

(2003) 10 AHC CK 0005
In the Allahabad High Court
Case No : C.M.W.P. No. 47863 of 2003

Anil Kumar Agarwal and Another

APPELLANT

Vs

U.P. Stock Exchange Association Ltd. and Others

RESPONDENT

Date of Decision : 30-10-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 1 AWC 280 : (2004) 53 SCL 119

Hon'ble Judges : R.C. Pandey, J;B.S. Chauhan, J

Bench : Division Bench

Advocate : Somesh Khare, for the Appellant; Manish Goyal and B.N. Singh, S.S.C., for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—This writ petition has been filed for quashing the orders dated 8.10.2003 and 15.10.2003 (Annexures-5 and 7) passed by the respondents imposing a penalty of Rs. 1 lakh and not to hear the appeal till the said amount is deposited.

2. Facts and circumstances giving rise to this case are that the petitioners are registered members and share-brokers of the U.P. Stock Exchange Association Ltd., Kanpur, respondent No. 1, hereinafter called the "Association". The Board of the Association stood superseded as per the orders of the Securities and Exchange Board of India, respondent No. 3, hereinafter called the "SEBI" vide order dated 12.5.2002. Association issued show cause notices dated 18.12.2002 to the petitioners as to why they should not be suspended for unauthorised carry forward transactions. They submitted the replies, which were considered and the matter was referred to the Disciplinary Committee of the Association, respondent No. 2. Petitioners were heard in person. Respondent No. 2 passed order dated 8.10.2003 imposing the penalty of Rs. 1 lakh on each petitioner and directed them to deposit the same by 15.10.2003. Being aggrieved, petitioners preferred appeals before the appellate forum. The same are pending but their stay

applications have been rejected vide order dated 15.10.2003 with a remark that appeals shall be entertained only if petitioners deposit the penalty imposed.

3. Preliminary objection has been raised by Shri Manish Goyal and Sanjai Goswami, learned counsel for the respondents, regarding maintainability of the writ petition, contending that respondent No. 1 is merely an Association. It does not perform any public function/duty nor the State has any pervasive control nor it is given financial assistance, fully or partly. It is an association of private businessman and even if the Board superseded by the SEBI appointing Administrator, i.e., it is only a regulatory measure and not a control to the extent that it becomes State or other authority or agency or instrumentality of the State, against which the writ petition may be entertained. It is submitted that it is just like a co-operative society, which has consistently been held to be not amenable to the writ jurisdiction. The Association is not governed by any statutory Rules. The Memorandum of Articles do not have any statutory force and the orders impugned cannot be challenged in the writ jurisdiction.

4. On the contrary, Shri Somesh Khare, learned counsel for the petitioners has submitted that if SEBI has a power to supersede the Board and appoint the Administrator, it is not only a regulatory major but having complete control on the functions and the activities of the Association, though the Association may not be receiving any financial help but it is amenable to writ jurisdiction. The action of the respondents is arbitrary and whimsical and not hearing the appeal of the petitioners till the penalty imposed is deposited, is in violation of the Rules/ Bye-laws, as the same do not provide for pre-deposit condition. Therefore, the orders impugned are liable to be quashed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

6. The issue involved herein, is no more res integra, as has been considered by the Courts time and again.

7. A Full Bench of this Court while considering the issue as to whether a co-operative society is amenable to writ jurisdiction in *Radha Charon Sharma v. U.P. Co-operative Federation*. 1982 AWC 64 : 1982 UPLBEC 89, considered a catena of judgments of the Supreme Court and other Courts and came to the conclusion that the co-operative society was not amenable to the writ jurisdiction as the bye-laws framed by the co-operative societies did not have any statutory force and no rule involving a duty of public nature was violated.

8. In *Ram Lakhan Pathak v. District Assistant Registrar, Co-operative Societies, Kanpur* 1996 (1) AWC 20 : 1996 (1) ESC 32, this Court held that as in such a case, the conditions of service of the employees are not governed by any statutory rule or regulation, the co-operative society is not an authority within the meaning of Article 12 of the Constitution nor it is an instrumentality of the State nor it exercises any statutory power or discharges statutory/public duties and writ petition is not maintainable against a co-operative society.

9. Similar view has been taken by the Karnataka High Court in *Workmen Kampli Co-operative Sugar Factory Limited v. Management of Kampli Sugar Factory Limited* 1994 Lab IC 2074, and it has been held that such rights are purely of a private nature and the same cannot be challenged in writ jurisdiction and in spite of the fact that the expression "Government function" may suffer from vagueness and indefiniteness, the activity of manufacturing sugar cannot fall within the ambit of public duty or governmental function as the production of sugar is being done only with the view to earn profit for the members of the society.

10. In *Co-operative Central Bank Ltd. and Others Vs. Additional Industrial Tribunal and Others*, the Supreme Court observed that the bye-laws of a co-operative society framed under the provisions of the Act do not have any force of law as the bye-laws contemplated by the Act govern the internal management, business or administration of a society and they may be binding upon the persons affected by them. The bye-laws providing for the service conditions of the employees of the society may be binding between the society and its employees in the same manner as conditions of service provided for in a contract between the parties. The Court observed as under :

"The bye-laws that can be framed by a society under the Act are similar in nature to the Article of Association of a company incorporated under the Companies Act and such Articles of Association have never been held to have the force of law."

11. A Constitution Bench of the Supreme Court in *Sabhajit Tewary Vs. Union of India (UOI) and Others*, , took the view that the society does not have a statutory character and it is merely a society incorporated in accordance with the provisions of the Societies Registration Act in spite of the fact that the statute provides for management, etc., by the Government of India, reason being that the Government has to control to the extent that the governing body shall frame, amend and repeal the bye-laws, etc., strictly in accordance with the purposes for which the society has been formed. The said society was found to have its existence independent from the Government and the law relating to corporations.

12. In *Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other*[OVERRULED], , the Apex Court after considering the law on the subject held that if "the function of the institutions are of public importance and related to the Government functions" it may be treated as a "State" or State instrumentalities. However, it was further clarified that State control does not render such bodies as "State" under Article 12 nor the financial contributions by the "State" is conclusive.

13. A Full Bench of Andhra Pradesh High Court in *Sri Konaseema Co-operative Central Bank Limited* AIR 1990 AP 171 , has held that if the petitioner invokes the writ jurisdiction of the High Court, he must satisfy the Court that he is seeking enforcement of a statutory public duty. Moreover, nomenclature by which the rules, regulations or bye-laws is known, is immaterial. The relevant determining factor is its essential nature which can be determined by applying

the test whether the same can be termed as delegated legislation. The Court after examining the various provisions of the Co-operative Societies Act of Andhra Pradesh, came to the conclusion that the bye-laws framed there, were framed by a delegatee of Legislature. The Court considered the judgments of the Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and came to conclusion that as the society was not doing governmental function or had been of any pervasive State control was not there, the society could not be found to be "State" within the meaning of Article 12 of the Constitution of India. The public authority must be a body, which has legal authority to determine the question affecting the statutory rights or obligations of other persons as individual. Such body must be the creation of the statute and its powers and duties are defined by the statute, e.g., legal authorities, statutory undertakings and corporations. When an authority protects only the private rights of its individual member, it cannot be said to be performing the public duty.

14. However, the Court held that if the duty imposed on body, whether expressly or by implication was a public duty and the body was exercising public law function, the decision of that body would be amenable to judicial review. Applying all those tests, the Court examined the nature of the co-operative society involved in that case and came to the following conclusion :

"It has no duty towards public. Its duty is towards its members only. It has no power to take action, or pass any order affecting the rights of the members of the public. The binding nature of its order and action is confined to its members and to its employees. It is neither a statutory body nor governed by a statute. Its functions are also not akin to governmental functions..... Even ifit can be characterised as a public body, even so the contract of service between it and the writ petitioner cannot be treated as belonging to public law field. It is a pure and simple contract of service, regulating, circumscribing and governing the State relationship..."

The Full Bench summarised the following legal propositions :

"(1) If a particular society can be characterized as a "State" within the meaning of Article 12 of the Constitution.....It would also be an "authority" of Article 226 of the Constitution. In such a situation the order passed by the society against its employees in violation of the bye-laws, can be corrected by way of a writ petition....."

(2) Even if a society cannot be characterized as a "State"..... even so a writ would lie against it to enforce a statutory public duty which an employee is entitled to enforce against the society..... What is material is the nature of the statutory duty placed upon it, and the Court will enforce such statutory public duty....."

(3) The bye-laws made by a cooperative society registered under the.....Cooperative Societies Act do not have the force of law. They are in

then nature of a contract, terms of contract between the society and its employees or between the society and its members, as the case may be. Hence, where a society cannot be characterised as a "State", the service conditions of its employees, governed by bye-laws, cannot be enforced through a writ petition."

15. A Full Bench of this Court in *Aley Ahmad Abidi Vs. Dist. Inspector of Schools, Allahabad and Others*, , placed reliance upon the judgment of the Supreme Court in *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, , wherein it has been held that the writ of mandamus can be issued to a person requiring him to do a particular thing which appertains to his office and is in the nature of his public duty and came to the conclusion that unless there is legal obligation or a duty imposed by a statute, the violation of the same shall not render the person amenable to writ jurisdiction.

16. In *Chakradhar Patel Vs. Samasingha Service Co-operative Society Ltd. and Others*, , the Orissa High Court held that the termination of the services of an employee of a society cannot be challenged in writ jurisdiction. While deciding that case, reliance had been placed on the judgment of the Supreme Court in *Executive Committee of Vaish Degree College, Shamli v. Laxmi Narain* AIR 1976 SC 888.

17. Similarly, a Full Bench of Kerala High Court in *P. Bhaskaran and Others Vs. Additional Secretary, Agricultural (Co-operation) Department, Trivandrum and Others*, , held that the co-operative societies are not the creation of the Co-operative Societies Act and they are not statutory bodies. They are merely functioning in accordance with the provisions of the Act as the institutions would have legal existence, even if the Co-operative Societies Act was not in force. There is no deep and pervasive State control, the management is under the effective control of a committee elected by the members of the societies and thus, such societies are not amenable to the writ jurisdiction.

18. Similar view has been taken by the Full Bench of Madhya Pradesh High Court in *Ramswarup Gupta Vs. Madhya Pradesh State Co-operative Marketing Federation Ltd. and Others*, . However, it was held that if there is violation of any statutory provision or rule, the writ can be issued in an appropriate case.

19. In *Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others*, , the Supreme Court has categorically held that where dispute arises from general law of contract, i.e., where reliefs are claimed on the basis of the general law of contract, the appropriate forum may be a civil court and appropriate remedy would be civil suit.

20. In *Dipak Kumar Biswas Vs. Director of Public Instruction and Others*, , the Hon"ble Supreme Court while considering this issue, held that even if an educational institution receives the financial aid from the Government, it would not necessarily be a statutory body because it has not been created by any statute and its existence is not dependent upon any statutory provision.

21. In *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, , the Apex Court held that the power of the writ court are not confined to statutory authorities and instrumentalities of the State rather it can be issued to any other person or authorities performing public duties. That was a case where a public trust was running a college and it was directed to pay the revised pay scale to its teachers, as imparting education was held to be performing a public function.

22. In *Ganapathi National Middle School Vs. M. Durai Kannan (dead) by LRs. and others*, , the Hon"ble Supreme Court held that as the aided private educational institution impart training on behalf of the State, it can be held to be agency or instrumentality of the State and, therefore, if the land is required to be acquired for its purpose on behalf of the State, the same can be held to be a public purpose.

23. In *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation*, , the Hon"ble Supreme Court examined a case wherein the service regulations framed by the statutory corporation were found having the force of law. The Hon"ble Supreme Court held that statutory Corporations, like O.N.G.C., L.I.C. and I.F.F.C.O. under different statutes, are the other authorities within the meaning of Article 12 of the Constitution and in case a corporation is owned, managed and could be dissolved by the Government ; were under complete control of the Government and performing public or statutory duties for the benefit of the public and not private profit, it would amount to acting as the agency of the Government.

24. In *Steel Authority of India Ltd. Vs. Shri Ambica Mills Ltd. and Others*, the Court held that SAIL was a department or agency of Union of India for the reason that the Government of India owned only some of the share capital.

25. In *Biman Krishna Bose Vs. United India Insurance Co. Ltd.*, , the Apex Court held that in order to maintain a writ petition against a Company/Association/ Society, it is necessary to determine as to whether it falls within the ambit of State authorities and for that purpose, the test is whether it has a trappings of the State and in a case where a Government company had been conferred the right and privilege to carry on business activities to the complete exclusion of others, the Court held the Company would have trappings of the State.

26. In *International Airport Authority (supra)*, the Hon"ble Supreme Court had laid down the test for determining as to when a corporation can be said to be instrumentality/agency of the Government and the same are that the entire share capital of the corporation is held by the Government; or the financial assistance of the State is so much as to meet almost entire expenditure of the corporation; the corporation enjoys monopoly status which is State conferred or State protected; there is existence of deep and pervasive control by the State;

functions of the authority/corporation are of public importance and closely related to governmental function ; a department of the Government itself has been transferred to a corporation. If the aforesaid questions are answered in affirmative, then it may fall within the definition of "authority" in Article 12 of the Constitution.

27. In *The Mysore Paper Mills Ltd. Vs. The Mysore Paper Mills Officers' Association and Another*, , the Hon"ble Apex Court re-examined the issue and held that if a company is owned by the Government and the State Government has deep and pervasive control over its day to day administration and it is entrusted with public duty; its Directors are nominee of the State Government or of the financial institutions; or are elected by the concurrence of the State Government, it has to be held to be other authority within the meaning of Article 12 of the Constitution, though it may be a company registered under the provisions of the Companies Act, 1956.

28. Thus, in view of the above, the legal position may be summed up that before an authority/body/association is held to be amenable to writ jurisdiction, the Court must record a finding that it can be held to be a State/State agency/instrumentality applying the aforesaid tests laid down by judicial pronouncements, i.e., the State must be having pervasive and deep control over its administration; it may be run entirely or substantially on the financial aid of the State ; its officers should be appointed by the State or State agencies ; it must perform a public duty or it may have a monopolistic character, like that of a State wherein it can be held that the body has trappings of the State. If the body can have existence independently that of the Statute, it is not amenable to writ jurisdiction.

29. The instant case requires to be examined in the light of the aforesaid settled legal propositions. The Memorandum of Articles of Association of the respondent No. 1 read that on 8th October, 1979, seven persons named therein, formed a company and agreed to take a number of shares in the capital of the company, shown opposite to their respective names. The main object of the Association-respondent No. 1 has been as under :

"(i) To organise and carry on the Stock Exchange and regulate that business of exchange of stocks and shares, debentures and debenture stocks, Government securities, bonds and equities of any description and with a view thereto, to establish and conduct Stock Exchange in Kanpur and/or elsewhere ; and

(ii) To acquire the membership of any other recognised Stock Exchange in India or abroad including membership of O.T.C. Exchange of India to broad base the operations of the Stock Exchange for the benefit of the general public and investors at large through its member brokers provided no trading will be made by the Exchange on its own behalf."

30. It further provides for the incidental or ancillary object to be attained by it and it includes to facilitate the transactions of business on the Stock Exchange

and to make rules, bye-laws and regulations regulating the mode and conditions, etc., to establish just and equitable principles, to settle points and to decide upon any question of business usage or courtesy between or among members of the Exchange ; to regulate and fix the scale of commission or brokerage to be charged by members ; to sell, improve, mortgage any property of the Exchange to subscribe to or become a shareholder in any corporate with any other company or society.

31. There can be no doubt that admission, expulsion or election of the members of the Association and their respective rights and obligations, suspension from attending or for the purpose of transacting the business in the premises occupied by the society, would fall within the exclusive domain of the Association. The mode and conditions and subject to which the business in Exchange is to be transacted and the conduct of the persons transacting business in the Stock Exchange and generally for maintaining law and order, the Association itself can frame rules/bye-laws not having any statutory force but may be binding upon its members and at the most it can be tantamount to the "self governing" regulations. Similarly, disciplinary power of the Board, etc., can be like the power of any authority as it may be necessary to maintain the discipline among its members and which may require taking action against its members after holding him guilty for misconduct, of course, by following the procedure prescribed therein or by following the principles of natural justice. The finding of misconduct recorded by it is binding upon its members subject to a right of appeal, etc., if any. (Vide Halsbury's Laws of England, 4th Edition, Vol. 45, paras 5 and 7).

32. It is admitted by learned counsel at the bar that there is no financial assistance to the Association-respondent No. 1 either by the State of U.P. or by Union of India or any other State Agency/ Instrumentality. From the memo of article, it is evident that the primary function of the association is to carry out the business of shares and dealing with debentures and Government Securities, etc., which even by stretch of imagination cannot be held to be a public function or a public duty, nor there can be any trappings of the State in the Association.

33. We are not impressed upon the argument that in exercise of the powers under the provisions of the Securities Contract (Regulation) Act, 1956, hereinafter called the "Act 1956", the respondent No. 3-SEBI has superseded the Board and appointed the Administrator, as it is merely a matter of regulating the activities of the Board which may be taken under the compelling circumstances to protect the innocent depositors or shareholders from fraud, etc., by the members of the Association. If the society registered under the Cooperative Societies Act, 1965, is superseded by the Registrar of the Societies, and the Administrator is appointed, that itself would not make the society amenable to the writ jurisdiction. The effect will be that the order passed by the Registrar superseding the administration of the society or appointing the Administrator may be challenged in writ jurisdiction, being passed by a statutory authority, therefore, there can be no difficulty in holding that the order passed by

respondent No. 3-SEBI superseding the Board and appointing the Administrator itself alone can be challenged in writ jurisdiction but once the Administrator is appointed, he substitutes the Board and nothing beyond it. Any order passed by it would be deemed to have been passed by the Board and such a factor alone would not confer any status upon the Board to make it a State within the meaning of any other authority/State Agency or instrumentality of the State.

34. Similarly, even if some of the members of the association are appointed by the respondent No. 3 that would not change the legal status of the association. This view stands fortified by the Division Bench judgment of the Kerala High Court in *Satish Nayak Vs. Cochin Stock Exchange Ltd., Ernakulam and Others*, , wherein a similar dispute arose and the Court held that it was a company registered under the Companies Act and not amenable to writ jurisdiction. While deciding the said case, the Kerala High Court referred to and relied upon large number of judgments of the Hon"ble Apex Court and various High Courts and distinguished the judgment of the Bombay High Court in *Sejal Rikeen Dalai v. Stock Exchange Bombay*, AIR 1991 Bom 30. wherein the view had been taken that a Stock Exchange is amenable to the jurisdiction of High Court under Article 226 of the Constitution. That was a case arising out of the decision of the stock exchange rejecting the application for transfer of members, while deciding the said case the Bombay High Court placed reliance on the judgment of *Shri Anadi Mukta Sadguru (supra)*, and held that the stock exchange was established to assist, regulate and control dealing in securities and to ensure various dealings and therefore, these were the objects of public interests and therefore, writ was maintainable.

35. Similarly in *R. Jagadeesh Kumar Vs. P. Srinivasan and others*, , the Karnataka High Court held that writ against the stock exchange would not lie for the reason that it does not discharge any public duty/function. The Board only have a duty towards its members and not to the public at large. It is merely a company registered under the Companies Act and the admission or expulsion of its members is to be governed by the resolution of Association. The provisions of the Act 1956 are only to the extent that the authority concerned can make provisions for carrying on effective function of the stock exchange, without taking away the powers of stock exchange in the matter of internal regulation at all. Dealing with the work or duty of the stock exchange and its nature/status, the Court observed as under :

"Under the Act, Stock Exchange means any body of individuals, whether incorporated or not, constituted for the purpose of assisting or controlling the business of buying, selling or dealing in securities. A Stock Exchange provides facilities to liquify capital by enabling a person who has invested money in any company by way of shares which is converted into cash by disposing off his share in the enterprise to someone else. A Stock Exchange gives mobility to the capital in the absence of which the capital invested in the form of shares in any enterprise would become locked up. The proper working of a Stock Exchange

essentially depends not only on the calibre of the members constituting it, but also perhaps more importantly on their moral statute. In carrying out the activities in a stock exchange the members thereof should be men of valour, prudence, level-headed and act with wisdom even in the most adverse circumstances. They must also be men of good financial stability, considerable experience, capable of assessing the market psychology etc. The stocks and shares are dealt with in three manners ; (i) Spot delivery contract where the contract provides for actual delivery of securities on payment of a price either on the day of the contract or the next day excluding perhaps the time taken for dispatch of the securities or the remittance of money from one place to another ; (ii) Ready delivery contract which means a contract for the purchase or sale of securities for the purpose of which no time is specified and it is to be performed immediately or within a reasonable time ; and (iii) Forward contracts, that is, contracts under which the parties agree for their performance at a future date. If the Stock Exchange is under the influence of unscrupulous members, the second and third categories of contract to buy or sell shares would lapse to highly degenerating and speculative transactions amounting to pure gambling. If the parties do not intend while entering into contracts for sale or purchase of securities that only difference in prices should be paid, the transactions which are even those speculative, may be valid and not void for there is no law against speculation as there is against gambling. If the parties do not intend that there should be no delivery of the shares but only the difference in price should be paid or accounted for, the contract becomes void for it is a wager. Quite often it becomes difficult for a Court to distinguish one from the other as a wagering transaction can be ingeniously camouflaged as to pass-off as a speculative transaction. Such obnoxious potentialities are inherent in the transaction and if left uncontrolled would tend to subvert the main object of the Stock Exchange and convert it into a den of gambling which would ultimately upset the economy of the country."

36. The Karnataka High Court, while deciding the case also considered the case of the Bombay High Court in *Mrs. Sejal Rikeen Dalal (supra)*, but did not agree to the extent that stock exchange could be a public authority as it was not discharging any public duty.

37. Division Bench of this Court while deciding Writ Petition No. 1043 of 1998, *Smt. Veena Ojha Vs. U.P. Stock Exchange Association Ltd. and others*, after considering the judgments of Karnataka, Kerala and Bombay High Court referred to above held as under :

"There is force in the objections raised by the respondents that in such a case jurisdiction of this Court under Article 226 of the Constitution of India cannot be invoked."

38. We see no cogent ground to take a view different from the judgment of the Division Bench of this Court in *Veena Ojha's* case.

39. The Association had been formed by the private individuals for carrying on the business of dealing in shares, debentures and Government securities. It does not perform any governmental function/public or statutory duty. Existence of the Association is independent of any statutory provision. State does not have pervasive and deep control over its day-to-day administration. Power of nominating some of its members or enabling provisions for the SEBI to supersede the Board and appoint Administrator in a particular eventuality, would not make the Association as other authorities or instrumentality or agency of the State. State does not contribute any funds to it at all. The functions of the Association are not at all of a public importance. It is merely a company registered under the Act, 1956 and not a governmental company. By no stretch of imagination, it can be held that it has the trappings of the State. The judgment of the Bombay High Court, referred to above, in this regard does not lay down the correct law for the reason that it was solely based on the judgment of the Hon''ble Apex Court in Shri Anadi Sadguru Shree Muktajee Vandasji Swami Suvarna Jayanti Mahotsav Smarak Trust (supra), wherein the Apex Court came to the conclusion that it was performing the public duties. As the Stock Exchange does not perform any public duty, the said judgment cannot be acceptable. More so, judicial discipline requires to follow the judgment of the Co-ordinate Bench of this Court in Veena Ojha's case. Thus, we reach the inescapable conclusion that the Association is not amenable to writ jurisdiction.

40. Writ petition is accordingly dismissed. No costs. Petitioners are at liberty to approach the appropriate forum for the relief sought.