

A COMMON CAUSE (A REGD. SOCIETY)

v.

UNION OF INDIA & ANR.

(Writ Petition (C) No. 291 of 1998)

AUGUST 18, 2010

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[J. M. PANCHAL AND A.K. PATNAIK, JJ.]

Public Interest Litigation:

- C Banks – Non-recovery of loans, known as Non-Performing Assets – Writ petition filed before Supreme Court for appropriate writs/directions, as legislative and administrative measures taken stated not to have been effective – HELD: whether legislative and administrative measures taken by the Union Government have been effective or not is not for the Court but for the Union Government and Parliament to consider, because reduction and control of NPAs is not within the domain of judiciary but within the domain of the Executive and Legislature – It is reiterated that in the field of economic activities, there has to be judicial deference to Legislative and Executive judgment, and decisions on complex economic matters are to be based on experimentation or what one may call ‘trial and error method’ – It is for Parliament to debate and decide on the policy decision and not for courts to sit in judgment whether a particular policy decision of Government is effective or not – An expert body known as Serious Fraud Investigation Office (SFIO) set up by the Union Government is already in existence – In order to make the SFIO effective, a Committee of Experts under the chairmanship of Ex-Deputy Governor of Reserve Bank of India has also been set up, which will suggest effective measures, legislative or administrative, to ensure that bank frauds are prevented in future and the NPAs are kept to the minimum – This Committee will consider the
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suggestion to make the SFIO (or any similar body) a statutory authority having sufficient powers and having the required autonomy to be able to effectively deal with the problems of bank frauds and NPAs – A copy of this order will be placed before the Committee of Experts – Constitution of India, 1950 – Article 32 – Banks/Banking. A B

Villianur Iyarkaai Padukapu Maiyam vs. Union of India and Ors. 2009 (9) SCR 225 = (2009) 7 SCC 561; and State of M.P. vs. Nandlal Jaiswal 1987 (1) SCR 1 = 1986 (4) SCC 566 - relied on. C

Vishaka and Ors. Vs. State of Rajasthan and Ors. 1997 (3) Suppl. SCR 404 = 1997 (6) SCC 241; and Vineet Narain & Ors. Vs. U.O.I. 1997 (6) Suppl. SCR 595 = 1998 (1) SCC 226 – distinguished. D

Case Law Reference:

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|-------------------------|---------------|--------|---|
| 1997 (3) Suppl. SCR 404 | distinguished | para 6 | |
| 1997 (6) Suppl. SCR 595 | distinguished | para 6 | |
| 1987 (1) SCR 1 | relied on | para 9 | E |
| 2009 (9) SCR 225 | relied on | para 9 | |

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 291 of 1998. F

Prashant Bhushan, Rohit Kumar Singh, Poulami Putatunda for the Petitioner.

Gopal Subramaniam, S. G., S.N. Terdal, Sunita Sharma, Aman Ahluwalia, Kuldeep S. Parihar, H.S. Parihar, Anil Katiyar, P.P. Singh, Romy Chacko for the Respondents. G

The order of the Court was delivered by

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ORDER

A.K. PATNAIK, J. 1. The petitioner is a society duly registered under the Societies Registration Act, 1860 and is engaged in taking up various common problems of the people for redressal. Concerned with the increase of the non-recovered loans advanced by the public and private sector banks in India which have come to be known as Non-Performing Assets (for short "NPAs"), the petitioner has filed this Writ Petition under Article 32 of the Constitution as a Public Interest Litigation praying for appropriate writs and directions.

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2. The petitioner has stated in the Writ Petition that the aggregate figure of NPAs worked out on the basis of data compiled by the Banking Division of the Ministry of Finance is Rs.43,577/- crores. According to the petitioner, non-recovery of such huge amount of NPAs has resulted in substantial funds of banks not being available for development of the country's economy and this, in turn, has affected the citizens. The petitioner has alleged that the steps taken by the Union Government to recover the NPAs have not yielded positive results and the Finance Ministry of the Union Government is reported to have admitted that 27 nationalised banks had written off a staggering amount of Rs.4,010/- crores as bad debts during 1994-95 and 1995-96. According to the petitioner, most of the bad debts are on account of defaults made by men of substantial means and influence and if proper checks are introduced to ensure that loans and advances are not given to fraudulent borrowers, the NPAs will get substantially reduced.

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3. Mr. Prashant Bhushan, learned senior counsel appearing for the petitioner, submitted that in the Writ Petition, as originally filed, the petitioner has suggested various measures to check the menace of increasing NPAs by evolving a proper mechanism that would reduce the possibility of fresh loans becoming NPAs, but subsequently this Court passed orders on 09.08.2005, 08.12.2005, 09.11.2006 and 30.01.2008 directing the petitioner to make written suggestions to the Union

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Government and also directing the Union Government to hold meetings with the concerned functionaries to consider those suggestions. He submitted that pursuant to these directions, the petitioner has made various suggestions in its letters dated 02.08.2001, 25.08.2005 and 10.08.2006, but except for one suggestion regarding the definition of "willful defaulter", all the suggestions were rejected by the Union Government. He submitted that the reasons given by the Government for rejecting the suggestions are that if the suggestions are adopted, the public sector banks will become less competitive and will loose its customers to the private sector banks. He explained that the suggestions made by the petitioner mainly emphasized that the loans and advances must not be given without fully checking the creditworthiness and past record of the borrowers and that companies, which have been "willful defaulters" in the past or whose subsidiary companies and promoters have willfully defaulted in the past in repaying the loans and advances, should not be given fresh loans and advances. He also explained that the suggestions of the petitioner also stress on the greater accountability of the bank officials and on the personal liability of the promoters by making personal guarantee of the promoters mandatory in every case. He vehemently argued that the Union Government could not possibly have any objection to these suggestions made by the petitioner and the reasons given in the affidavit of Shri Dharam Paul Bhardwaj, Under Secretary, Ministry of Finance, Department of Economic Affairs (Banking Division) filed on behalf of the Union Government for not accepting the suggestions are frivolous. On behalf of the petitioner, he urged the Court to issue appropriate writs and directions to the respondents to implement the suggestions made by the petitioner.

4. Mr. Gopal Subramaniam, learned Solicitor General for the Union of India, however, submitted, relying on the additional affidavit, that a number of steps have already been taken by the Ministry of Finance, Government of India, to address the

- A issue of NPAs and bank frauds and these are: action taken under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short "the DRT Act") to recover the NPAs of Banks, the enactment of the Securitization and Reconstruction of Financial Assets and Enforcement of Security
- B Interest Act, 2002 (for short "the SARFAESI Act") which empowers the banks to realize the securities furnished by the borrowers to the bank and to recover the loans and advances from the defaulted borrowers, the enactment of the Credit Information Companies (Regulation) Act, 2005 which provides
- C for the setting up of Credit Information Companies for collection, sharing and dissemination of credit information, which will help in arresting fresh accretion of NPAs and framing of the rules under the Credit Information Companies (Regulation) Act, 2005, which would ensure that the Credit Information Companies
- D collect, process and collate accurate and complete data relating to the borrowers, so that fresh loans and advances given to the borrowers do not become sticky. He submitted that besides the legislative measures, the Reserve Bank of India has been circulating a list of non-suit filed 'doubtful' and 'loss' borrowal accounts of Rs. 1 crore and above, on 31st March and on 30th
- E September every year to the banks and financial institutions for their confidential use. He submitted that the banks and the Union Government also refer cases of bank frauds to the C.B.I. wherever considered necessary and appropriate and that the Union Government has set up in July, 2003 the "Serious Fraud
- F Investigation Office" (SFIO), which comprises officers specialized in various disciplines, such as Taxation, Customs, Central Excise, Information Technology, Company Law, Capital Market, Banking, Investigation/ Police, Forensic Audit, etc. and this expert and experienced body has already started
- G functioning since October, 2003 and has been assigned a total of 51 cases of serious frauds up to 30.04.2008 out of which 30 cases have already been investigated and 18 cases are under investigation. He explained that SFIO is presently working under the existing provisions of the Companies Act but
- H legislation will be brought to invest the SFIO with adequate

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reach and powers. He submitted that the Central Government has already constituted a Committee of Experts under the Chairmanship of the Ex-Deputy Governor of the Reserve Bank of India to make recommendations regarding the SFIO and the report of this Committee of Experts as and when received will be considered by the Union Government. He argued that since adequate mechanism presently exists to tackle the issue of NPAs and bank frauds and there has in fact been a sharp decrease in the level of NPAs in scheduled commercial banks from 4.4% of their net advances as on 31.03.2003 to 1.0% as on 31.03.2008, this Court should not issue any writs or directions, as prayed for, by the petitioner.

5. In rejoinder, Mr. Prashant Bhushan submitted that the reduction in NPAs, as claimed by the Union Government, has come about by waivers, write-offs, rescheduling of repayments, moratoriums and one-time settlements but all this has actually resulted in loss of substantial amount of public funds. He submitted that as per the report of the Reserve Bank of India on the trend and progress of banking in India for 2004-2005, total NPAs recovered by the banks amounted to Rs.20,568/- crore and out of this, an amount of Rs.14,506/- crore was recovered through asset reconstruction companies and these recoveries are nothing but purchase of NPAs from the banks by another set of public companies. He submitted that the report of the Reserve Bank of India would further show that during 2004-2005 an additional Rs.16,000 crore of NPAs have accrued. He submitted that the measures taken by the Union Government to reduce the NPAs, therefore, have not been effective. He finally submitted that without statutory power and without qualified manpower, the SFIO would be teeth-less and incompetent and this Court should direct the Union Government to make the SFIO an independent statutory body consisting of qualified manpower as suggested by Mr. Harish Salve, learned senior Counsel.

6. Mr. Bhushan cited the decision of this Court in *Vishaka*

- A *and Others v. State of Rajasthan and Others* [(1997) 6 SCC 241] for the proposition that if there is no enacted legislation to provide for the effective enforcement of any fundamental right, this Court can issue guidelines/directions for the effective enforcement of the fundamental right under Article 32 of the
- B Constitution, which would be law under Article 141 of the Constitution, till a suitable legislation is enacted to occupy the field. He also relied on the decision in *Vineet Narian & Ors. v. Union of India & Anr.* [(1998) 1 SCC 226] in which this Court has observed that the judiciary must step in, in exercise of its
- C constitutional obligations under Article 32 read with Article 142 of the Constitution, to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field. He submitted that in case this Court is not
- D at least direct that the suggestions made by the petitioner for checking the NPAs in future be referred to an independent expert committee.

7. In *Vishaka and Others v. State of Rajasthan and Others* (supra) cited by Mr. Bhushan, this Court held that in the absence
- E of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, some guidelines and norms for due observance at all workplaces or other institutions were required
- F to be laid down by this Court until a legislation is enacted for the purpose and this Court made it clear that this was required to be done in exercise of the power available under Article 32 of the Constitution for enforcement of the Fundamental rights guaranteed under Articles 14, 15, 19(1)(g) and 21 of the
- G Constitution. Similarly, in *Vineet Narain and Others v. Union of India and Another* (supra), this Court issued some directions for rigid compliance till such time as the legislature steps in to substitute them by proper legislation and these directions were made under Article 32 read with Article 142 of the Constitution
- H to implement the rule of law wherein the concept of equality

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enshrined in Article 14 is embedded. Hence, in both the cases cited by Mr. Prashant Bhushan, the Court issued writs and directions for enforcement of fundamental rights conferred by Part-III of the Constitution, but in the present case, the petitioner has not made out a case that for enforcement of any right guaranteed under Part-III of the Constitution, writs or directions are required to be issued by this Court under Article 32 of the Constitution.

8. Moreover, in *Vishaka and Others v. State of Rajasthan and Others* (supra), this Court laid down guidelines and norms for due observance at work places and institutions to prevent sexual harassment of working women, because there was no law to prevent such sexual harassment. In the present case, we find from the additional affidavit filed on behalf of the Union of India that through various legislative measures such as the DRT Act, the SARFAESI Act, 2002, the Credit Information Companies (Regulation) Act, 2005 and through some administrative measures, the respondents are trying to reduce the number and amount of NPAs and to detect and check bank frauds in future.

9. According to Mr. Prashant Bhushan, however, these legislative and administrative measures taken by the Union Government have not been effective in reducing and controlling the NPAs. Whether legislative and administrative measures taken by the Union Government have been effective or not is not for the Court but for the Union Government and Parliament to consider because reduction and control of NPAs are not within the domain of judiciary but within the domain of the Executive and Legislature under our Constitution. Moreover, as has been observed by P.N. Bhagwati, J. in *State of M.P. and Others v. Nandlal Jaiswal and Others* [(1986) 4 SCC 566] in field of economic activities, there has to be judicial deference to Legislative and Executive judgment and decisions on complex economic matters are to be based on experimentation or what one may call 'trial and error method'. It is therefore not

- A for Courts to sit in judgment whether a particular policy decision of the Government is effective or not, but for Parliament to debate and decide on the policy decision. In a recent decision of this Court in *Villianur Iyarkkai Padukappu Maiyam v. Union of India and Others* [(2009) 7 SCC 561], Panchal, J. writing the judgment on behalf of a three-Judge Bench observed:

C “It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to “trial and error” as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts.”

E 10. The Union Government, however, must ensure that SFIO is effective in detecting and preventing bank frauds by influential people. We find that the Central Government has constituted a Committee of Experts under the Chairmanship of Shri Vepa Kamesam, Ex-Deputy Governor of Reserve Bank of India, with the following terms of reference:

- (a) Assessment of the need for and details of a separate statute to govern the constitution and functioning of SFIO;
- G (b) The nature and details of the legislative changes as may be required in existing laws, to enable effective functioning of SFIO including prosecution of offences detected by it;
- H (c) The mechanism for referral of cases to SFIO and coordination of activities of SFIO with other agencies/

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organizations of the Central and State Governments, including investigating; A

(d) Powers of SFIO and its investigation officers;

(e) Specification of offences and penalties to enable effective conduct of investigation agencies and the need for Special Courts for trial of corporate fraud cases; and B

(f) Other matters consequential to or in pursuance of the above.

We have no doubt that this Committee of Experts under the Chairmanship of Ex-Deputy Governor of Reserve Bank of India will suggest effective measures, legislative or administrative, to ensure that bank frauds are prevented in future and the NPAs are kept to the minimum. We hope and trust that this Committee under the Chairmanship of Ex-Deputy Governor of Reserve Bank of India will consider the suggestion to make the SFIO (or any similar body) a statutory authority having sufficient powers and having the required autonomy to be able to effectively deal with the problems of bank frauds and NPAs. A copy of this order will be placed by the respondent No.1 before the Committee of Experts. C
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11. The writ petition and the application for impleadment/ intervention stand disposed of. No costs.

R.P.

Writ Petition Disposed of. F