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

% **Date of decision: 20.03.2025**

+ **LPA 908/2024 & CM APPLs. 52217/2024 & 52218/2024**

MR. KAMLESH KUMARAppellant

Through: Ms.Mani Gupta with Mr.Pranav Malhotra, Ms.Sreemantini Mukherjee, Ms.Shrijiet Roychowdhary, Advs.

versus

SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES & ORS.Respondents

Through: Mr.Sakya Singha Chaudhuri with Ms.Astha Sharma, Ms.Shreya Dubey, Mr.Aditya Pratap Singh, Advs for SAROD.

Mr.Manish K Bishnoi with Mr.Khubaib Shakeel, Advs for NHAI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G M E N T

DEVENDRA KUMAR UPADHYAYA, CJ (ORAL)

1. By instituting the proceedings of this intra-court appeal, the appellant/petitioner takes exception to the judgment dated 09.07.2024 passed by the learned Single Judge, whereby the writ petition filed by the



appellant/petitioner has been dismissed with finding that the respondent no.1/society against which writ was sought, is not an instrumentality of the State amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India.

2. It has been argued by learned counsel representing the appellant that the learned Single Judge has erred in law in relying on the minority opinion of the judgment of the Hon'ble Supreme Court of India in the case of **Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Others, (2002) 5 SCC 111**, and as such the judgment under challenge is erroneous.

3. Further contention of the appellant is that the respondent no.1/society even if is not to be held to be either a State or its instrumentality, will still be amenable to writ jurisdiction of this Court for the reason that it discharges certain public functions in as much as that the respondent no.1/society not only facilitates arbitration proceedings for resolution of disputes between the parties but it is also to be noticed that an arbitral award is a decree and award of such a decree is a public function, and therefore, the writ petition against such a society will be maintainable.

4. Learned counsel further canvassing the case on behalf of the appellant has stated that as per the rules and regulations of the respondent no.1, it is its governing body which manages its day-to-day affairs and funds, which consists of a President, a Vice-President and three members to be nominated by the National Highways Authority of India/respondent no.2 (hereinafter referred to as 'NHAI'). It has also been stated that though governing body also consists of three members to be nominated by the National Highways Builders Federation/respondent no.4, however, since the majority of the members are nominated by the NHAI, it is the NHAI which has deep and



pervasive control over the affairs of the respondent no.1/society and thus, it is an instrumentality of the State and accordingly will be amenable to writ jurisdiction of this Court.

5. On behalf of the appellant, it has also been argued that the respondent no.1/society receives major funding from NHAI and therefore NHAI not only exercises administrative and supervisory control over the affairs of the respondent no.1/society but is also having financial supervision over it. The submission, thus, is that for this reason as well, it cannot be said that the respondent no.1/society is not an instrumentality of the State and therefore the findings recorded by the learned Single Judge in this regard are erroneous.

6. Per contra, learned counsel representing the respondent no.1/society has stated that the respondent no.1 is a private society whose affairs are governed by rules and regulations framed by it, according to which, though governing body consists of the President, the Vice-President and three members to be nominated by the NHAI, however it does not mean that those to be nominated must be officers or employees of NHAI.

7. It has also been argued on behalf of the respondent no.1/society that the nature of functions performed by the respondent no.1/society does not make it amenable to the writ jurisdiction for the simple reason that the society has been formed primarily to function as an Arbitral Institution, which provides for panel of Arbitrators for conducting arbitration proceedings. It has also been stated on behalf of the respondent no.1/society that the object of the society is only to provide a forum to ensure cost effective and time bound resolution of disputes between respondent no.2/NHAI and other entities and further that respondent no.1/society only selects and maintains list of experts who can provide their assistance in working of the society.



8. According to the learned counsel representing the respondent no.1/society, the functions performed by it cannot be termed as governmental or public functions and therefore, the judgment under appeal cannot be said to be erroneous so as to call for any interference by this Court in the present Letters Patent Appeal.

9. Having heard the learned counsel for the parties and perused the judgment passed by learned Single Judge, which is sought to be impeached in the proceedings of the instant appeal, the issue which falls for our consideration is as to whether the respondent no.1, which admittedly is a society, is an instrumentality of State performing any public function so as to make it amenable to writ jurisdiction of this Court under Article 226 of the Constitution of India.

10. It is well settled law, as held by Hon'ble Supreme Court of India in **Rajbir Surajbhan Singh v. Chairman, Institute of Banking Personnel Selection, Mumbai, (2019) 14 SCC 189**, that a petition under Article 226 of the Constitution of India will be maintainable even against a private body provided such a private body discharges public functions. Therefore, what needs to be determined by this Court in the instant appeal is as to:

- i. whether the respondent no.1/society is an instrumentality of State within the meaning of Article 12 of the Constitution of India; and
- ii. whether it discharges any public functions so as to make it amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India.

11. The test to determine as to whether a particular body or organization is



an instrumentality of State, has been outlined by Hon'ble Supreme Court of India in **Pradeep Kumar Biswas** (*supra*), wherein it has been held that such issue should be decided on examining whether the body is financially, functionally and administratively dominated by or under the control of the Government.

12. Hon'ble Supreme Court, relying on **Pradeep Kumar Biswas** (*supra*) in **Chairman, Institute of Banking Personnel Selection, Mumbai** (*supra*), has held that such control should be particular to the body in question and must be pervasive and further that a control which is merely regulatory under the statute or otherwise would not make the body a State under Article 12 of the Constitution of India. Para 16 of the judgment **Chairman, Institute of Banking Personnel Selection, Mumbai** (*supra*), is extracted herein below:

“16. Resolving the dispute, the seven-Judge Bench in Pradeep Kumar Biswas [Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111:2002 SCC (L&S) 633] held that the question as to whether a corporation/society would fall within the meaning of Article 12 should be decided after examining whether the body is financially, functionally and administratively dominated by or under the control of the Government. This Court observed that such control should be particular to the body in question and must be pervasive. A control which is merely regulatory under the statute or otherwise would not make the body “State” under Article 12. As there is no control by the Government over the respondent in the manner mentioned above, we have no doubt in our mind that the respondent cannot be said to be falling within the expression “State” under Article 12 of the Constitution of India.”

13. If the test as evolved by the Hon'ble Supreme Court in **Chairman, Institute of Banking Personnel Selection, Mumbai** (*supra*), is applied to



the facts of the instant appeal to determine whether the respondent no.1/society can be termed to be either a State or its instrumentality, what we find is that the respondent no.1/society is neither a State nor its instrumentality. The rules and regulations of the respondent no.1/society provides that affairs and funds of the society will be managed by its governing body, which comprises of a President, a Vice-President and three members to be nominated by NHAI and three other members to be nominated by the National Highways Builders Federation/respondent no.4.

14. We may note at this juncture that the provision relating to constitution of the governing body of respondent no.1/society does not provide that the President, Vice-President and three members to be nominated by the NHAI, are to be necessarily officers of the NHAI. Further, three other members are to be nominated by the National Highways Builders Federation/respondent no.4, which admittedly is purely a private society. As already observed above, even the funds are also to be managed by the governing body and we do not find any pervasive control of the NHAI, which is a statutory body created under National Highways Authority of India Act, 1988.

15. Clause IV of the rules and regulations of the respondent no.1/society provides for source of income and utilization of funds according to which the society receives funds, donations and financial assistance from non-political sources in India or from abroad for furtherance of its objects. It further provides that respondent no.1/society shall have its own fund and all its receipts through grants, donations, subscriptions, fees as well as income from specified investments, service charges for providing services to members and other sources, shall be credited to the funds of the society and all payments shall be made by the society. It is also mentioned therein that income of the



society shall be utilized for furtherance of its objects.

16. The rules further provide that funds of respondent no.1/society shall be raised by the Loans (with or without interest), Deposits, Donations, Subsidies, Grants, Membership Subscriptions, Contributions and Fees against special services provided by the society, if any. The rules also provide for a general fund which consists of annual subscription of members of the society, interest on and income from the Reserve Fund and of the General Fund and other moneys or donations received by the society. It also has a provision for a Reserve Fund, which consist of accumulation of fees receipts and other funds as may be decided by the governing body.

17. Accordingly, if we closely scrutinize the functions of the respondent no.1/society and the manner in which its affairs are run and managed by the governing body and also the constitution of the governing body, we do not find that the NHAI exercises deep and pervasive control or even supervision over its affairs, both administratively as also financially. For this reason, we are unable to agree with the submissions made by the learned counsel representing the appellant that the respondent no.1/society is either a State or its instrumentality within the meaning of Article 12 of the Constitution of India. We, thus, find ourselves in complete agreement with the findings recorded by the learned Single Judge in this regard in the judgment under appeal herein.

18. As observed above, Hon'ble Supreme Court in **Chairman, Institute of Banking Personnel Selection, Mumbai (*supra*)** has held that even a private body which is not a State or its instrumentality within the meaning of Article 12 of the Constitution of India, can be amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India, provided the functions



being discharged by such a body or society are in the realm of public functions or governmental functions.

19. Admittedly, the functions discharged by the respondent no.1/society is only to facilitate resolution of disputes through arbitration and to provide for a panel of Arbitrators and experts to aid resolution of disputes between NHAI and other entities.

20. Hon'ble Supreme Court in **Chairman, Institute of Banking Personnel Selection, Mumbai (*supra*)** has referred to the judgment of the Apex Court in **K.K. Saksena v. International Commission on Irrigation & Drainage, (2015) 4, SCC 670** and has observed that the concerned body which was the subject matter in issue in the said case, was performing certain activities which were voluntarily undertaken by it and there was no obligation to discharge any activity which were statutory or of public character. In the instant case as well, the respondent no.1/society performs no such function for which it is statutorily charged or which can be termed to be a function or activity of public character.

21. In **Chairman, Institute of Banking Personnel Selection, Mumbai (*supra*)**, Hon'ble Supreme Court of India has also held that though it is not easy to define what a public function or public duty is, however 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 observations made by the Hon'ble Supreme Court in **Chairman, Institute of Banking Personnel Selection, Mumbai (*supra*)**, which are relevant for appropriate resolution of the issue involved in this appeal can be found in paragraph nos. 20 and 22, which are extracted herein below:

“20. There is no manner of doubt that a writ petition under



Article 226 is maintainable even against a private body provided it discharges public functions. While deciding the question as to whether Icrisat is amenable to the writ jurisdiction under Article 226, this Court held [K.K. Saksena v. International Commission on Irrigation & Drainage, (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119] that it is not easy to define what a public function or public duty is. It can reasonably be said that such functions as are similar to or closely related to those performable by the State in its sovereign capacity, are public functions. The primary activity of Icrisat is to conduct research and training programmes in the sphere of agriculture, purely on a voluntary basis which according to this Court, is not a public duty [G. Bassi Reddy v. International Crops Research Institute, (2003) 4 SCC 225] . A private company carrying on banking business as a scheduled commercial bank cannot be termed as an institution or a company carrying on any statutory or public duty [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733].”

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22. *The relevant questions, according to this Court in K.K. Saksena [K.K. Saksena v. International Commission on Irrigation & Drainage, (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119], to be answered for the purpose of deciding whether a writ petition is maintainable under Article 226 are:*

- (a) Whether a private body which is a non-governmental organisation partakes the nature of public duty or State action?*
- (b) Whether there is any public element in the discharge of its functions?*
- (c) Whether there is any positive obligation of a public nature in the discharge of its functions?*
- (d) Whether the activities undertaken by the body are voluntary, which many a non-governmental organisation perform?”*

22. Accordingly, for a private body being amenable to writ jurisdiction, it



should necessarily partake the nature of public duty or State action and that there has to be established a public element in discharge of its functions. It is also to be established that there has to be some positive obligation of public nature in discharge of the functions of the society. If the functions and activities of the respondent no.1/society are evaluated on the aforesaid touchstones/tests as laid down by the Apex Court in **K.K. Saksena(supra)**, what we find is that merely by preparation of a panel of Arbitrators or by providing some assistance or aid in resolution of disputes through arbitration proceedings, it cannot be said that the respondent no.1/society performs any public function or its activities contain any public element. It is also to be noticed that there is no statutory duty cast on the respondent no.1/society and therefore, it also does not perform any statutory function to make it amenable to the writ jurisdiction of this Court.

23. The submission of the learned counsel representing the appellant that since the arbitral award given by the Arbitrator appointed from the panel maintained by the respondent no.1/society is a decree of a Civil Court and passing such a decree is a public function, therefore, respondent no.1/society has to be held to be amenable to writ jurisdiction of this Court, is highly misconceived for the reason that it is not that the respondent no.1/society which passes any award or decree or judgment; rather it only maintains a panel of Arbitrators and provide some help to resolve the disputes between the respondent no.2/NHAI and any other entities through arbitration proceedings. Such submission, as observed above, being highly misconceived, merits rejection.

24. For the reasons given and discussion made above, we do not find any force in the instant appeal, which, resultantly is hereby dismissed.



25. All pending applications, if any, stand disposed of.
26. There will, however, be no order as to costs.

DEVENDRA KUMAR UPADHYAYA, CJ

TUSHAR RAO GEDELA, J

MARCH 20, 2025
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