refund of the excess amount said to have been paid; and

(ii) the writ petition insofar as it relates to Term Loan No. 286 stands dismissed with a direction to the respondents to furnish the particulars relating to the payments made within a period of two weeks from the date of receipt of a copy of this order, with liberty to the petitioner to work out his remedy in the manner known to law, including the enforcement of the right of quasi-contract under the Indian Contract Act.

No costs.