

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 29.08.2011
% Date of decision : 23.09.2011

+ WP (C) No.429/2011

R.P.KESHARI PETITIONER

Through : Mr.Sandeep Sethi, Sr.Adv. with
Mr.Bharat Gupta, Mr.Rahul Mittal &
Mr.Varun Tyagi, Advocates.

- V E R S U S -

CENTRAL REGISTRAR OF COOPERATIVE SOCIETIES & ANR.

... RESPONDENTS

Through : Ms.Sweety Manchanda, Adv. for R-
1.

Ms.Deepti Dogra, Adv. for R-2.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICE RAJIV SHAKDHER

Whether the Reporters of local papers
may be allowed to see the judgment? YES

To be referred to Reporter or not? YES

Whether the judgment should be
reported in the Digest? YES

SANJAY KISHAN KAUL, J.

1. The petitioner, an erstwhile consultant of National Agricultural Cooperative Marketing Federation of India Limited (NAFED)/R-2, in the present writ petition filed under Article 226 of the Constitution of India seeks to impugn the show cause notice dated 15.07.2010 issued by R-1.
2. The petitioner was appointed as a consultant by R-2 for rendering consultancy services in connection with the tie up business of the said respondent on a monthly lump sum remuneration of Rs.15,000/- with other perquisites as per letter dated 22.07.2005 initially for a period of three months and continued till 30.04.2008 when he ceased to be the consultant. The nature of work of the petitioner, as contained in the letter dated 22.07.2005, is as under:

“1. He will render consultancy services in connection with the work relating to tie up business viz. commodity financing, collateral security services, risk coverage measures, client rating, analysis of balance sheets of the clients and possibility of structured financing if the client is relatively new in the field, formatting of necessary agreements etc. He may be assigned any other duties relating to Tie up work from time to time as may be deemed fit by the competent authority.”

3. The petitioner had been employed with R-2 as an Additional Managing Director and retired from service on 28.02.1998. It is after a lapse of more than 7 years that the services of the petitioner were sought to be deployed in respect of the tie up business which was stated to be already in existence since the year 2003-2004.
4. It is the say of the petitioner that as a consultant he had no administrative business or financial powers to take any decisions in respect of the business of R-2 and in support of this fact has relied upon an office order dated 24.06.2002 which records the decisions of the Board of Directors of R-2 in its meeting held on 07.06.2002 setting out the guidelines/rules relating to engaging consultants in NAFED/R-2. In para 6 of this office order, the powers of consultants have been specified. The same para reads as under:

“6. Powers of the Consultants

Since Consultants/Experts are to be engaged on short-term contract basis, they will not be delegated with any financial/administrative powers.”

5. The petitioner claims that the Managing Director of R-2 vide an order dated 04.01.2006 gave additional

responsibility to the petitioner to handle the legal cases in the period when the petitioner was working as a consultant when M/s Disha Impex Private Limited, with whom a memorandum of understanding had been entered into on 10.03.2004, gave additional security to the tune of Rs.12.29 crores by way of post dated cheques. There was a default in the refund of the advance amount and the cheques bounced. The petitioner advised R-2 to initiate legal action not only for dishonoured cheques but also for initiation of arbitration proceedings. These steps are stated to have been taken. However, the petitioner was alleged to be responsible for causing deficiencies to the assets of R-2 to the tune of Rs.8.92 crores as on 31.03.2010. It is the say of the petitioner that the agreement with M/s Disha Impex Private Limited was entered into even prior to the petitioner being appointed as consultant and substantial funds were released prior to his appointment. In any case, the petitioner denies any role in connection with the funding for which requests were made to R-2 by M/s Disha Impex Private Limited. The petitioner claims

that the basis of the show cause notice is an internal note penned down by him as a consultant on 20.07.2005, which is as under:

“A view has been taken to discourage providing of finance for non-agro items and to implement this view in phased manner.”

6. The petitioner had written to the committee which was authorized in this behalf to take a final view in the matter of which the petitioner was not a member. The matter was placed before a tie up committee appointed by the competent authority and in its meeting held on 20.07.2005, which was attended by the petitioner in the capacity of a consultant, the decision was taken.

7. The Central Registrar of Cooperative Societies/R-1 appointed two Inquiry Committees over a period of time under Section 83(1) of The Multi-State Co-operative Societies Act, 2002 ('the said Act' for short). The said provision reads as under:

“83. Repayment, etc. – 1) If in the course of an audit, inquiry, inspection or the winding up of a multi-State co-operative society, **it is found that any person, who is or was entrusted with the organization or management of such society or who is or has at any time been an officer or an employee of the society,** has made any payment contrary to this Act, or by bye-laws or has

caused any deficiency in the assets of the society by breach of trust or willful negligence or has misappropriated or fraudulent retained any money or other property belonging to such society, the Central Registrar may, of his own motion or on the application of the board, liquidator or any creditor inquire himself or direct any person authorized by him, by an order in writing in this behalf, to inquire into the conduct of such person within a period of two years from the date of the order of winding up, as the case may be:

Provided that where the Central Registrar is satisfied that such inquiry could not be commenced during the period of two years aforesaid on account of fraud or concealment of facts, he may make or direct the inquiry to be made within such period not exceeding six years from the date of the report of the audit, inspection or inquiry or the date of the order of winding up, as he thinks fit.

2) Where an inquiry is made under sub-section (1), the Central Registrar may, after giving the person concerned a reasonable opportunity of being heard, make an order requiring him to repay to restore the money or property or any part thereof, with interest at such rate, or to pay contribution and costs or compensation to such extent, as the Central Registrar may consider just and equitable."

(emphasis supplied)

8. The first Inquiry Committee was constituted on 30.01.2008 to enquire into the conduct of the members of the Board of Directors, the Committee, Executive Committee and the then Chairman,

Managing Director, Additional Managing Director and officers of R-2/NAFED for causing losses to R-2/NAFED. The second Inquiry Committee was set up on 24.02.2009 to enquire into the conduct of the members of the Board of Directors of R-2/NAFED and its officers with regard to 13 cases. The second Inquiry Committee *inter alia* found the Chairman and officers being negligent and imprudent in their acts and omissions while sanctioning the loan amount to the parties and post loan monitoring. The petitioner claims that he has never been given an opportunity to represent his case before the Inquiry Committee and the finding, if any, arrived at is without any hearing being granted to the petitioner. It is on the basis of the finding of the Inquiry Committees that the show cause notice dated 15.07.2010 under Section 83(2) of the said Act has been issued to the petitioner. The relevant para 13 of the said notice reads as under:

“And whereas the Inquiry Committee has also named the officers of NAFED and indicated members of Business Committee responsible for causing deficiency in the assets of NAFED to the tune of Rs.1602.37 crores. On the basis of the findings of the first Inquiry Committee, it is, therefore, justified to issue notice to all the members

and local Directors of the Business Committee who were present and were party to the decisions taken for approval of tie-up business in its meetings in the years 2003-04 and 2004-05. It is also justified to issue notice to all the officers including the Consultants and Advisors found responsible by the Inquiry Committee for causing deficiency in the assets of NAFED.”

9. The notice called upon the petitioner to show cause within eight weeks from the date of the issue of the notice why the petitioner should not be held responsible for causing deficiency in the assets of R-2/NAFED by breach of trust and wilful negligence to the tune of Rs.8.92 cores jointly and severally and why he may not be required to repay to restore the money or part thereof with interest as may be found just and equitable. The petitioner seeks to challenge the show cause notice on the following grounds:

- i) The show cause notice is only in respect of the losses caused on account of the decisions taken consequent to approval of tie-up business and in its meetings held in the year 2003-04 and 2004-05 when the petitioner was not even in the picture as the petitioner was appointed only on 22.07.2005.

- ii) The petitioner was paid a lump sum remuneration of Rs.15,000/- per month as a consultant and such engaging consultants are to be appointed in R-2/NAFED on a short term basis and are not to be delegated any financial/administrative powers as specified in the office order dated 24.06.2002.
- iii) In view of the aforesaid facts and taking into consideration the provisions of Section 83 read with Section 3(t) of the said Act, the show cause notice is completely without jurisdiction.
- iv) The findings of the Inquiry Committee are in violation of principles of natural justice as the petitioner was never given an opportunity to explain his stand.
- v) The disbursements to M/s Disha Impex Private Limited were much prior to the appointment of the petitioner as a consultant with R-2/NAFED.
- vi) The petitioner had submitted a reply to the show cause notice dated 15.07.2010 *inter alia* raising the plea of maintainability of the show

cause notice, but instead of deciding that question, the R-1 has proceeded with the merits of the case.

10. We are conscious of the fact that only a show cause notice has been issued to the petitioner to which he has responded and no adverse orders have been passed as yet. Thus, insofar as the aforesaid pleas of merits are concerned, the present stage would not be the appropriate stage to examine the same as no order has been passed by R-1. The question of violation of principles of natural justice would also not arise as post the inquiry, the petitioner has been issued the show cause notice to which he has responded. Thus, the only plea which is really required to be examined is as set out in the third plea relating to the aspect of the notice being without jurisdiction in view of the provisions of the said Act.

11. Learned senior counsel for the petitioner thus contended that if the provisions of Section 83 of the said Act are scrutinized closely, the inquiry against a person can take place only if that person is or was entrusted with the organization or management of

such society or who is or has at any time been an officer or an employee of the society.

12. If any person who fits the bill has made any payment contrary to the said Act or the bye-laws or has caused any deficiency in the assets of the Society by breach of trust or willful negligence or has misappropriated or fraudulently retained any money or other property belonging to the society, an inquiry can be made into the conduct of such person within a period of two years from the date of the report of the audit. The expression 'officer' has been defined in Section 3(t) as under:

"3. Definitions – In this Act, unless the context otherwise requires, -

....

(t) "officer" means a president, vice-president, chairperson, vice chairperson, managing director, secretary, manager, member of a board, treasurer, liquidator, an administrator appointed under section 123 and includes any other person empowered under this Act or the rules or the bye-laws to give directions in regard to the business of a multi-State co-operative society;

13. Learned senior counsel for the petitioner thus contended that the petitioner was not an officer within the definition of Section 3(t) of the said Act.

The petitioner was also not entrusted with the organization or management of such Society being a consultant and the rules/powers of a consultant being defined under the office order dated 24.06.2002. In fact, such an officer is not to be delegated any financial/administrative powers. It is in view of the aforesaid that learned senior counsel for the petitioner contended that the petitioner's alleged conduct could not be called into question under Section 83(1) of the said Act.

14. The response of R-1 is that the amounts in respect of the tie-up business undertaken with M/s Disha Impex Private Limited are still outstanding and that the petitioner failed to exercise due diligence and care in conduct of the tie-up business. The petitioner ought to have considered whether the proposal was according to the bye-laws of R-2/NAFED and thus by recommending the proposal, the petitioner failed to ascertain the financial soundness of M/s Disha Impex Private Limited. The loans, as per bye-law 3(A)(xix) of R-2/NAFED, could have been advanced only to its members and other cooperative institutions and M/s Disha Impex

Private Limited did not fit in this category. The fact that the petitioner attended the meeting of the tie-up committee and signed the minutes have been held against the petitioner as they amounted to taking an active part in the decision making process. Copies of the minutes of the meeting of the tie up committee held on 20.07.2005 have been filed which are signed by the petitioner albeit in the capacity as a consultant. The second affidavit affirmed on 02.08.2011 filed by R-1 states that in a particular case of M/s Disha Impex Private Limited, the file was examined by the petitioner on 27.07.2005 when he recommended further finance contrary to the bye-laws of R-2/NAFED over-ruling the junior officers who recommended against financing of M/s Disha Impex Private Limited. In addition to the petitioner, all the officers/consultants and nine members of the then business committee of R-2 have been served with a show cause notice. The fact that the notice referred to business for the period 2003-04 and 2004-05 is not disputed, but the role of the petitioner arising from his recommendation dated

27.07.2005 is stated to be the cause of the show cause notice.

15. R-2/NAFED admits that the petitioner remained only a consultant from 22.07.2005 to 30.04.2008, but is stated to have exceeded his jurisdiction in re-commending the release of funds to M/s Disha Impex Private Limited.

16. We may note that if it was the note of the petitioner as a consultant made on 20.07.2005 which was called into question, it is not understood as to how in para 13 of the show cause notice, cause for the same was specified to be the approval of tie-up business in its meetings in the year 2003-04 and 2004-05. If the period of 2005-06 had been called into question, the note of the petitioner would be material.

17. Be that as it may, as set out aforesaid, we are not examining the merits of the controversy as it would not be appropriate keeping in mind that the stage is one of show cause notice. Thus, we are only examining the issue as to whether the petitioner falls within Section 83(1) read with Section 3(t) of the said Act.

18. On a plain reading of Section 83(1) of the said Act, we are of the view that the conduct of only a person who is or was entrusted with the organization or management of such society or who is has at any time been an officer or an employee of the society, can be called into question. The office order dated 24.06.2002 is not disputed by the respondents and thus there is no doubt about the fact that the consultant is not to be delegated any financial/administrative powers. It is not even the case of the respondents that contrary to the circular any financial/administrative powers were, in fact, delegated to the petitioner. The role of the petitioner was to advise as a consultant and that advise was then placed before the committee/board for necessary approval. The role of the petitioner was only advisory. It was always open to the committee or the board to reject the advice of the petitioner which was not binding. Thus a mere advisory role without having the authority to take decisions cannot make the petitioner a person who is entrusted with the organization or management of such society. The respondents have sought to

place reliance on the fact that in the meeting of the relevant tie-up committee dated 20.07.2005, the petitioner was present. That is no doubt true but it is obvious that he was present in the capacity as a consultant and has signed in that capacity. It has clearly been specified “Mr.R.P.Keshari, Consultant”. The signing of the minutes of the tie up committee in the capacity of the consultant thus would not vest the petitioner with any managerial authority nor such an authority being delegated to the petitioner is claimed by the respondents. The petitioner thus clearly does not fall within the definition of a person who is or was entrusted with the organization or management of such society.

19. That brings us to the second part of the clause (1) of Section 83 of the said Act i.e. “has any time been an officer or employee of the society”. As to who is an officer is defined under Section 3(t) of the said Act. The petitioner admittedly did not hold any post at the relevant time. The respondents did seek to contend that since the petitioner had held a post of Additional Managing Director at an earlier stage from which he demitted office on 28.02.1998,

the expression “has at any time been an officer” would cover him under the said provisions of Section 83(1) of the said Act.

20. In our considered view, this is a misconstruction of the provisions of Section 83(1) of the said Act. The mere fact that a person has been an officer at any past period of time cannot make him liable unless that past period when he was holding such a post is called into question. It is nobody’s case that when the petitioner was functioning as an Additional Managing Director or at any earlier stage of time, any conduct of the petitioner was found wanting. The petitioner was, in fact, engaged as a consultant after more than 7 years of his demitting office as an Additional Managing Director. The role which has been called into question is of petitioner as a consultant. The role of consultant is not covered under the provisions of Section 83(1) of the said Act.

21. We are thus of the view that the role of the petitioner as a consultant was advisory in character and cannot bring him within the purview of Section 83(1) of the said Act where only the conduct of a

person who is entrusted with the organization or management of the society or who is or has at any time been an officer or employee of the society can be enquired into. We, however, make it clear that in the present case we are only concerned with the show cause notice dated 15.07.2010 issued to the petitioner and not with the show cause notices which may be issued to other persons who fit the bill under Section 83(1) of the said Act.

22. The impugned show cause notice dated 15.07.2011 issued to the petitioner is thus quashed qua the petitioner and the rule is made absolute leaving the parties to bear their own costs.

23. The writ petition is allowed in the aforesaid terms.

SANJAY KISHAN KAUL, J.

SEPTEMBER 23, 2011
dm

RAJIV SHAKDHER, J.