

M/S WRITERS AND PUBLISHER PVT. LTD.

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v.

A K MISHRA, OFFICIAL LIQUIDATOR
THE COOPERATIVE STORES LTD. SUPER BAZAR
(Contempt Petition (C) Nos.1665-1666 of 2017)

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IN

(I.A. Nos. 102-103 of 2017)

IN

(Special Leave Petition (C) Nos. 8398-8399 of 2005)

C

MAY 17, 2018

**[DIPAK MISRA, CJI, A.M. KHANWILKAR AND
DR. D.Y. CHANDRACHUD, JJ.]**

Multi-State Cooperative Societies Act, 2000 – Process of revival of Super Bazar; monitored by Supreme Court – Offer made by petitioner-WPL accepted – Official Liquidator (OL) directed to take steps to revive Super Bazar – WPL infused funds for revival of Super Bazar inter alia through subscriptions towards share capital – However, the process of revival could not take place – WPL was directed to be refunded “entire investment” made by it during the period when the arrangement subsisted, with interest @ 6% p.a.– In terms of the direction, Comptroller and Auditor General of India (CAG) submitted its report – WPL filed objections thereto – Also instituted contempt proceedings against OL – Held: In terms of the direction, WPL is entitled to interest at 6% on the entire investment made by it – Investment brought in by way of share capital, did fall within the above mandate – It is part of the overall investment by WPL – Once WPL was allowed a return on its investment, the profits which it earned were required to be deducted – This part of the direction does not contemplate that losses which accrued over the period were to be adjusted – Further, loss accrued not as a result of the business as such but due to payments which were required to be made to the workmen in pursuance of the directions issued by Supreme Court – Report submitted by CAG needs to be corrected on the said counts – OL has set out the steps taken in pursuance of

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A *the order of Supreme Court for valuation and sale of the properties of Super Bazar – Petition for contempt as against the OL, not entertained.*

B The process of revival of Super Bazar was being monitored by Supreme Court. Offer made by the petitioner-WPL was accepted. The Official Liquidator (OL) was directed to take steps to revive Super Bazar. The bid submitted by WPL stipulated that the infusion of funds for revival of Super Bazar was *inter alia* through subscriptions towards share capital. The process of revival could not take place and it was directed that WPL be refunded “entire investment” made by it during the period when the arrangement subsisted, with interest at 6% p.a. In terms of the direction to effectuate the refund, Comptroller and Auditor General of India (CAG) verified the income and expenditure incurred by WPL, the profits earned from the Super Bazar establishment. CAG submitted its report to which WPL filed objections. Contempt petition also filed by WPL against OL.

Disposing of the contempt petitions, the Court

E HELD: 1.1 WPL in terms of the direction in order dated 29 March 2016 is entitled to interest at 6 per cent on the entire investment made by it. Investment brought in by way of share capital, did fall within the said mandate. It is part of the overall investment by WPL. The order of Supreme Court envisaged an exit for WPL. The order directed that there be a deduction of profits made, since WPL was being compensated by way of interest on its investment. Consequently, it would be impermissible to deny WPL the benefit of interest on its entire investment inclusive of share capital. [Para 12] [782-G-H]

G 1.2 The adjustment of losses incurred in Super Bazar and their deduction from the amount to be refunded to WPL is contrary to the mandate of the order dated 29 March 2016. CAG was only required to deduct the profits which had accrued in favour of WPL while determining the amount refundable to it. Once WPL was allowed a return on its investment, the profits which it earned were required to be deducted. This part of the direction does not contemplate that losses which accrued over the period were to

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be adjusted. The loss accrued not as a result of the business as such but due to payments which were required to be made to the workmen in pursuance of the directions issued by this Court. The report submitted by CAG needs to be corrected on the said counts, namely; A

(i) Denial of interest at 6 per cent on the entire investment of WPL including by way of share capital; and B

(ii) Adjustment of losses; as explained earlier. [Paras 13, 14] [783-A, C, D-E]

1.3 The OL has also set out the steps which have been taken in pursuance of the order of Supreme Court for valuation and sale of the properties of Super Bazar. Having regard to the contents of the said affidavit, the petition for Contempt as against the OL is not being entertained. [Para 15] [783-G-H] C

CIVIL APPELLATE JURISDICTION : Contempt Petition (C) Nos. 1665-1666 of 2017 in I.A. Nos. 102-103 of 2017 in Special Leave Petition (Civil) Nos. 8398-8399 of 2005. D

From the Judgment and Order dated 07.05.2008 of the Hon'ble Court in Special Leave Petition (C) Nos. 8398-8399 of 2005

WITH

M.A. Nos. 1394-1395 of 2017 in I.A. Nos.102-103 of 2017 in S.L.P. (C) Nos.8398-8399 of 2005, M.A. Nos. 677-678 of 2018 in S.L.P. Nos. 8398-8399 of 2005 & I.A. No.3664 of 2018 E

WITH

Contempt Petition (Civil) Nos.866-867 of 2018 in S.L.P. (C) Nos. 8398-8399 of 2005 F

WITH

M.A. Nos....D. Nos.64493, 64494 and 16545 of 2018.

C. A. Sundaram, Sunil Gupta, Sr. Advs., Hemant Singh, Biju Mattam, Shourya Malhotra, Ankur Mody, Ms. Siddhi Padia, Santosh Sharma (for Praveen Swarup), R. P. Shukla, Ms. Upasna Shukla, Vijay K. Jain, S. Wasim A. Qadri, Jubair Ahmad Khan, Zaid Ali, Tamim Qadri, Saeed Qadri, Syed Faizan Ali (for Lakshmi Raman Singh), Ms. Sunita Sharma, Ms. Rekha Pandey, Raj Bahadur, Ms. Swati Ghildiyal (for Mrs. Anil Katiyar), R. K. Kapoor, Ms. Rekha Giri, Ms. Kheyali Sarkar, Reyat Kapoor, Ms. Reetu Sharma for Anis Ahmed Khan, M/s. Parekh & Co., Advs. appearing for the parties. H

- A The Order of the Court was passed by
- DR. D. Y. CHANDRACHUD, J.** 1. The revival of Super Bazar was being monitored by this Court over several years. By an order dated 7 May 2008, this Court noted that three bidders were identified by the Evaluation Committee; among them being M/s Writers and Publisher Pvt Ltd (**WPL**). This Court recorded that all the Unions representing the workmen had agreed that the dues of the workers as on 31 December 2007 were Rs. 54.31 crores.
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2. By an order dated 26 February 2009, this Court accepted the report of the Evaluation Committee which had recommended acceptance of the offer made by **WPL**. Accordingly, the Official Liquidator (OL) and the Central Registrar, Multi State Cooperative Societies were directed to take steps to revive Super Bazar. In a further order dated 13 August 2010, this Court observed thus :
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- “(ii) In terms of our order dated 7th May, 2008, an amount of Rs.54.31 crores, being arrears of wages upto 31st December, 2007, was directed to be disbursed by the highest bidder. Rs.55 crores stands deposited by the highest bidder. The sum of Rs.20 crores out of Rs.55 crores which lies with the Registry of the Supreme Court, will be disbursed by the Official Liquidator and the nominee of the Central Registrar Co-operative Societies in the presence of one Union representative of each Union within four weeks from today. The representative of the highest bidder will also remain present in the said meeting. It is made clear that the workers will sign the receipt of payment, which will be adjusted towards the arrears of Rs.54.31 crores.
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- (iii) As far as the balance amount is concerned, we are directing the highest bidder to file an affidavit containing an Undertaking that within a period of eight weeks, from the date of constitution of the Board of Directors after the elections, the balance amount will be disbursed to the workers. This will cover arrears of wages up to 31st December, 2007.”
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- G 3. Subsequently, in September 2015, an IA was filed on behalf of the Union of India stating that neither **WPL** nor the management of Super Bazar had submitted a revival plan before the Central Registrar of Cooperative Societies. As a result, the Super Bazar could not be revived in accordance with the provisions of the Multi-State Cooperative Societies Act 2000.
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4. Faced with this situation, on 29 March 2016, a two Judge Bench of this Court observed that despite earnest efforts made by the Court since the acceptance of the bid of **WPL**, it was not possible to give effect to the terms of revival. It appears from the order of this Court that the Union of India was associated in the preparation of the modalities by which **WPL** could be released from the arrangement. Accordingly, this Court observed as follows :

“Despite earnest efforts made by this Court ever since the acceptance of the bid of M/s Writers and Publishers Ltd., and despite a series of hearings in the matter ever since 2009, it came to be realised, that it would not be possible to give effect to the terms of revival. It is in the above view of the matter, that this Court sought suggestions from the rival parties, how the arrangement could be terminated. It is in the above background, that the following motion bench order came to be passed on 23.02.2016:

“The bidder has suggested two alternative courses of action in a written note handed over to us in Court today. The above note is taken on record and marked as Annexure-A. Mr. P.S. Narsimha, learned Additional Solicitor General representing the Union of India seeks a short adjournment so as to enable him to obtain instructions in the matter. All other parties may likewise obtain instructions in the matter before the next date of hearing. Post for hearing on 01.03.2016.”

On the issue, as to how and under what terms and conditions M/s Writers and Publishers Ltd., could be released from the arrangement, the parties (consequent upon mutual negotiations), submitted a joint statement of the Government of India and the bidder – M/s Writers and Publishers Ltd., dated 03.03.2016. It seems that on re-consideration, there was a change of heart, at the hands of Government of India, which then submitted a revised joint statement dated 05.03.2016. Learned counsel for the rival parties have assisted this Court, on the manner in which M/s Writers and Publishers Ltd., should be released from the obligation of the instant arrangement. Having heard learned counsel, we are satisfied in recording, that M/s Writers and Publishers Ltd. should be refunded the entire investment made by them, along with interest at the rate of 6% per annum (though it was suggested, that the rate of interest could be at 9% per annum), subject to

A deduction of profits made during the period when the arrangement subsisted.”

B 5. The above order of this Court dated 29 March 2016 envisages that **WPL** would be refunded its “entire investment” together with interest at 6 per cent per annum. However, the amount invested was to be subject to a deduction of the profits made by **WPL** during the period when the arrangement subsisted. Since **WPL** was to be refunded the entire investment made by it with interest, it was evident that the profits realised by it during the subsistence of the arrangement would have to be deducted.

C 6. In order to give effect to the above directions, the order of this Court envisaged a process of verification by Controller and Auditor General of India (CAG). The CAG was directed to nominate an auditor to verify the income and expenditure incurred by **WPL** and the profits earned from the Super Bazar establishment. The determination by the auditor was required to be verified by CAG, upon which it would be binding upon by the parties concerned. **WPL** was directed to handover all the movable and immovable properties of Super Bazar to the OL.

D 7. The role which was ascribed to CAG emerges from the following extract, from the order of this Court dated 29 March 2016 :

E “In order to effectuate the refund referred to hereinabove 5 (to M/s Writers and Publishers Ltd.), we consider it just and appropriate to direct the Comptroller and Auditor General of India, to nominate an Auditor, to verify the income and expenditure incurred by M/s Writers and Publishers Ltd., and also, the profits earned by it from the Super Bazar establishment, during the period under consideration. The determination so made by the Auditor, will be verified by the office of the Comptroller and Auditor General of India, whereupon, the same shall be binding on all the parties including M/s Writers and Publishers Ltd. Needless to mention, that all interested parties shall have the liberty to appear before the nominated Auditor, and canvass their respective claims.”

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G 8. **WPL** was held to be entitled to the withdrawal of an amount of Rs. 14.84 crores deposited by it in the Registry of this Court and to a further sum of Rs. 8.07 crores which was deposited with the Regional Commissioner, Employees’ Provident Fund Organization (EPFO), Delhi together with interest. The above amounts were to be deducted from the principal amount payable to **WPL**, while refunding the payments
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9. In pursuance of the directions issued in the order of this Court, CAG submitted its report dated 1 September 2017. **WPL** has filed its objections to the report. A

10. Certain aspects of the CAG report form the subject matter of some dispute. They are:

(i) Interest at the rate of 6 per cent per annum on the share capital infused by **WPL** has been disallowed. **WPL** contends that this is expressly contrary to the order dated 29 March 2016 by which its entire investment was to be returned together with interest at 6 per cent. According to **WPL**, the entire investment would include the amount invested towards share capital. According to **WPL**, subscription towards share capital was only a methodology by which the bid amount was to be brought in and utilized to discharge various dues in satisfaction of the orders of this Court. On the other hand. The affidavit filed by CAG contains a defence of its view that interest should not be allowed on share capital. CAG has stated thus : B
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“The investment by M/s WPL was primarily in the nature of Share Capital, wherein share holders bear the profits and losses of a business. Share Holders do not get interest on their investment made in the form of share capital. Further, if such a practice is to be followed then it should be made applicable for other shareholders of Super Bazar too.” E

(ii) The CAG report provides that the amount payable to **WPL** should be determined after adjustment of losses incurred by Super Bazar. **WPL** asserts that this would be expressly contrary to the order of this Court dated 29 March 2016 under which CAG was not required to adjust losses but to only deduct the profits which accrued in favour of **WPL**, while determining the amount refundable. There was, according to **WPL**, no direction for the adjustment of losses. Moreover, CAG, in the view of **WPL**, has failed to notice that the so called losses in Super Bazar were not due to business but due to : (i) an amount of Rs. 54.31 crores being paid to the workers as their past dues in compliance of the orders dated 7 May 2008 and 13 August 2010 of this Court; (ii) an amount of Rs. 31 crores being paid to the workmen towards three years’ salaries; and (iii) an amount of Rs. 15 crores paid towards arrears of property taxes, education cess and dues which had accrued even before possession was taken over by **WPL**; F
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A 11. While dealing with these objections, we must in fairness, advert to the fact that in the order dated 29 March 2016, CAG was required to nominate an auditor to verify the income and expenditure incurred by **WPL** as well as the profits earned by it from the Super Bazar establishment during the period under consideration. This determination of the auditor was to be verified by the office of the CAG upon which it would be binding on all parties including **WPL**. In other words, the actual exercise required to be carried out by the auditor was to verify the income, expenditure and the profits earned by **WPL** and it was this determination which would, subject to verification by the CAG, be final and binding. CAG has, however, proceeded on the basis that **WPL** is not entitled to interest at 6 per cent per annum on share capital on the ground that a shareholder who participates in the profits and losses of a business is not entitled to interest on share capital.

12. Now the order dated 29 March 2016 indicates that :

D "...in the bid which was submitted by M/s Writers and Publishers Ltd, the infusion of funds stipulated, was to the tune of Rs.504 crores. The break up thereof, for the revival of Super Bazar, was roughly as under:

Share Capital - Rs.102 crore

Working Capital - Rs 276 crore

E Revival and Revamping - Rs 126 crore”

F All the above elements including share capital and working capital were part of the infusion of funds contemplated for the revival of Super Bazar. Eventually, when the process of revival could not take place, this Court formulated directions for the exit of **WPL**. After due deliberation by all the parties, including the Union government, this Court observed that **WPL** “should be refunded the entire investment made by them along with interest at the rate of 6 per cent per annum.. subject to deduction of profits made during the period when the arrangement subsisted”. **WPL** in terms of the aforesaid direction is entitled to interest at 6 per cent on the entire investment made by it. Investment brought in by way of share capital, did fall within the above mandate. It is part of the overall investment by **WPL**. The order of this Court envisages an exit for **WPL**. The order directs that there be a deduction of profits made, since **WPL** was being compensated by way of interest on its investment. Consequently, it would be impermissible to deny **WPL** the benefit of interest on its entire investment inclusive of share capital.

13. We are also of the view that the adjustment of losses incurred in Super Bazar and their deduction from the amount to be refunded to **WPL** is contrary to the mandate of the order dated 29 March 2016. CAG was only required to deduct the profits which had accrued in favour of **WPL** while determining the amount refundable to it. In its affidavit, CAG has proceeded on the general consideration that the term ‘profit’ represents a revenue earned from business activity exceeding the expenses/costs and that a loss is “*vice versa*”. What this ignores however are the specific terms of the directions issued by this Court which envisage that it was the profits earned by **WPL** from the Super Bazar establishment which were to be deducted. Once **WPL** was allowed a return on its investment, the profits which it earned were required to be deducted. This part of the direction does not contemplate that losses which accrued over the period were to be adjusted. We have also noted the submission of **WPL** that the loss accrued not as a result of the business as such but due to payments which were required to be made to the workmen in pursuance of the directions issued by this Court.

14. We are accordingly of the view that the report submitted by CAG needs to be corrected on the above counts namely;

(i) Denial of interest at 6 per cent on the entire investment of **WPL** including by way of share capital; and

(ii) Adjustment of losses;
as explained earlier.

15. **WPL** has instituted Contempt proceedings against the OL. In the reply filed by the OL, it has been stated that the determination of the income and expenditure of **WPL** and the profits earned from the Super Bazar establishment was to be carried out by the auditor nominated by CAG which was to be thereafter verified by CAG. The OL has submitted that in these circumstances, it would be inappropriate to contend that he has violated any part of the directions of this Court. In pursuance of the order of this Court, the Director General of Audit nominated M/s SPMG for conducting an audit of the accounts of Super Bazar. Time for the completion of the audit was extended by this Court on 21 November 2016 and 27 April 2017. The OL has also set out the steps which have been taken in pursuance of the order of this Court for valuation and sale of the properties of Super Bazar. Having regard to the contents of the said affidavit, we are not inclined to entertain the Petition for Contempt as against the OL.

A 16. However, we direct that all concerned shall now act in pursuance of the observations contained in this order and the interpretation placed on the earlier directions dated 29 March 2016.

 17. The Contempt Petition(Civil) Nos 1665-1666 of 2017 in I.A. Nos. 102-103 of 2017 in Special Leave Petition (Civil) 8398-8399 of
B 2005 are accordingly disposed of.

Divya Pandey

Contempt Petitions disposed of.