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

\+ W.P.(C) 6845/2016, CM No. 28234/2016

DILIP KUMARI KULKARNI ..... Petitioner
Through: Mr. Manish Yadav and Mr. Arjun Garg, Advs.

versus

AFC INDIA LIMITED & ANR. ..... Respondents
Through: Mr. Kaushtabh Anshuraj, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

<u>O R D E R</u>

% **23.08.2017**

1. The present petition has been filed by the petitioner with the following prayers:-

"The Hon'ble Court may be pleased to:-

(a) Issue an appropriate writ/order/direction to set aside and quashed the order dated 11.05.2016 passed by Respondent no.1;

(b) Issue an appropriate writ/order/direction to hold Regulation 14(4) of the Officers' Service Regulation, 2012 of Respondent No.1 ultra vires of the Constitution as being violative of Article 14 of the Constitution of India;

(c) Issue an appropriate writ/order/direction to the Respondents to reinstate the Petitioner on the same position

and on the same place of posting as he was holding before the illegal termination along with all consequential benefits; and

(d) Any other relief(s) which may be deemed proper and fit under the facts and circumstances may also be awarded to the Petitioner with cost.”

2. It is the case of the petitioner that he was appointed with the respondents on March 30, 1983 as Junior Stenographer and was kept on probation for a period of six months. His services were confirmed on July 30, 1983. He was promoted to the post of AFC Officer Grade-A at a basic pay of Rs.2820/-. Subsequently, he got promotions from time to time and at the relevant time, was working as Senior Accounts Officer. In 2012, Agricultural Finance Corporation India Limited Officers' Service Regulations (Amendments) 2012 were notified.

3. On March 28, 2014, he was promoted to the post of Manager and was entrusted administrative work with additional assignments. He was confirmed as Officer Grade-C with effect from April 01, 2015. He was transferred to New Delhi on October 16, 2015. Finally, his services were terminated on May 11, 2016 and he stood relieved on May 18, 2016 on the ground of *“in the interest of Company”*. It is this termination order, which is under challenge in this writ petition.

4. The learned counsel for the respondents has taken a preliminary

objection on the maintainability of the petition on the ground that the respondent Company is not a State within the meaning of Article 12 of the Constitution of India. A short reply and additional affidavit has been filed on behalf of respondents wherein they have annexed the Memorandum of Association of the Company along with Articles of Association. Even though, Rejoinder affidavit has been filed but the same has not been brought on record in view of the objection put by the Registry. Be that as it may, I have heard the learned counsel for the parties.

5. The learned counsel for the petitioner primarily relies on the aforesaid two documents i.e Memorandum of Association and Articles of Association (running pages 126 and 171) to contend that the major shareholders of the Company are the Public Sector Banks. In other words, it is a Company of the Government and as such a State within the meaning of Article 12 of the Constitution of India. That apart, it is his submission that the respondent Company is discharging public functions, inasmuch as it is a multi-disciplinary consultancy and technical support organization specializing in agriculture and rural development segments. He would rely upon the judgment of the Supreme Court reported as ***(2005) 6 SCC 657 Binny Ltd. and another v. V. Sadasivan and others and connected Civil Appeal,*** to

contend that the private bodies also, which are discharging public functions are amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India.

6. On the other hand, learned counsel for the respondents would contest the submissions made by the learned counsel for the petitioner and states, that the case of the respondents is covered by the judgment of the Supreme Court in the case reported as ***(2015) 4 SCC 670 K.K. Saksena v. International Commission on Irrigation and Drainage and others.***

7. Having considered the record and the submissions made by the learned counsel for the parties, the issue whether an Authority/Body can be treated as a "State" within the meaning of Article 12 of the Constitution of India is well settled. If the Authority/Body is a State within the meaning of Article 12 of the Constitution of India then a writ petition under Article 226 would be maintainable against such Authority/Body for issuance of writ(s) in case of violation of fundamental rights or for any other purpose. The Supreme Court in ***R. D. Shetty v. The International Airport Authority of India & Ors AIR 1979 SC 1628*** culled out six criteria for an Authority/Body to be a State within the meaning of Article 12 of the Constitution of India. The said tests were reiterated in ***Ajay Hasia v. Khalid***

Mujib AIR 1981 SC 487. The said tests 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."

In the year 2002, the seven Judges' Bench of the Supreme Court in the case reported as ***2002 (5) SCC 111 Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology and Ors.,*** by referring to its judgment in the case of ***Ajay Hasia (supra),*** in para 40 has held as under:

> *"40. The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex*

hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State".

8. In the case in hand, it is noted from the Memorandum of Association and Articles of Association that the objects of the Company are primarily consultancy and technical support specializing in agriculture and rural development. The Membership of the Company is confined to only Companies, Corporations or Corporate Bodies as can be seen from Clause 13 of the Articles of Association, which I reproduce as under:-

"13. The Company shall have as its members only companies, Corporations or Corporate Bodies incorporated or registered under the laws of India which are Scheduled Banks, i.e. the Banks included in the Second Schedule to the Reserve Bank of India Act, 1934, Public Financial Institution as mentioned in Section 4A of the Companies Act, 1956, other agencies like NABARD, SIDBI, NCDC, Co-operative Banks and their Federations, APEDA, national Horticulture Board etc, and

institutions having interest in development and financing of agriculture and agri-business.

"Besides the above members, Company can take the shareholders from Private Sectors both in India and abroad such as individual investors; private consultancy companies subject to shareholding of private sector entrepreneur will not exceed 49% of the total shareholding."

9. The said clause also stipulates, besides the above Members, Company can take the shareholders from Private Sectors both in India and abroad such as individual investors; private consultancy companies subject to shareholding of private sector entrepreneur will not exceed 49% of the total shareholding. The liability of the Members, is limited to Authorized Share Capital of the Company i.e Rs. 100 Crores. The promoters of the Company, at the time of Incorporation were primarily the Public Sector Banks including the National and Grindlay Bank Ltd. Only for the reason, the Membership of the Company is confined to Companies, Corporations or Corporate Bodies including Scheduled and Public Sector Banks would not make the Company an entity promoted/established by the Government. It is purely a venture of the Banks including Private Banks. There is no averment in the writ petition, stating that the Company has been established by the Central Government/the State Government or any grant in aid being

provided by the Central Government/the State Government. There is also no averment regarding participation of the Central Government/the State Government in the running of the Company. So there is no deep and pervasive State control.

10. So, it is not a State within the meaning of Article 12 of the Constitution of India.

11. Having said that, still the power of the High Court under Article 226 to issue writ, is extended to any person or Authority discharging public functions. This was held by the Supreme Court in catena of judgments including ***Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust & Ors v. V.R. Rudani & Ors. (1989) 2 SCC 691***, wherein in paras 15, 17 and 20, it held as under:-

> *"15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working*

of educational institutions. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. (See - The Evolving Indian Administrative Law by M.P. Jain (1983) p.266). So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super- added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

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17. There, however, the prerogative writ of mandamus confined only to public authorities to compel performance of public duty. The 'public authority' for them means everybody which is created by statute - and whose powers and duties are defined by statute. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities;. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Court to issue *writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to 'any person or authority'. It can be issued "for the enforcement of any of the fundamental rights and for any other purpose".*

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20. The term "authority" used in Article 226, in the context, must receive a liberal meaning like the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art.32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

12. In para 15 of the judgment, the Supreme Court spelled out two exceptions to the writ of mandamus, (i) if the rights are purely of a private character, no mandamus can issue; and (ii) if the management of the college is purely a private body "with no public duty", mandamus will not lie. In

para 17 as the Supreme Court, was dealing with an aided Institution which was imparting education to the students, held it was discharging public duty. From para 20 of the ***Shri Anadi Mukta (supra),*** it is clear that the term 'authority' appearing in Article 226 of the Constitution would cover any other person or body performing public duty. The issue in what manner, the Authority is discharging public duty is quite well settled by the Supreme Court in the case of ***K.K. Saksena (supra),*** wherein in paras 38 to 45, the Supreme Court held as under:-

> *"38. In **K. Krishnamacharyulu & Ors. v. Sri Venkateswara Hindu College of Engineering**, this Court again emphasized that:*
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> > *"4.....when there is an interest created by the Government in an institution to impart education, which is a fundamental right of the citizens, the teachers who impart education get an element of public interest in performance of their duties."*
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> *In such a situation, remedy provided under Article 226 would be available to the teachers. The aforesaid two cases pertain to educational institutions and the function of imparting education was treated as the performance of public duty, that too by those bodies where the aided institutions were discharging the said functions like Government institutions and the interest was created by the Government in such institutions to impart*

education.

39. In ***G. Bassi Reddy v. International Crops Research Institute & Anr.,*** *the Court was concerned with the nature of function performed by a research institute. The Court was to examine if the function performed by such research institute would be public function or public duty. Answering the question in the negative in the said case, the Court made the following pertinent observations:*

> *"28...Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities of the institute, it certainly cannot be said that the ICRISAT owes a duty to the Indian public to provide research and training facilities."*

Merely because the activity of the said research institute enures to the benefit of the Indian public, it cannot be a guiding factor to determine the character of the Institute and bring the same *within the sweep of 'public function or public duty'. The Court pointed out:*

> *"28...In Praga Tools Corporation v. C.A. Imanual, this Court construed Art. 226 to hold that the High Court could issue a writ of mandamus" to secure the performance of the duty or statutory duty" in the performance of which the one who applies for it has a sufficient legal interest". The Court also held that:*
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> *"6. ...an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. (See Sohan Lal v. Union of India, 1957 SCR 738)."*

40. Somewhat more pointed and lucid discussion can be found in the case of ***Federal Bank Ltd. v. Sagar Thomas & Ors.****, inasmuch as in that case the Court culled out the categories of body/ persons who would be amenable to writ jurisdiction of the High Court. This can be found in para 18 of the said judgment, specifying eight categories, as follows:*

> *"18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a*

company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function."

41. In ***Binny Ltd. & Anr. v. V. Sadasivan & Ors.****[9], the Court clarified that though writ can be issued against any private body or person, the scope of mandamus is limited to enforcement of public duty. It is the nature of duty performed by such person/body which is the determinative factor as the Court is to enforce the said duty and the identity of authority against whom the right is sought is not relevant. Such duty, the Court clarified, can either be statutory or even otherwise, but, there has to be public law element in the action of that body.*

42. Reading of the categorization given in Federal Bank Ltd. (supra), one can find that three types of private bodies can still be amenable to writ jurisdiction under Article 226 of the Constitution, which are mentioned at serial numbers (vi) to (viii) in para 18 of the judgment extracted above.

43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is a 'State' within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that *even in such cases writ would not lie to enforce private law rights. There are catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. Reason is obvious. Private law is that part of a legal system which is a part of Common Law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is 'State' under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law.*

44. Within a couple of years of the framing of the Constitution, this Court remarked in Election Commission of India v. Saka Venkata Subba Rao that administrative law in India has been shaped in the English mould. Power to issue writ or any order of direction for 'any other purpose' has been held to be included in Article 226 of the Constitution 'with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of the King's Bench in England. It is for this reason ordinary 'private law remedies' are not enforceable through extraordinary writ jurisdiction, even though brought against public authorities (See - Administrative Law; 8th Edition; H.W.R. Wade & C.F. Forsyth, page 656). In a number of decisions, this Court ha held that

> *contractual and commercial obligations are enforceable only by ordinary action and not by judicial review.*
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> *45. On the other hand, even if a person or authority does not come within the sweep of Article 12 of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, as noted in Federal Bank Ltd. (supra), such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under liability to discharge any function under any statute, to compel it to perform such a statutory function."*

It is not the case of the petitioner that the respondent Company is discharging any function under a Statute.

13. It is the stand of the respondents that it carries out consultancy assignment through competitive bidding like any other Private Body and is allotted work if found qualified. In other words, the Company generates its own resources without the aid or help from the Government / State. It is not the case of the petitioner, Government provides Bank Guarantees/loan availed by the Company. It is clear that the respondent Company is another Company doing consultancy/technical support in the field of agriculture. In other words, purely a Commercial Organization and as such, it cannot be

said that the activities are similar to or closely related to those performed by a State.

14. The Supreme Court in ***Federal Bank Ltd .(supra),*** has held that solely because a private company carries on banking business, it cannot be said it would be amenable to writ jurisdiction. The activities undertaken by the respondent Society in that case and non-Governmental organization do not actually partake the nature of public duties or State actions.

15. The respondents carry activities, which other non-Governmental organization perform. In the absence of any obligation on the part of the respondents to carry activities, which are statutory or of public character, it must be held that the respondent Company is not discharging any public functions / duty.

16. In view of my above discussion, the present petition is not amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India and is dismissed. The petitioner shall be at liberty to seek such remedy as available to him in law.

CM No. 28234/2016 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

AUGUST 23, 2017/*ak*