IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 4TH DAY OF AUGUST 2015/13TH SRAVANA, 1937

WP(C).No. 8794 of 2012 (Y)

PETITIONER:

M/S. NADUKKARA AGRO PROCESSING CO.LTD.
REPRESENTED BY ITS MANAGING DIRECTOR,
HAVING ITS REGISTERED OFFICE AT NADUKKARA, AVOLY P.O
MUVATTUPUZHA 686677, ERNAKULAM DISTRICT, KERALA

BY ADVS.SRI.T.KRISHNAN UNNI (SR.)
SRI.R.BINDU (SASTHAMANGALAM)

RESPONDENTS:
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1. STATE OF KERALA
REPRESENTED BY ITS SECRETARY, AGRICULTURE (PU)
DEPARTMENT, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM 695001

2. THE CHIEF EXECUTIVE OFFICER,
VEGETABLE AND FRUIT PROMOTION COUNCIL KERALAM
KAKKANADU, ERNAKULAM 682037

3. THE BRANCH MANAGER,
STATE BANK OF INDIA, AVOLY, MUVATTUPUZHA 686677
ERRNAKULAM DISTRICT

4. THE BRANCH MANAGER,
SOUTH INDIANBANK, VAZHALLULAM, MUVATTUPUZHA 686670

5. THE BRANCH MANAGER,
STATE BANK OF INDIA, KTDC BUILDING, SHANMUGHAMROAD
ERNAKULAM 682031

6. TGE BRANCH MANAGER,
FEDERAL BANK LTD, VAZHALLULAM MUVATTUPUZHA 686670

7. THE BRANCH MANAGER,
UNIONBANK OF INDIA, ARAPUZHA BRANCH
MUVATTUPUZHA 686670

* Addl.8. M/S.VAZHAKULAM AGRO AND FRUIT PROCESSING CO. LTD.,
VI/169 A, NADUKKARA, AVOLY PO.
MUVATTUPUZHA
KERALA - 686 670 REPRESENTED BY ITS
MANAGING DIRECTOR MR.PREMNATH K.
ADDL.R8 IMPLEADED AS PER ORDER DATED 31.03.2015 IN IA 4693/15.

R1 BY SRI.RAFEEK V.K. GOVERNMENT PLEADER
R3-5 BY ADV. SRI.K.K.CHANDRAN PILLAI (SR.)
R3 AND5 BY ADV. SRI.A.S.SAJUSH PAUL
R4 BY ADV. SRI.K.K.JOHN,SC,SOUTH INDIAN BANK
R-R2 BY ADV. SRI.S.M.PRASANTH, SC, VEGETABLES & FRUITS PROMOTION COUN
RADDL-RR8 BY ADV. SRI.P.G.JAYASHANKAR
RADDL-RR8 BY ADV. SMT.V.VIJITHA
R BY SRI.B.S.KRISHNAN (SR.)
R BY SRI.A.S.SAJUSH PAUL
R BY SRI.A.S.P.KURUP, SC, UBI

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 04-08-2015, ALONG WITH WPC. 23318/2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

RKC

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1 : MEMORANDUM OF ASSOCIATION AND ARTICLES OF ASSOCIATION OF THE PETITIONER COMPANY, DATED NIL.

EXT.P2 : AGREEMENT DTD.30.11.2000, KNOWN AS ASSETS TRANSFER AGREEMENT BETWEEN THE KERALA HORTICULTURE DEVELOPMENT PROGRAMME AND THE PETITIONER-COMPANY.

EXT.P3 : AGREEMENT FOR WORKING CAPITAL LIMITS ENTERED INTO BETWEEN THE PETITIONER-COMPANY AND THE KERALA HORTICULTURE DEVELOPMENT PROGRAMME ON 26.2.2001.

EXT.P4 : BOARD RESOLUTION RESOLVING TO OPERATE BANK ACCOUNTS IN THE NAME OF THE PETITIONER-COMPANY, DATED 23.11.2011.

EXT.P5: THE LATEST STATEMENT OF THE STATE BANK OF INDIA, AVOLY, MUVATTUPUZHA, DATED NIL.

EXT.P5(a): THE LATEST STATEMENT OF THE SOUTH INDIAN BANK, VAZHAKKULAM, MUVATTUPUZHA, DATED NIL.

EXT.P5(b): THE LATEST STATEMENT OF THE FEDERAL BANK, VAZHAKKULAM, MUVATTUPUZHA, DATED NIL.

EXT.P5(c): THE LATEST STATEMENT OF THE UNION BANK OF INDIA, ARAKKUZHA, MUVATTUPUZHA, DATED NIL.

EXT.P6 : MEMORANDUM OF ASSOCIATION OF VEGETABLE AND FRUIT PROMOTIONS COUNCIL, KERALAM, DATED NIL.

EXT.P7 : ARTICLES OF ASSOCIATION OF VEGETABLE AND FRUIT PROMOTION COUNCIL KERALAM, DATED NIL.

EXT.P8 : LETTER NO.31962/PU2/2011 AD DTD.23.3.2012 UNDER THE CAPTION "VERY IMPORTANT".

EXT.P9 SERIES: REQUISITION FOR RELEASE OF THE FUNDS FROM TIME TO TIME AND THE GOVERNMENT SANCTION FOR RELEASE OF THE FUNDS.

EXT.P10: THE LETTER ISSUED BY THE JOINT SECRETARY TO THE AGRICULTURAL DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM ON 23.3.2012 UNDER THE CAPTION "URGENT" ADDRESSED TO THE PETITIONER-COMPANY, THE CHIEF EXECUTIVE OFFICER, VEGETABLE AND FRUIT PROMOTION COUNCIL KERALAM AND TO THE 5 BANKERS OF THE PETITIONER-COMPANY.

EXT.P11: THE LETTER ISSUED BY THE 6TH RESPONDENT BANK TO THE PETITIONER COMPANY, DTD.28.3.2012.

EXT.P12: THE LETTER ISSUED BY THE 7TH RESPONDENT BANK TO THE PETITIONER COMPANY, DTD.30.3.2012.

EXT.P13: THE LETTER ISSUED BY THE 2ND RESPONDENT COMPANY TO THE PETITIONER COMPANY, DTD.28.3.2012.

EXT.P14: TRUE COPY OF THE LETTER NO.30839/PU2/11/AD ISSUED BY THE 1ST RESPONENT TO THE PETITIONER COMPANY DT.26.4.12 MARKED IN I.A.NO.6663/12 IN THE ABOVE WRIT PETITION.

EXT.P15: TRUE COPY OF THE LETTER NO.30839/PU2/11/AD ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER COMPANY DT.5.5.12 MARKED IN IA NO.6663/12 IN THE ABOVE WRIT PETITION.

EXT.P16: TRUE COPY OF THE REPLY NO.NAPC/F&A/12/76 GIVEN BY THE PETITIONER COMPANY TO THE 1ST RESPONDENT DT.10.5.12 MARKED IN IA NO.6663/12 IN THE ABOVE WRIT PETITION.

EXT.P17: TRUE COPY OF THE ENQUIRY NOTE NO.1 ISSUED BY THE FINANCE INSPECTION WING OF THE 1ST RESPONDENT TO THE PETITIONER COMPANY DT.18.5.12 MARKED IN IA NO.6663/12 IN THE ABOVE WRIT PETITION.

EXT.P17(a): TRUE COPY OF THE ENQUIRY NOTE NO.1 ISSUES BY THE FINANCE INSPECTION WING OF THE 1ST RESPONDENT TO THE PETITIONER COMPANY DT.18.5.12 MARKED IN IA NO.6663/12 IN THE ABOVE WRIT PETITION.

EXT.P17(B): TRUE COPY OF THE ENQURIY NOTE NO.1 ISSUED BY THE FINANCE INSPECTION WING OF THE 1ST RESPONDENT TO THE PETITIONER COMPANY DATED 18.5.2012 MARKED IN IA NO.6663/12 IN THE ABOVE WRIT PETITION.

EXT.P18: TRUE COPY OF THE EXTRACT FROM THE OFFICIAL WEBSITE OF THE GOVERNMENT OF KERALA DATED 30.5.12 MARKED IN IA NO.7120/12 IN THE ABOVE WRIT PETITION.

EXT.P19: TRUE COPY OF THE HYPOTHICATION AGREEMENT DTATED 30.7.2001 ENTERED INTO BETWEEN THE PETITIONER COMPANY AND KERALA HORTICULTURE DEVELOPMENT PROGRAMMED REFERRED TO AND MARKED AS EXT.P19 IN IA NO.7485/12 IN THE ABOVE WRIT PETITION.

EXT.P20: TRUE COPY OF THE LETTER ISSUED BY THE MANAGING DIRECTOR TO THE CHAIRMAN OF THE 1ST RESPONDENT COMPANY REFERRED TO AND MARKED AS EXT.P20 IN IA NO.7485/12 IN THE ABOVE WRIT PETITION.

EXT.P21: TRUE COPY OF THE LETTER FAXED BY THE 2ND RESPONDENT COMPANY TO THE PETITIONER COMPANY REFERED TO AND MARKED AS EXT.P21 IN IA NO.7485/12 IN THE ABOVE WRIT PETITION.

EXT.P22: TRUE COPY OF THE GOVERNMENT G.O(MS) NO.137/12AD/DT.2.6.12 ALSO FAXED ALONG WITH THE LETTER OF THE 2ND RESPONDENT REFERRED TO AND MARKED AS EXT.P22 IN IA NO.7485/12 IN THE ABOVE WRIT PETITION.

EX.P23: COPY OF THE MAHAZAR DT.2.6.12 SIGNED BY THE VILLAGE OFFICER ALONG WITH AGRICULTURAL OFFICER AND THE OFFICERS OF THE RESPONDENT-COMPANY.

1ST RESPONDENT'S EXHIBITS

RI(A) : A TRUE COPY OF AGENDA NOTES, SUB COMMITTEE DECISION AND LETTER DT.13.03.2012 ISSUED BY THE GOVERNMENT DIRECTOR

RI(B) : A TRUE COPY OF LETTER NO.33230/PB2/09/AD DATED 12.05.2010 & LETTER NO.NAPC/GOK/11/7365 DATED 09.02.2011

R1(C): COPY OF G.O.(MS) NO.149/12/AD DT.16.6.2012

R1(D): COPY OF THE PRINT OUT TAKEN FROM THE WEBSITE OF THE MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA

R1(E): COPY OF LETTER DT.2.2.2012.

2ND RESPOONDENT'S EXHIBITS

R2(A): COPY OF THE ORDER DT.28.8.1992 ISSUED BY THE GOVERNMENT OF KERALA

R2(B): COPY OF THE LETTER DT.21.10.1994 ISSUED BY RDO, MUVATTUPUZHA TO KHDP.

R2(C): COPY OF THE ORDER DT.22.5.1999 ISSUED BY THE GOVERNMENT.

R2(D): COPY OF THE ORDER DATED 2.6.2000 ISSUED BY GOVERNMENT OF KERALA.

R2(E): COPY OF DEMAND NOTICE DT.21.11.2011 ISSUED BY VFPCK TO THE COMPANY.

R2(F): COPY OF THE EXTRACT OF DETAILS OF CHARGE CREATED BY THE COMPANY.

R2(G): COPY OF THE LETTER DT.2.2.2012 SUBMITTED BY THE COMPANY TO THE GOVERNMENT.

R2(H): COPY OF THE LETTER DATED 13.3.2012 ISSUED BY VFPCK TO THE COMPANY

R2(I): COPY OF THE LETTER DATED 28.3.2012 ISSUED BY THE COMPANY.

R2(J): COPY OF THE CHEQUE DATED 28.3.2012 ISSUED BY THE COMPANY.

R2(K): COPY OF THE DEMAND NOTICE DATED 23.4.12 ISSUED BY VFPCK TO THE COMPANY.

R2(L): COPY OF THE LETTER DATED 21.4.2010 ISSUED BY VFPCK TO THE COMPANY.

R2(M): COPY OF THE PAYMENT VOUCHER DT.11.5.2010 ISSUED BY THE COMPANY.

R2(N): COPY OF THE CHEQUE DATED 11.5.2010 ISSUED BY THE COMPANY IN FAVOUR OF VFPCK.

R2(O): COPY OF THE GOVERNMENT ORDER DT.27.9.13

R2(P): COPY OF THE BASIC TAX RECEIPT DT.21.10.14.

R2(Q): COPY OF THE POSSESSION CERTIFICATES DATED 19.4.13.

8TH RESPONDENT'S EXHIBITS

R8(A): COPY OF GO(MS) NO.263/13/AD DT. 31.8.13

R8(B): COPY OF THE G.O(RT) NO.660/14/AD DT.26.3.14

RKC

TRUE COPY

PA TO JUDGE

P.V.ASHA, J.

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W.P.(C) Nos.8794 of 2012 &
23318 of 2012

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Dated this the 4th day of August, 2015

JUDGMENT

Nadukkara Agro Processing Company Limited (NAPCL for short) has filed this writ petition, challenging the competence of Government in issuing directions to it as per Exts.P8 and P10 letters and in issuing Ext.P22 order taking over the assets of petitioner Company to revest it to Vegetable and Fruit Promotion Council Keralam (VFPCK for short) and the authority of 2nd respondent in issuing Ext.P21 letter requesting petitioner to hand over the assets as directed in Government order.

2. Petitioner Company was incorporated on 1.12.1999 as a Public Limited Company with certificate of commencement of business on 20.1.2000, with the object to carry on business of production, processing and marketing of horticultural and agricultural products. It has paid up capital of Rs.1,00,00,000/- divided into equity shares of Rs.10 each. Government is having share of 30%. Remaining 70% is with Registered Target Farmers of the Company.

3. Immediately on formation of the petitioner Company,

two agreements were entered into between Kerala Horticultural Development Programme (KHDP for short) and petitioner ie Ext.P2 on 30.11.2000 for asset transfer and Ext.P3 on 26.2.2001 regarding loan for working capital. 1st petitioner Company was expected to work strictly in terms of the two agreements executed with KHDP.

4. Petitioner has produced Ext.P1 Memorandum and Articles of Association of NAPCL to show that it was incorporated under the Companies Act, 1956, as a Public Limited Company registered with Registrar of Companies on 1.12.1999 and a certificate for commencement of business was issued on 2.1.2000. The main objective of the Company is to carry out business of production, process and marketing of horticultural and agricultural products. Its authorised share capital is Rs.1 crore, divided into 10 lakh equity shares of Rs.10/- each. 70% or more of the total shares are to be allotted to the Farmers engaged in the farming of horticultural and agricultural products of the Company and a maximum of 30% to Government of

Kerala. There shall be 3 Directors to be nominated by Government of Kerala. Other 7 shall be from among Farmers registered as its members.

5. By Ext.P2 agreement executed on 30.11.2000, the possession and operation of a fruit processing factory unit at Muvattupuzha was transferred to petitioner Company. As per Clause 5 of the agreement 5% of the sales turn over of the Company is to be invested in a development fund named Agro Development Fund separately, for the purpose of replacement and modernisation of plant and machinery of the factory. This has to be deposited in a separate bank account. As per Clause 6, KHDP or its successor could take over the assets transferred in case the petitioner Company was unable to run profitably or in the event of any violation of any of the clauses of the agreement by the petitioner Company and run the same, or hand it over to some other agency or Company, either newly formed or engaged in a similar project.

6. The 2nd agreement-Ext.P3 was executed on 26.2.2001.

As per Clause 2 thereof, the total amount of working capital to be released by the KHDP was not exceeding Rs.440.00 lakhs including the amount already availed and to be released since 1.4.2000. Clause 2(v) provided that the working capital finance can be used only for procurement of raw materials, expenses for domestic sales and export and for operational expenses such as repairs, maintenance, fuel etc., and that it shall not be used for payment of salaries and wages of employees and statutory payments and shall not be diverted for capital works. In case it was found diverted, further payment will be withheld or repayment will be demanded. It was also provided that KHDP or its successor can make any change in the conditions with prior notice.

7. The activities of KHDP were taken over by the 2nd respondent Company, which was incorporated under Section 25 of the Companies Act as per Ext.P6 in 2001 for sustaining the successful activities of KHDP.

8. According to the petitioner, Government having only

30% share in the 2nd respondent Company, does not have any control over it. Petitioner's complaint is over the action of Government in sending Exts.P8 and P10 letters to it.

9. In Ext.P8 letter, the Joint Secretary to Government, Department of Agriculture directed the Managing Director of NAPCL, on 23.3.2012, to ensure that Agro Growth Development Fund as stipulated in Clause 5 of Asset Transfer Agreement dated 30.11.2000 was maintained and the funds of working capital was used only for purposes stipulated in the agreement dated 26.2.2001 for working capital loan. It was mentioned there that NAPCL did not furnish its explanation, though notices were issued to it repeatedly. Though Clause 2(v) of the agreement stipulated that the working capital finance was available only for the purposes mentioned therein, it was found that the finance was used for payment of salary and wages of employees and it was diverted for capital works. Government warned the Company that the situation seriously affects the existence of the Company itself and directed it to refrain from any expenditure which is not

permitted under clause 2(v) of the agreement for working capital. Substantial amounts were seen withdrawn by the petitioner Company intermittently during the entire period of loan, ever since financial assistance was credited to the petitioner Company. Pointing out these, on 23.3.2012, the Joint Secretary to Government, Agricultural Department, as per Ext.P10 letter informed all the Banks mentioned therein as well as the petitioner Company that the Chief Executive Officer VFPCK, Kakkanad was nominated as a co-signatory in all the financial transactions in respect of the petitioner Company. The Managing Director of petitioner Company was requested to ensure that all financial transactions are done only with the prior concurrence of CEO of VFPCK and all banking transactions are done after obtaining the signature of the CEO, VFPCK. The CEO, VFPCK was directed to ensure its expenditure as per the terms of the agreement.

10. Aggrieved by the nomination of CEO as co-signatory and by the warning of Government, petitioner filed this Writ

Petition challenging the same. During the pendency of the Writ Petition, Government issued Ext.P22 order taking over the assets transferred to petitioner Company as per Ext.P2 agreement for revesting it to VFPCK. Based on the Government order, VFPCK by Ext.P21 letter requested the Managing Director of petitioner Company to hand over the assets. The writ Petition was amended incorporating the challenge against Exts.P21 and 22.

11. The Government as well as the 2nd respondent have filed separate counter affidavits pointing out that the impugned action was taken in order to protect its huge investment in petitioner Company and to protect the genuine pineapple farmers. The contentions of Government are : Government with an aim to protect and upgrade the living conditions of the pineapple farmers and promote and sell their products has set up a horticulture project implementing agency, KHDP, with the help of the grant extended under the financing agreement dated 17.1.1992 executed between the Commission of European Communities and the Republic of India. For that purpose

Government acquired 14 acres of land in Avoly and established a fruit processing plant. A further agreement between the petitioner Company and the KHDP was entered into for further implementation of the project. KHDP as well as petitioner Company were formed at the instance of Government and with the approval of Government. One of the terms of agreement executed by petitioner Company was that it would not sell, dispose, transfer, pledge, hypothicate or otherwise alienate any of the assets transferred without the knowledge and consent of KHDP or its successor. But several transactions were entered into by the petitioner Company without intimating KHDP. Apart from the fact that they did not make any repayment towards the financial assistance already availed, the petitioner Company had already availed a sum of Rs.440 lakhs from KHDP towards working capital, which was to be utilised only for procurement of raw materials, expense for domestic sale and export and operational expenses, maintenance etc. When it was found that the working capital finance was found to have been used for purposes other than for which it was granted, KHDP or its successor had every right to take over petitioner Company. When the matter was intimated to the Government, the Government who established both the companies and who is responsible to protect the interest of the Government of India to see that the conditions under the agreement executed with the Commission of European Communities and the Government of India is not violated and the financial assistance extended by them are utilised for the object with which it was granted, had every right to take over the petitioner Company and to hand over it to 2nd respondent Company which is the successor of KHDP. As the petitioner Company did not choose to furnish any satisfactory explanation as to the maintenance of agro development fund, while furnishing a vague reply that agro development fund and working capital cannot be segregated and when it was clear that the Company did not maintain agro development fund, as stipulated in the agreement, it was the responsibility of the Government to protect the project by necessary intervention. The violation of clauses in asset transfer agreement as well as refusal to maintain agro development fund constituted sufficient reasons for Government to see that further loss is not caused at the instance of the petitioner Company by continued violation of the provisions. VFPCK is the successor Company of KHDP. The petitioner is bound by the clauses in the agreements executed with the KHDP as well as its successor Company VFPCK. It is only when the petitioner Company was not willing to fulfil the mutually agreed contractual obligations that the Chief Executive Officer of VFPCK, who is one of the Government directors, was nominated as the co-signatory of the Company, in order to ensure the financial propriety and observations of the terms and conditions of the agreement. The petitioner failed to utilise even 1% of the capacity utilisation of main pineapple processing plant. The highest utilisation of it was 7.6% in the year 2006. It was only when the Government was convinced of the substantial erosion of its investment in the petitioner Company that co-signatory was proposed. Moreover petitioner Company did not agree to the proposal made by the Government for modernization and diversification of the Company with working capital loan from the Federal Bank based on RIAB's project report. Thus what Government did was only a work of rectification in order to protect its huge investment in the petitioner Company, while protecting the interest of the pineapple farmers.

12. The 2nd respondent has also filed a detailed counter affidavit on similar terms. An additional counter affidavit was also filed. The counter affidavit explained the formation of the Company by Government as successor to KHDP for effective implementation of the programmes of KHDP. It also explained the inability of Government nominee to prevent mismanagement and misappropriation as they were only 3 in number. Explaining the instances of misappropriation, recurrent withdrawal of funds, under utilisation of plant and machineries etc., it had brought the matter to the notice of Government. The petitioner had no explanation for non-payment of working capital loan or its

interest even after several demands. It explained the liabilities incurred by the petitioner without the knowledge of VPFCK. The only repayment made was of Rs.10 lakhs on 28.3.2012/-, whereas the accumulated loan as on 31.3.2012 was Rs.5,96,53,627/-. Government was compelled to take back the assets transferred, in order to regulate the outflow of funds. VFCPK took possession of the assets on 2.6.2012. An advisory committee was constituted as per order dated 16.6.2012, for the smooth functioning of factory till alternate organisational set up is made. The contentions in the additional counter affidavit include the following:Petitioner Company is functioning in a total area of 15 acres of land owned by KHDP and the office and plant itself takes in 5 acres of land. The capital investment incurred by KHDP at the time of transfer of assets is Rs.22.44 crores by way of plant and machinery and Rs.10.98 crores towards other expenditure. Over and above that Rs.4.40 crores is availed by petitioner Company by way of Ext.P3 agreement. The land in which the petitioner Company is situate is in the name of VFPCK and it is in emergent need of 4.5 acres of land out of the 15 acres land in which the petitioner Company is functioning, for the purpose of establishing seedling unit and because of the interim order, it is unable to utilise its own land, though the building of petitioner Company is within 5 acres of land.

13. I.A.No.4963 of 2015 was filed by M/s.Vazhakulam Agro and Fruit Processing Company Ltd., in order to get impleaded as additional 8th respondent. According to them Government ordered incorporation of the said Company as per G.O(Ms) No.263/13/AD dated 31.8.2013 with 51% shares for Government of Kerala, 30% for Registered Farmers and 19% for VFPCK. The petitioner Company was incorporated as per order dated 31.8.2013 for the effective management of the Company.

14. Heard learned Senior Counsel Sri.Krishnanunni for petitioner, learned Government Pleader, Sri. S.M.Prasanth for VFPCK and Sri. P.G. Jayasankar for Additional respondent.

15. The contention raised on behalf of the petitioner is that Government cannot interfere with the affairs of petitioner

Company, as it is not a party to the agreements Exts.P2 or P3. The agreements are only with KHDP and they alone can take action that too on proved violation of the terms of agreement. But KHDP ceased to be in operation. VFPCK, which is incorporated under Section 25 of the Companies Act, has no authority to interfere with its financial transactions or to direct the petitioner to hand over the assets. According to them they are functioning properly, started making profits and there is no violation of any conditions and there is no circumstance for any interference. On the other hand, the case of the respondents is that the assets were transferred to petitioner Company at the instance of Government, in implementation of the programmes based on the agreement between Commission of European Communities and Government of India. The object behind formation of all these Companies, programme etc. are all as required under the terms of the basic agreement between Government of India and Commission of European Communities to promote the interest of pineapple farmers. Therefore it had every right to protect its assets and capital investment from further depletion.

16. As rival claims and contentions are raised on either side, it is necessary to have a look at the circumstances leading to the formation of the Company and steps taken thereafter.

17. Ext.P2 is an agreement executed by the KHDP with NAPCL on 30.11.2000, with KHDP as 1st party and NAPCL as 2nd party. It is also stated that each of the parties will include its successors or assigns. From the pre-amble of the agreement, it can be seen that KHDP was established as an Agri-Horticultural Project implmenting agency set up by Government as per G.O.(Ms) No. 237/1992/AD date 28.8.1992, in terms of the financing agreement dated 17.1.1992 executed between the Commission of European Communities and the Republic of India. The said financing agreement provided for the establishment of a fruit-agro processing plant. The possession and operation of a fruit processing factory unit at Muvattupuzha was to be transferred to an independently operating public limited Company, in which

70% of the shares shall be held by identified farmers and 30% by Government of Kerala. The preamble would also show that the petitioner Company was formed as a Public Limited Company on 1.12.1999 with the approval of Government, as per G.O.(Ms) No.140/99/AD dated 22.5.1999 with the object of carrying on production, processing and marketing of horticultural and agricultural products, by taking over the fruit processing plant held by KHDP and operating the same. It would also show that the agreement was entered into in order to protect and safeguard the interest of farmers and to improve their living conditions and to ensure that the assets transferred to petitioner Company are put to use to the best possible manner for the object with which KHDP and petitioner Company were set up in terms of the basic bilateral agreement executed by Commission of European Communities and Government. The conditions were therefore stipulated in Ext.P2, in which KHDP is the first party and NAPCL is the 2^{nd} party. Clause 5 and 6 of Ext.P2 agreement read as follows:

> *"5. The 2^{nd} party shall at the end of every quarter during every financial year transfer an amount @ 5% of the sales turn over of the Company to be invested in a development fund named Agro Development Fund to be specially constituted for provision of funds, for replacement and modernisation of plant and machinery of the factory. These contributions shall be deposited in a separate bank account, on a quarterly basis, which in turn shall be invested in interest yielding securities of public financial institutions or deposit in a nationalised or commercial bank. No lien or charge shall be created on these deposits without the consent of the first party or its successor.*
>
> *6. In the event of any eventuality resulting in the Company being unable to run profitably necessitating closure of business or factory or in case of violation of any of the clauses of this agreement by the second party, the Programme or its successor will have every right to take back the assets transferred and run, use or deploy it or hand it over to some other agency or Company, either newly formed or engaged in a similar project, to further the objects envisaged".*

18. Thus as per clause 6, in the event of violation of any of the provisions in the agreement by the NAPCL, the KHDP or its

successor can take back the assets transferred to the NAPCL and either run it or handover it to some other agency in order to achieve the objects envisaged for its formation.

19. Ext.P3 agreement was executed with the NAPCL as 'borrower' on one part and KHDP as 'Programme' on the other part on 26.2.2001 for working capital loan. In this it is stated that the borrower will include its successors and permitted assigns and Programme will include its successors and assigns. Preamble of this agreement also indicates the circumstances under which both the parties to the agreement were formed. It begins with the reference to the fruit processing factory constructed by KHDP as follows:

> *"Whereas the Programme has constructed a fruit processing factory as envisaged in the bilateral financing agreement between Government of India and the European Union on the basis of which the programme was launched, under a turn key contract which was fully financed by the European Union directly as per the project outlay agree to*
>
> *And whereas the aforesaid factory commenced production and a Public Limited*

Company viz. Nadukkara Agro Processing Company Limited has been incorporated to take over and run the factory independently, in which the pineapple farmers and Government of Kerala would be holding equity capital of 70% and 30% respectively.

And whereas the two year overall work plan of the programme for the year 2000-2001 envisages provision of financial assistance by the programme or its successor viz The Vegetable and Fruit Promotion Council, Keralam to the Nadukkara Agro Processing Company Limited, in the form of working capital.

xxxx"

20. As per Clause 2, the total amount of working capital to be released by KHDP was not exceeding Rs.440.00 lakhs including the amount already availed and to be released since 1.4.2000. It was further provided that the working capital will be released in quarterly instalments as decided by the KHDP or its successor based on request. The loan was to carry interest at the rate of 10% per annum. As per Clause 2(v) the working capital finance was available only for:- (1) procurement of raw materials (2) expenses for domestic sales and export and (3) operational

expenses such as repairs, maintenance, fuel, etc. It was also stipulated that the finance shall not be used for payment of salaries and wages of employees and statutory payments and shall not be diverted for capital works. In clause 2 (vi), it was provided that KHDP or its successors will have every right to further payment and demand immediate repayment of the finance already released along with interest, in case it was found that the working capital finance was being used for any other purpose. Clause 2 (vii) provides that the KHDP or its successor shall have every right to alter any of the conditions with prior notice in financial exigencies. Several conditions were stipulated in the agreement in order to see that the working capital released to the petitioner is not diverted and is utilised with the intent and purpose for which it is given accurately and providing for the measures in the event of failure to adhere to the conditions.

21. VFPCK was incorporated in 2001 under Section 25 of the Companies Act, based on sanction accorded by Government in G.O.(Ms) 189/2000/AD dated 2.6.2000 [Ext.R2(d)], as a

permanent self financing organisation had to be formed, to continue the successful models developed and implemented by KHDP in the horticulture sector of the State. Clause 1(e) of Ext.P6 Memorandum of Association of 2nd respondent provides that one of the main objects of the Company is to sustain the successful activities initiated by KHDP.

22. Thus it can be seen that it is in implementation of the basic bilateral agreement between Commission of European Communities and the Government that all these companies have been incorporated in order to promote the interest of pineapple farmers and to promote its products in terms of the agreement. It was the responsibility of Government to see that the terms of that financing agreement was adhered to.

23. When instances of misuse as well as diversion of funds resulting in depletion of working capital of the Company were brought to the notice of Government, it has taken action initially to ensure that the conditions in the agreement are adhered to by the petitioner Company. When investment of more than 56

crores was with petitioner Company, Government had every right to see that there is no further depletion. Just because it is not a party to agreement, it does not cease to have its liability to protect its assets. Government had only directed to ensure that Agro Growth Development Fund, as stipulated in Clause 5 of Asset Transfer Agreement dated 30.11.2000, is maintained and the funds of working capital is used only for the purposes stipulated in clause 2(v) of the agreement dated 26.2.2001. NAPCL did not furnish the statements despite notices issued to it repeatedly. Under Clause 2(v) of the agreement, it was specifically stipulated that the working capital finance was available only for procurement of raw material, expenses for domestic sales and export and operational expenses. But as it was found that the finance was used for payment of salary and wages of employees and hence it diverted for capital works, Government warned the Company that the situation seriously affects the existence of the Company itself and directed it to refrain from any expenditure which is not permitted under clause

2(v) of the agreement for working capital. When substantial amounts were seen withdrawn by the petitioner Company intermittently during the entire period, ever since financial assistance was credited to the petitioner Company, Government had on 23.3.2012, as per Ext.P10 letter informed all the Banks, which petitioner Company is having financial transaction, about the nomination of the Chief Executive Officer VFPCK as a co-signatory in all the financial transactions and requested the Managing Director of petitioner Company to ensure that all financial transactions are done only with the prior concurrence of CEO of VFPCK. The CEO, VFPCK was directed to ensure its expenditure as per the terms of the agreement. Even thereafter the petitioner Company failed to furnish the reasons for violation of the conditions in the agreement. The petitioner had submitted Ext.P16 and objected to the action taken against it denying the violation of the terms and conditions of the agreements and requested for a full and final discussion. But the grant was found misused contrary to clause 5 of the working capital agreement. It was only thereafter Government issued Ext.P22 to take back the assets transferred to it under clause 4 and 6 of Ext.P2 agreement to re-vest it with VFPCK, for effective management of the factory and assets. The reasons leading to takeover and transfer are explained in Ext.P22. Subsequently another Company is formed which got impleaded as additional 8th respondent to take over the petitioner Company.

24. From the preamble to the agreements executed by petitioner Company itself, it is clear that all these companies including petitioner Company, KHDP, 2nd respondent Company etc. are all incorporated in different stages of implementation of basic bilateral financing agreement executed on 17.1.1992 between Commission of European Communities and Government of India in order to see that the farmers in Kerala State can earn supplementary income by increasing the production of high value horticultural crops. Each of these companies are incorporated in terms of the decision of the steering committee constituted in terms of the basic agreement. It is the responsibility of the

Government of India as well as Government of Kerala to see the effective implementation of the project by proper utilisation of the funds and to report the same. The assets including the land and the plant worth crores were transferred to the petitioner Company as per Ext.P2 asset transfer agreement. In addition to that Rs.4.4 crores were released to it by way of loan to be utilised for purposes mentioned therein alone. VPFCK is the successor of KHDP, as described in Ext.P3 agreement itself in its 5th preamble. Moreover the party on 2nd part in Ext.P3 agreement is described as 'Programme' and will include its successor also. It is not disputed that all these companies are incorporated on orders of Government based on sanction accorded by Government and in implementation of the bilateral agreement with European Communities. It is at the instance of the Government that the petitioner Company as well as 2nd respondent Company are established under the very same object in implementation of that agreement.

25. The learned Government Pleader relying on the

judgment of the apex court in ***Hill Properties Ltd. v. Union Bank of India****, [(2014) 1 SCC 635]* contended that the right of Government to interfere in the matter is not limited by articles of association of the petitioner Company. There a flat was attached in the proceedings, for realisation of amount due towards a loan advanced. It was contended that the 5th respondent therein was only a shareholder of the Company and he has no right to mortgage the flat to the Bank without permission of the appellant Company and that by virtue of Articles of Association of the Company, he could use and occupy the flat owned by the appellant Company and the same is not liable to be attached and sold. It was held therein that the Articles of Association of a Company have no force of a statute and that the right of respondent 5 to mortgage could not have been restricted by the Articles of Association.

26. It is not disputed that the assets were transferred to petitioner Company and that it has availed the loan from KHDP. The object of the 2nd respondent is also not disputed. The assets

of KHDP, were transferred to the petitioner Company only by way of an agreement. What is transferred is only possession and not ownership over the assets. Petitioner Company does not have a case that the assets including the land, plant and machineries are owned by them. It is also admitted that KHDP is having 1st charge over all the assets including future. Therefore, it can be seen that Government of Kerala has got every right to see that the Companies are operating in terms of the objects with which they are incorporated and the funds made available are utilised properly. Otherwise it has every right to step in and take corrective measures.

27. It is also pertinent to note that petitioner is disputing the very authority of the VFPCK and Government, relies on Ext.P9 series - correspondence with Government- to show that they had been using the working capital finance for different purposes when funds were released by Government upon requisition by petitioner Company stating different reasons and getting approval of the Government. When petitioner has already

approached Government on several occasions, they cannot be heard to contend that Government cannot interfere. It is after all these, they are questioning the authority of Government saying that it is only one of the shareholders of the Company with 30% share alone, apart from the fact that there is no privity of contract. The alleged disqualification of the 2nd respondent is, it is a Company incorporated under Section 25 of the Companies Act and hence it cannot undertake commercial operations. Even assuming that the 2nd respondent will incur any disqualification on account of this, it will not invalidate Ext.P22 order or give rise any right to petitioner to retain the assets. At any rate now that there is another Company formed, it is not necessary to consider that question.

28. Therefore the intervention of Government in order to protect further erosion of its investment cannot be said to be without authority for the sole reason that Government is not a party to the agreement or petitioner has not entered into any agreement with the Government. If Government took a decision

to intervene in the matter, on account of various circumstances like mismanagement, diversion of funds, diversion of working capital finance, under utilisation of the capacity of the plant and appropriation of capital investment for purposes other than those permitted, this Court will not be justified in standing on its way on the ground of want of provision in the agreement or due to privity of contract, when all the assets transferred were those procured by Government based on its sanction as part of a project under its immediate supervision.

29. On consideration of the issue in the light of the pleadings and materials before this Court, it is clear that the impugned action of Government was in public interest, to see that the purposes for which the basic agreement executed between the Government of India and Commission of European Communities are not defeated and to see that the pineapple farmers are protected.

Under the above circumstances, I do not find any reason to interfere with the impugned orders under Article 226 of the

Constitution of India. Accordingly, the writ petition fails and is dismissed.

W.P.(C) No.23318 of 2012

This writ petition is filed by VFPCK who is the 2nd respondent in W.P.(C) No.8794 of 2012, for a declaration that it is entitled to operate the bank accounts of NAPCL in terms of Ext.P22 in the other writ petition. In view of the judgment in W.P.(C) No.8794 of 2012, further orders will not be necessary in this case.

Sd/-

P.V.ASHA,
JUDGE.

rkc