

\$~19 & 20

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 6645/2017; CM No. 27645/2017

+ W.P.(C) 6745/2017; CM Nos. 28077-28078/2017

RAJPAL MITTAL

PRADEEP GOSWAMI

..... Petitioners

Through: Mr. B.S. Chawdhary and Ms. Chitra
Goswami, Advs.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Kavindra Gill, Adv. for R1

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

%

16.08.2017

CM No. 28078/2017 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

W.P.(C) Nos. 6645/2017 and 6745/2017

1. These two petitions have been filed primarily seeking relief against the National Agricultural Cooperative Marketing Federation of India Limited (NAFED). The learned counsel for the respondent No.2 has raised a preliminary objection on the maintainability of the petitions in view of the clear determination by the Division Bench of this Court in the case of *National Agricultural Co-operative Marketing Federation of India Ltd. v. Nafed Processed Food Cooperative Marketing Federation of India Employees Union and Ors* 2001 (58) DRJ 799 wherein this Court has

conclusively held that the Nafed is not a State within the meaning of Article 12 of the Constitution of India and as such, the writ petitions under Article 226 of the Constitution of India shall not be maintainable.

2. It is the submission of the learned counsel for the petitioner that much water has flown after the judgment rendered by the Division Bench in *National Agricultural Co-operative Marketing Federation of India Ltd. (supra)*. According to him, the status of the Nafed has undergone a change. He would rely upon the averments in the writ petition (W.P.(C) No. 6645/2017) at pages 10 to 13. He would also rely upon the judgments of the Supreme Court in the case reported as (2003) 10 SCC 733 *Federal Bank Ltd. v. Sagar Thomas and Ors* and 2015 (13) SCALE Dr. Janet Jeyapaul v. *SRM University & Ors.* in support of his contention.

3. I am afraid that the averments made in the writ petition and also the reliance placed by the learned counsel for the petitioners on the judgments of *Federal Bank Ltd. (supra)* and *Dr. Janet Jeyapaul (supra)* would not be of any help to the petitioners herein, inasmuch as the Division Bench of this Court in *National Agricultural Co-operative Marketing Federation of India Ltd. (supra)*, has, on consideration of the Bye laws of the Nafed has in paras 7 to 14 came to the following conclusion.

4

"7. It is essential to know the constitution of the Society for finding an answer to this question. NAFED is a co-operative Society registered under the Bombay Co-operative Societies Act as extended to Delhi. Later it was deemed to be registered as a Co-operative Society under the Delhi Co-operative Societies Act, 1973. It being a Multi-Unit Cooperative Society it is deemed to be registered as a Cooperative Society under the Multi State Co-operative Societies Act, 1984 in view of Section 3(g) of this Act. The second schedule of this Act contains a list of National Level Co-operative Societies. The name of petitioner figures at item no.4 in this list. It has its own buy-laws as per which it manages its affairs. It is created for the benefit and welfare of its members. The entire share capital of the Society is held by Members, Co-operative Societies, and no share capital is vested with the Government of India. In the counter affidavit filed by the appellant in the appeal it has been asserted that the Society does not receive any financial assistance or subsidy from the Government and it runs its own business on commercial principles, raising its own funds/resources and obtaining loans from financial institutions/commercial banks on commercial terms. NAFED does not enjoy any monopoly status in its business. Some times export of certain commodities like nigerseed, onions etc. are canalised through NAFED. According to the Buy-laws the Board of Directors is the authority responsible for the management, administration, business and functioning of

5

NAFED. The Board of Directors is elected in accordance with the Bye-Laws and out of 42 Directors, only three are government nominees who do not have special or veto powers in the management of the society i.e. NAFED.

8. On the basis of aforesaid structure in constitution of NAFED it cannot be treated as "State" or other authority or instrumentality or agency of the "State" within the meaning of Article 12 of the Constitution of India.

9. The respondents could not dispute the factual position contained in the bye-laws of NAFED as spelt out above. In fact respondents admit that the management of NAFED vests in the Board of Directors elected from amongst the representatives of the State owned cooperatives marketing Federations and other member societies with three representatives from the Government of India and one each from National Cooperative Union of India, National Cooperative Development Corporation, National Cooperative Consumer Federation Ltd., Bharat Krishik Samaj and State Bank of India. However, they emphasise that out of 44 Directors, ten are Indian Administrative Service officers and two are Provincial Civil Service officers representing Government of India and state owned Federations. Support is also sought to be taken from the fact that NAFED has been entrusted with the implementation of Market Intervention Scheme in respect of perishables (onions/potatoes etc.) and spices like black pepper, chillies, as well as the fact that Government of India has also canalised the

export of onion and niger seed through NAFED. But these would not be sufficient considerations to lead to a finding that NAFED is a "State" under Article 12 of the Constitution of India.

10. There are number of judgments of various High Courts whereby such co-operative societies are held not to be "State" or other authority within the meaning of Article 12 of the Constitution. Learned counsel for the appellant referred to the following judgments in this behalf :-

- i. J.S. Arneja versus NCCF .
- ii. S.S.Dhanoa versus Municipal Corporation of Delhi .
- iii. Ajmer Singh versus The Registrar, Cooperative Societies, Punjab .
- iv. Pritham Singh Gill versus State of Punjab .
- v. R.R. Sahu versus NCCF .
- vi. Bana Bihari Tripathi versus Registrar of Cooperative Societies .
- vii. Sri Kona Seema Cooperative Central Bank versus N. Sitarama Raju reported in AIR 1990 AP 171.

11. The judgment in the case of J.S. Arneja (supra) is rendered by a Division Bench of this very Court.

12. In Ajay Hasia Versus Khalid Mujib, the Apex Court culled out six criteria as laid down in the judgment of Ramana Dayaram Shetty Versus the International Airport Authority of India & Ors. to determine whether a concern is an instrumentality or agency of the State. These are the following:-

1. "One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government."

2. "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character."

3. "It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected."

4. "Existence of " deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."

5. "If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."

6. "Specifically, if a department of Govt. is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government."

13. These tests still hold the field. The decision of the Supreme Court in *Ajay Hasia (supra)* and later *M.C.Mehta versus Union of India* reiterate the same position. It follows from this that name does not matter. The fact that an authority is a Company

8

registered under the Companies Act or under the Societies Registration Act or a State Cooperative Societies Act, alone will not be determinative. Each case will turn on its own peculiar facts. What normally matters is the facts surrounding the constitution, functioning, control and management of a society. Control will include financial control. Keeping these aspects in view a Full Bench of this Court held the Indra Gandhi National Centre for Arts as a "State" within the meaning of Article 12 of the Constitution of India, in Sanghi Technologies Private Ltd. versus Union of India . In Sri Kona seema Cooperative Central Bank Ltd. versus N.S.Raju reported in 1990 A.P.171, a Full Bench of the Andhra Pradesh High Court found that a Bank registered under the Cooperative Societies Act was not discharging any functions of public importance or which could be said to be governmental. It was held not to be a "State". Similarly, after examining all relevant facts the National Consumers; Cooperative Federation was held to be not a "State" in Ramu Ram Sahni versus N.C.C.F. reported in 1991 M.P. 63. This Court also held NCCF not to be a "State" for purposes of Article 12 of the Constitution of India in J.S. Arneja (supra).

14. NAFED does not meet any of the criteria laid down by the Supreme Court which have been noted above. Admittedly, the Government is not holding any share capital of NAFED. It also cannot be said that any financial assistance is provided by the Government which meets almost all the entire expenditure of

NAFED. There is no state control, much less "deep and pervasive" state control. Moreover by no stretch of imagination it can be said that functions of NAFED are closely related to governmental functions. One may also refer to the judgment of the Supreme Court in the case of *Chander Mohan Khanna Versus NCERT*. While holding NCERT as not "State" or "instrumentality" or an "agency" of the State, following pertinent observations were made by the Supreme Court:

"3. Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the government within the sweep of the expression "State". A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State control. The State control does not render such bodies as "State" under Article 12. The State control, however vast and pervasive is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "State". If the government operates behind a corporate veil, carrying out governmental activity and governmental functions of vital public importance, there may be little difficulty in identifying the body as "State" within of Article 12 of the

Constitution.”

4. That apart, assuming that the respondent Nafed is not a State within the meaning of Article 12 of the Constitution of India, the question would arise whether respondent No.2 shall be subjected to writ jurisdiction of this Court under Article 226 of the Constitution of India. The answer in that regard must be ‘Yes’ if the respondent No.2 is discharging any public duty or a positive obligation of a public nature and/or the respondent No.2 is under a liability to discharge any function under any statute to compel it to perform such statutory function. The writ petitions have been filed by the petitioners challenging their transfer/termination respectively.

5. It is not the case of the petitioners that the impugned action of the respondent No.2 is in violation of any provisions of a Statute. The service Rules of a Society registered under the Societies Registration Act are not statutory in nature unlike Rules made under proviso to Article 309 of the Constitution of India. If that be so, in the absence of any public law element in the reliefs sought by the petitioners and also keeping in view the judgment of the Supreme Court in *K.K. Saxena v. ICIC (2015) 4 SCC 670*, wherein at para 49, the Supreme Court has held as under, the petitions shall not be maintainable.

“49. There is yet another very significant aspect which needs to

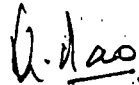
1

be highlighted at this juncture. Even if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review, as already pointed out above. Only those decisions which have public element therein can be judicially reviewed under writ jurisdiction. In *The Praga Tools Corporation v. Shri C.A. Imanual & Ors.*[11], as already discussed above, this Court held that the action challenged did not have public element and writ of mandamus could not be issued as the action was essentially of a private character. That was a case where the concerned employee was seeking reinstatement to an office."

6. I also note, this Court has dismissed two writ petitions against Nafed on the same ground being *W.P.(C) No. 5000/2015 Donald Masih v. National Agricultural Cooperative Marketing Federation of India Ltd. (Nafed)* and *W.P.(C) No. 8295/2015 Sunil Rawat v. National Agricultural Cooperative Marketing Federation of India Ltd.* The writ petitions are dismissed. The petitioners are at liberty to approach appropriate forum, seeking redressal of their grievance in accordance with law. No costs.

CM No. 27645/2017 in W.P.(C) 6645/2017 (for stay)
CM No. 28077/2017 in W.P.(C) No. 6745/2017 (for stay)

Dismissed as infructuous.


V. KAMESWAR RAO, J

AUGUST 16, 2017/ak