

(2007) 09 JH CK 0014
In the Jharkhand High Court

Hare Ram Singh etc.

APPELLANT

Vs

Bihar State Co-operative Milk Producers Federation Ltd.
(COMPFED)

RESPONDENT

Date of Decision : 13-09-2007

Acts Referred:

Bihar Reorganisation Act, 2000 — Section 41, 42
Constitution of India, 1950 — Article 12

Citation : AIR 2008 Jhar 86 : (2008) 1 JCR 13

Hon'ble Judges : M. Karpaga Vinayagam, C.J.;Narendra Nath Tiwari, J;D.P. Singh, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

M. Karpaga Vinayagam, C.J.—"Whether the Bihar State Co-operative Milk Producers" Federation Ltd. (hereinafter called as Federation) is State within the meaning of Article 12 of the Constitution of India so as to attract-writ jurisdiction?" This is the moot question to be decided by this Full Court in this batch of cases.

2. Since conflicting views have been expressed by different Division Benches with reference to the above question, the Division Bench by the order dated 29.11.2004 referred these matters to the Full Bench to determine the said question. That is how, this batch of cases has come up before this Full Bench.

3. This question came up for consideration earlier on several occasions before Hon"ble the Supreme Court. Over the years several decisions have been rendered. The Apex Court in those decisions tried to throw light as to what are the guidelines to be followed to determine as to whether a particular, organisation is State.

4. Before dealing with the issue in question, in the light of the facts of this case, it would be better to see some of the important decisions which give the guidelines or conditions to determine the said question.

The leading case in this regard is the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . As per this decision, the following conditions were incorporated to decide the status of the organisation:

(I) Where the Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the charter of its incorporation, then it would be an instrumentality or agency of Government.

(II) 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.

(III) If extensive and unusual financial assistance is given by the Government and the purpose in giving such financial assistance coincides with the purpose for which the Corporation is expected to use the assistance and such purpose is of public character, then it may be a relevant circumstance supporting an inference that the Corporation is an instrumentality or agency of Government.

(IV) The existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.

(V) It may also be a relevant factor to consider whether the Corporation enjoys monopoly status which is State conferred or State protected.

(VI) If the functions of the Corporation are of public importance and closely related to Government functions, it would be a relevant factor to classify the Corporation as an instrumentality or agency of Government.

4. The next leading case is *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . As per this decision, the followings are the tests to find out whether the Corporation is an instrumentality or agency of State:

(I) Where the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would be an indication of the Corporation being impregnated with Governmental character.

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

(III) If a department of Government 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.

(IV) On consideration of these relevant factors, if it is found that the Corporation is an instrumentality or agency of Government it would be considered as an authority which would attract Article 12 of the Constitution of India.

(V) It is immaterial whether the Corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The enquiry is not to see as to how the juristic

person is born but why it has been brought into existence. This must have regard to the Memorandum of Association and the Rules of the bye-laws.

5. The next important case is Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, , in which the followings are the conditions:

(a) 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.

(b) Simply by holding a legal entity to be an instrumentality or agency of the State, it does not necessarily become an authority within the meaning of Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to the public. It should have been entrusted with such function as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental.

(c) Before it is held to be the State, the person alleging it to be so must satisfy the Court of brooding presence of the Government or deep and pervasive control of the Government so as to hold it to be an instrumentality or agency of the State.

6. In the next leading case being Virendra Kumar Srivastava Vs. U.P. Rajya Karmachari Kalyan Nigam and Another, , the Supreme Court has observed as follows:

(i) The multiple test which is to be applied to ascertain the character of a body as falling within Article 12 outside as laid down by majority view in Pradeep Biswas, case (supra) is to ascertain nature of financial, functional and administrative control of the State over it and whether it is dominated by the State Government and the control can be said to be so deep and pervasive so as to satisfy the Court of brooding presence of the Government on the activities of the Corporation.

(ii) On detailed examination of the administrative, financial and functional control of the Corporation, it must be found that the control of the State is not merely regulatory but it is deep and pervasive in the sense that it is formed with the object of catering to the needs of the Government employees and the Corporation must be supported financially and administratively by the State and its authorities and it is made to show that even day to day functioning of the Corporation is watched, supervised and controlled by the various departments of the State.

7. Bearing in mind the above parameters and guidelines, the question posed before this Court has to be dealt with.

According to the counsel for the petitioners, the Federation is a State within the meaning of Article 12 and as such, writ is maintainable as against the Federation.

According to the counsel for the respondent-Federation and the Government, writ is not maintainable as it is not State within the meaning of Article 12.

8. The crux of the submissions made by the counsel for the petitioners to substantiate the plea that writ is maintainable as the Federation is State within the meaning of Article 12 is given below:

(A) The functions discharged by this Federation are public functions for the benefit of public in general. The share capital held by the Government is admittedly 90%. The State Government paid Rs. 6,46,62,000/-, whereas other share holders paid Rs. 11,32,000/-. Invariably the Board meeting was attended by the Government officials who took decisions. The Chairman of this Federation has always been a Secretary level Officer of the State Government. The Managing Director is appointed by the State Government. The Chairman is also a State Government official. As per bye-laws, the Board of Directors shall exercise powers, enter into agreement, make arrangement etc. and will be bound to any rule which may be passed by the State Government.

(B) The available documents would show that the State Government is founding the Federation regularly. One of the resolutions, as per Annexure-17, would show that the Federation having business within the jurisdiction of State of Jharkhand shall be under the administrative control of the Government. Annexure-18 would indicate that the service conditions of all the employees class IIIrd and class IVth shall be governed by the Government Rules. The very opening line of the bye-laws would reveal that the State has got the power to issue directives to various co-operative societies in the matter of appointment and service conditions. The Board of Directors and other officials are from the Government and the period of Board of Directors can be extended by the Government.

(C) The objects of the Federation are to perform functions which are governmental and closely associated with public and are of public importance or fundamental to the life of the people.

Thus, the State Government has got direct control over the activities of the Federation. Therefore, the Federation is a State amenable to writ jurisdiction.

9. The reply of the respondents in gist is as follows:

(a) There is no financial control of the State Government over the Federation. When the Federation was a new born baby, the State Government was the major shareholder to regulate its activities and to achieve the object of Operation Flood and with the increased number of Milk Onions the share of the State Government is decreasing every year.

(b) Secondly there is no functional control of the State Government over the Federation. There is no control whatsoever of the State Government over the funds of the Federation and there is no interference of any nature of the State Government. The State Government has no role to play either in policy decision for raising funds for the Federation or for its expenditure.

(c) Thirdly there is no administrative control of the State Government over the Federation in view of Rule 15 of the bye-laws, which deals with the administrative structure. According to this rule, the supreme authority of the Federation shall vest in the General Body. The General Body will consist of Chairman of each affiliated Milk union enrolled as Ordinary Member, Registrar, Co-Operative Societies, all ex-officio and nominated members of the Board of Director.

Thus, the State Government has neither financial and functional control, nor administrative control over the functioning of the Federation. At best the role of the State Government can be said to be of regulatory and there is no direct or indirect pervasive control over the Federation.

10. In the light of the rival contentions referred to above, it has to be seen as to whether the State has go financial, functional and administrative control and whether such control is pervasive over the functioning of the Federation.

11. As guided by the Hon"ble Supreme Court in the various decisions referred to above, the question in each case has to be decided, in the light of the cumulative facts as established, whether the Federation is financially, functionally and administratively dominated by or under the control of the Government. Further it has to be seen whether such a control is pervasive without being regulatory. These could be seen by analysing the objects which have been incorporated in the memorandum of Association and the bye-laws. There is no dispute in the fact that the bye-laws govern the functions of the Federation.

12. According to the counsel for the Federation, as per the bye-law governing this Federation the Marketing Federation is totally independent body and there is no deep rooted and pervasive control of the State Government over the management of the Federation and it is neither financially, nor functionally, nor administratively dominated by or under the control of the Government.

13. While elaborating this point, the learned Counsel for the Federation brought to our notice one development which took place subsequent to bifurcation, which is as follows:

On 23.11,2001, the Secretary, Department of Animal Husbandry and Fisheries, Government of Jharkhand, issued an order under Sections 41 and 42 of the Bihar Re-organisation Act, 2000, declaring the Federation (COMFED) as the property of the State of Jharkhand. By virtue of this order, the Chief Executive Officer of the Federation was directed to function under the control of the Department of Animal Husbandry, Government of Jharkhand with immediate effect.

On coming to know this, the Managing Director, COMFED, informed the Secretary, Department of Animal Husbandry, that the COMFED, after re-organisation of the State, has become Multi State Co-operative Society and therefore, the order passed on 23.11.2001 was not in accordance with law and requested the Secretary to recall the said order. Despite that, the Government of Jharkhand issued a resolution taking over the Federation to the Government. This was challenged in the writ petition before the Division Bench of this Court in W.P. (C) No. 3201/2002.

In this case, one of the issues raised is that "Whether, after re-organisation of the State, the COMFED, a Co-operative Society, shall be deemed to be a multi State Co-operative Society u/s 95(1) of the Multi State Co-operative Societies Act, 1984 or not?

This issue was raised because of the claim and counter-claim of the parties. According to the Federation, after re-organisation, the Federation has become Multi State Cooperative Society and the Government has no control; on the other hand, it is the claim of the State of Jharkhand that it is under the control of the Government.

Ultimately, the Division Bench, by the order dated 26.6.2003, held in favour of the COMFED, the Federation, to the effect that COMFED shall be deemed to be a Multi State Co-operative Society under Sub-section (1) of Section 95 of Multi State Co-operative Societies Act, 1984, since the date of re-organisation of State of Bihar, i.e. with effect from 15.11.2000 and set aside the order of the Secretary of the Government dated 23.11.2001 and the order of the Registrar, Co-operative Societies dated 5.11.2002. While deciding the aforesaid issue, the Division Bench of this Court observed as follows:

...COMFED, which is deemed to be a Multi State Co-operative Society under Sub-section (1) of Section 95 of M.S. Co-Operative Societies Act, 1984, since the date of re-organisation of State of Bihar i.e. with effect from 15th November, 2000.

In view of finding aforesaid, the order No. 52 dated 23rd November, 2001 (Annexure-1) and the resolution No. 444 dated 4th June, 2002, (Annexure-5) issued by the authorities or by Government of Jharkhand and the order dated 5th November, 2002, passed by the Registrar, Co-operative Society, communicated vide letter No. L-11016/ 9/2002--L & M dated 4th December, 2002, are set aside.

While dealing with the question raised in the instant case, it is appropriate to take notice of the same for proper appreciation of the facts of this case.

14. Now let us see the submissions made by the counsel for the Federation in respect of three important aspects.

As regards the first aspect that there is no financial control of the State Government over the Federation, the learned Counsel for the respondent-Federation pointed out various rules of the bye-laws.

The first rule pointed out by the counsel for the Federation is Rule 4. This rule deals with various sources for raising of funds by it. There are ten sources which are as follows:

4. Funds: Funds may be raised by-

4.1 Shares

4.2 Debentures

4.3 Deposits

4.4 Loans

4.5 Grants, aids and subsidies

4.6 Donations

4.7 Entrance Fees.

4.8 The Federation may accept funds from any development agency or any financial institution by accepting loans etc., as per the terms and conditions prescribed by such institutions as may be mutually agreed upon.

4.9 The authorised share capital of the Federation shall be Rs. 15 crores divided into 150 thousand share of Rs. one thousand each and shall be paid in full on allotment.

4.10 The funds of the kind specified in (4.2), (4.3) and (4.4) above to be raised shall not exceed twelve times of the total paid up share capital and reserve fund; less accumulated losses as provided in Act or Rules thereunder.

According to the learned Counsel for the Federation, as far as shares are concerned, when the Federation was new born baby, the State Government was the major shareholder to regulate its activities. Now there are increased numbers of Milk Unions. Therefore, shareholders of outside are increasing every year and the State Government is decreasing year by year. Though at the beginning, the share of the Government was more than 90%; now at present the share of the State Government has decreased to 72% only. So the decreasing trend of the Government goes to show that day by day other members of the Federation, i.e. Cooperative Milk Unions, are getting stronger.

The total loan obtained by the Federation is about Rs. 12 crores approximately-- the loan from the State Government is only Rs. 1.5 crores and the rest of Rs. 10.5 crores is from other nationalised banks. The grant whenever given by the State Government is not actually a grant in true nature because it is a sort of contractual consideration. On several occasions, the Government, in order to fulfill its own projects, selects several federations to implement its own projects. Since the Marketing Federation is one of the best organisations in the field of Operation Flood of Milk and Milk projects, the Government often allots work orders to this Federation also, for which Federation is charging technical service

fee of 7.5%.

15. According to the counsel for the petitioners, revenue grant, as per the Balance-sheet of M/s. Prakash Aditya and Co., of Rs. 5.01 crore was provided by the State to the Federation for the purchase of technical inputs, equipments, artificial insemination, producers' incentive etc. But it is pointed out by the counsel for the Federation that the total cumulative revenue expenditures incurred by the Federation till the year 2003-04 is Rs. 983.74 crores. The revenue grant, by the State Government amounting to Rs. 5.01 crore is only 0.50% and as such, the revenue expenditure is not substantially financed by the revenue grant.

It is also pointed out by the counsel for the Federation that it is true that the guarantee agreement was signed by the State Government, thereby it became guarantor for the loan granted by I.D.C. to the Federation but the fact that the Government being the guarantor for any loan by itself does not ipso facto change the status of the guarantor for being owner and that the right of ownership cannot be given to a guarantor and merely because the Government stood as guarantor, the nature of borrower cannot change. The Federation need not require any sanction or approval from the State Government for any financial decision and the right of the State Government is just like a share holder.

It is further pointed out by the counsel for the Federation that the Federation is a business like organisation and has to compete in the open market and whenever it accepts any project, it accepts the same on certain terms and conditions.

The counsel for the Federation further indicates that all the dairy projects of the State Government are not being implemented through this Federation alone as the State Government has its own dairy directorate to develop the dairying in the State and some time allots the project works to the other Federations also.

16. The learned Counsel for the Federation further points out Rules 32 and 33 of bye-laws. Rule 32, which deals with distribution of profit, provides as follows:

32. Distribution of the profit:

At the annual general meeting, the net profit shall be distributed as follows:

32.1 25% shall be carried to reserve fund.

32.2 To contribute towards the educational fund of the Bihar Co-operative Federation as and where required under the Co-operative Societies Act.

32.3. An amount not exceeding 12% per annum shall be distributed as dividend on the paid up share capital. The balance amount of net profit, after abovementioned statutory deductions, shall be taken to general fund and/or will be distributed as bonus to member unions in proportion to their business through the Federation and/or will be utilized for research and development as may be decided by the general meeting. As per this rule, 25% shall be carried to Reserve Fund; an amount not exceeding 12% per annum shall be distributed as dividend

on the paid up share capital and the balance amount of net profit shall be taken to General Fund and/or will be distributed as Bonus to Member Unions and the same will be utilised for research and development as may be decided by the General Meeting.

17. Rule 33 describes about reserve fund, which is as follows:

33. In addition to the sum in the bye-laws, 32.1, all entrance fees, donations, other than those for specific purposes and receipt on account of forfeited share and fines, other than those collected from employees, shall be carried to the Reserve Fund.

18. From perusal of the relevant rules, it is clear that they do not indicate that there is effective control of the Government over the financial management or over the funds of the Federation. On the other hand, it is noticed that the funds of the Marketing Federation is to be handled exclusively as per own rules, whereby there is no interference of any nature by the State Government. There is also no indication in the relevant bye-laws that the State Government has any role to play either in the policy decision for raising fund for the Federation or for its expenditure. From this it is clear, there is no financial control.

19. Now let us deal with the question whether there is any functional control. Rule 5 of the bye-laws, being relevant in this context, is reproduced below:

5. Membership:

The membership of the Federation shall be of the following types:

(i) Ordinary (ii) Nominal

5.2.1. Any registered Milk Union falling under the jurisdiction of the Federation shall be entitled to hold a nominal or ordinary membership.

5.2.2. A Milk Union desiring to enroll itself as a nominal member shall have to make an application to the Federation in writing, in the prescribed form along with application fee of Rs. 101/- and annual membership fee of Rs. 1000/-. However, nominal members would not have voting right or share in the profits.

5.2.3 A nominal member shall be allowed to apply to the Federation to enroll itself as Ordinary Member provided it has dealing with the Federation of two lakh units during the previous financial year. A nominal member, eligible for ordinary membership shall make an application to the Federation in the prescribed form with an entrance fee of Rs. 251/- and required amount for the member of shares as prescribed in these bye-laws. However, the membership to such nominal member shall be given subject to the approval of the general meeting.

5.2.4. Besides the nominal members mentioned in bye-laws No. 5.2.2 and 3, the nominal membership shall also be open to any person competent to contract and having business dealings or any sort of contractual relationship with the Federation. Such nominal member shall be required to pay only an admission fee

of Rs. 251/- which shall be non-refundable. These nominal members shall not have to subscribe to the share capital of the Federation, nor they shall have any right to vote in the affairs of the Federation or to seek election to any office under the Federation, nor they shall have any right to claim share in the profits of the Federation.

5.2.5. Milk Unions who have signed the bye-laws and the application of registration will be considered enrolled as ordinary members.

5.2.6. Besides the Milk Unions, the ordinary membership of the Federation shall also be open to the State "Government who will not be required to pay an admission fee as prescribed for the other members.

5.3 Every member shall hold at least one share. However, initially, every ordinary member Milk Union shall subscribe Rs. 20,000/- as share capital (this can be issued in installments).

5.3.1 The Federation shall have the right to call upon ordinary members to subscribe share capital and/or debentures in proportion to the business transacted through the Federation, as may be prescribed by the Board from time to time.

5.3.2. If the amount of share and/or debenture remains unpaid for more than six months from the due date, the Board of Directors may take suitable action on the members as they may deem fit.

20. As per this rule, there will be two types of members, i.e. Ordinary and Nominal. They have right to subscribe share capital and right to vote. The total organisational set up of the Federation is based on three-tier system. In the village level, there are registered co-operative societies of Milk Producers; in the district level, there is registered Milk Union and in the State level, there is Federation. There are five Milk Unions, such as Vishal Patliputra Union, Barauni Milk Union, Shahabad Milk Union, Mithila Milk Union and Tirhut Milk Union.

21. Rules 29 and 30 of the bye-laws deal with the Programme Committee and its functions, which are as follows:

29. Programming Committee.--The Programming Committee will consist of the following:

(i) The Managing Director of the Federation who shall be the Chairman of the Committee.

(ii) The General Manager of the Federation who shall be the Secretary of the Committee.

(iii) Chief Paid Executives of all the affiliated ordinary member Milk Unions.

(iv) The Chief Quality Control Officer of the Federation.

The Programming Committee shall meet as and when necessary but at least

once in three months.

30. Function of the Programming Committee:

30.1 The Programming Committee will perform the following functions:

30.1.1 To recommend manufacturing programme for the ensuing year and to review it periodically.

30.1.2 To Fix the minimum standard of the products to be manufactured and marketed by the Federation.

30.1.3 To recommend the programme for organising the Milk Cooperatives and milk routes in member Milk Unions.

30.1.4 To recommend the rate of the various costs for manufacture, processing, commissions, packaging charges, overhead charges, subscriptions, royalty, etc.

30.1.5. To recommend prices of raw materials and/or finished products and for that matter, recommend periodically the conversion factor for expressing Fat and SNF into units.

30.1.6. To prescribe and recommend the terms and conditions for procurement, chilling, processing and marketing of dairy and allied products.

30.1.7. To review the policies regarding procurement, processing and marketing periodically.

30.1.8 To suggest measures for increasing the productivity of the members and assist in implementing the same.

30.1.9. To suggest to undertake market research and development.

30.1.10. To plan production, procurement keeping in view of the market strategies.

30.1.11. To advise and assist members in all respect of management.

30.1.12. To recommend financial, technical, administrative and other necessary assistance to the member Unions and to recommend to enter into collaboration agreement.

30.1.13. To advise member Unions on public relations and allied matters.

30.1.14. The Programming Committee may, if it finds necessary, appoint a sub-committee to report on any specific problem and may, if necessary, co-opt on the sub-committee, a specialist in the field from amongst the staff members of the affiliated Milk Unions.

As per these provisions, the Programme Committee will recommend the manufacturing programme for the ensuing year and to review it periodically. The said committee can fix the minimum standard of products to be manufactured and marketed by the Federation. It can recommend the programme for

organising the Milk Co-operative and Milk routes member unions. Besides these, it can recommend rate of various manufacture, processing, commission, packaging charges, royalty etc. In addition to that, it can also recommend prices of raw materials and finished products. Apart from the above referred two functions, there are several other functions and every recommendation of the Programme Committee has to be assented by the General Body who is the supreme authority. These bye-laws do indicate that the State Government has no control over this Committee.

22. True it is that the functions of the Federation are of public importance of distributing milk and milk products to the public. But it is not at all related to the governmental function as it does not have any nexus with the State Government. The Federation is selling milk and milk products in the open market and is competing with other agencies who are also selling the same products. The federation is competing in the open market with other organisations and it is a business like organisation, which has no monopolistic control over its market operation nor does the State Government intervenes in its behalf. There are other agencies also which are supplying milk and milk products in the open market. As indicated above, though the Federation is doing public duty of distributing milk to public, it does not do governmental functions; on the other hand, It does the same work as other private organisations do.

23. As stated above, the State Government, in order to fulfill its own projects, allots work orders to N.G.Os like eradication of Pulse Polio, which being a public duty is implemented by N.G.Os. Merely by doing a public duty does not confer any organisation to be declared as State controlled. In other words, the function of the Federation may be helping the public at large but in no way, it can be said that it is doing a public duty to the extent that it has monopoly over the market. As a matter of fact, there is no direct or deep rooted control of the State Government over the Federation. No. provision under the bye-laws would indicate that the State Government has got any control in the functioning of day to day affairs of the Federation or policy decision of the Federation regarding manufacturing or marketing or distribution of milk and milk products. In short, there is nothing to indicate that there is functional control of the State Government over the functioning of the Federation.

24. Let us deal with the question as to whether there is administrative control over the Federation.

According to the counsel for the respondents, the bye-laws do not indicate that there is administrative control of the State Government over the Federation. Rule 15 of the bye-law, which deals with the administrative structure and general body and is relevant in this context, is reproduced below:

15. General Body.--15.1 The Supreme authority of the Federation shall vest in the General Body subject to Act, Rules and Bye-laws.

15.2.1. The General Body will consist of:

- (i) The Chairman of each affiliated Milk Union enrolled as ordinary member.
- (ii) The Registrar, Co-operative Societies, Bihar, Patna.
- (iii) All the ex-officio and nominated members of the Board of Directors.

15.2.2. The Chairman of the Board of Directors will preside over the General Meeting. In case of his absence, the meeting will elect a Chairman from amongst the members present.

15.3.1. The general meeting shall be called every year within six months of the close of co-operative year, i.e. by 31st March. This shall be called Annual General Meeting.

15.3.2. Notice of the agenda of the General meeting mentioning date, place and time of the meeting shall be issued in writing to all its members at least 14 days in advance. Provided further that in case of Annual General Meeting it may also be accompanied by a copy of the Annual Administration Report, the Audit Certificate (if available) and the Balance-Sheet. Non-receipt of such a notice by any member of the General Body shall not invalidate the proceedings of the meeting.

15.3.3. Prior notice is not necessary in case of the following:

- (i) A motion for a change in the order of the business of the agenda.
- (ii) A motion for adjournment or dissolution of the meeting.
- (iii) A motion that the meeting to pass on to the next time on the Agenda paper.
- (iv) A motion to refer the matter under consideration for discussion or report to the Board of Directors.
- (v) A motion allowed by 2/3rd of the members present.

15.4.1. An Extraordinary General Meeting may be convened at any time by the Board of Directors of the Federation, or on the latter case, the Managing Director shall call the Extraordinary Meeting within a month from the date of requisition.

15.4.2. A special general meeting may be convened by the Registrar of Co-operative Societies or by any person authorised by him in that behalf in accordance with the rules.

15.4.3. The first meeting of the members after registration shall have the same powers as are given to the Annual General Meeting.

As per this provision, the supreme authority of the Federation shall vest in the General Body. Rule 15.2.1. provides for constitution of the General Body consisting of Chairman of each affiliated Milk Union, the Registrar of Co-operative Societies, and all ex-officio and nominated members of the Board of Directors.

25. Rule 20, which is quoted below, would deal with Board of Directors.

20. Board of Director--20.1.1. Board will consist of the following:

(i) Chairman to be elected by the General Body of the Federation from amongst the Chairman of the member unions.

(ii) Chairman of the affiliated Union enrolled as ordinary member.

(iii) Registrar, Co-operative Societies

(iv) One nominee of N.D.D.B.

(v) One nominee of the Financing Agency (I.D.C.)

20.1.1. (vi) Amended Clause.--Two nominees of the State Government as under:

(a) Milk Commissioner

(b) A representative of the State Finance Department.

20.1.1. (vii) Amended Bye-laws.--The Board shall hold office for one full term as per the Co-operative Act, provided that the first Board of Directors shall be a nominated Board consisting of the following:

1. Milk Commissioner-Chairman

2. Managing Director of the Federation-Ex-officio.

3. Registrar, Co-operative Societies

4. One nominee of NDDB

5. One nominee of IDC

6. One nominee of the State Government (representing the State Finance Deptt.)

7. Managing Director, Bihar State Co-operative Bank Limited, Patna.

8. Chairman of the Unions as and when they are affiliated. The notified Board shall hold office for one full term as per the Act, provided that the term may be extended by the State Government further till deemed necessary.

20.1.2. Each member of the Board shall have voting right as fixed under these bye-laws." It shows that the Board will consist of Chairman, who shall be ex-officio Chairman, Managing Director, Registrar of Co-operative Societies, one nominee of N.D.D.B., one nominee of the State Finance Department and 5 members, who shall be Chairman of each registered Milk Unions.

26. Rule 25 deals with the power and, responsibilities and functions of the Board, which is as follows:

25. Power, responsibilities and functions of the Board.--Power to decide the policy of the Federation shall rest with the Board of Directors. The Board of Directors shall have and exercise all such powers and enter into all such agreements, make all such arrangements, take all such proceedings and do all such acts and things, as may be necessary or proper, for the due management of the Federation and for carrying out the objects for which the Federation is

established and for securing and furthering its interests subject to the provisions of the Act, or such Act as shall hereafter take its place, and to any Rules which may be passed by the State Government in pursuance of the said Act and subject also to these bye-laws, the following powers and authorities are given to and conferred upon the Board:

- 25.1. To approve the proceedings of the previous meeting.
- 25.2. To purchase or taken lease or otherwise acquire land and/or buildings, and/or construct buildings for value exceeding Rs. 1.00 lakh.
- 25.3. To borrow funds required from time to time to carry on the business of the Federation in accordance with the subject to the provisions of these bye-laws.
- 25.4. To apply to Government for exemption from holding the licence required for undertaking processing of dairy product, to generate electricity for plants etc.
- 25.5. To apply for the licence required under the rules of the State.
- 25.6. To apply for outright purchase or otherwise by way of the licence or otherwise, any patent, patent rights of inventions, trade rights, copy-rights of secret process of technical and/or know-how which may be useful to achieve the objects of Federation and to grant licences to use the same.
- 25.7. To create funds and trusts for the welfare of the employees or ex-employees of the Federation or their connections or dependents of such persons and to support the same.
- 25.8. To institute, conduct, defend, compound or abandon any legal proceedings by or against the Federation or its officers or otherwise concerning the affairs of the Federation or its officers or otherwise concerning the affairs of the Federation and also to allow time for payment or satisfaction of any debts due and to settle any claims and/or demands by or against the Federation by arbitration or otherwise.
- 25.9. To recommend to the General Body, expulsion of any member, whose conduct in the opinion of the Board is detrimental to the interests of the Federation by 3/4th majority of member present at the meeting.
- 25.10. To admit members and allot share and/or debentures.
- 25.11. To call upon the members to subscribe to share capital and/or debentures as prescribed in these bye-laws, in proportion to their dealings in terms of unit, with the Federation.
- 25.12. To receive Audit Note and approve its rectification report for placing before the next General Meeting.
- 25.13. To approve the Annual Accounts, Annual reports and to recommend distribution of profits earned by the Federation.

25.14. To fix the rate of service charges for procuring, manufacturing, processing, and marketing of raw materials and allied dairy products through the Federation.

25.15. To decide the pricing structure, rate of commission to be paid to the Primary Societies/Unions on procurement of milk and other commodities.

25.16 To decide the pricing structure for the dairy and allied products supplied by the member.

25.17 To decide taking over the management of member unions as and when requested or required.

25.18. To insure against the risk of all kinds for movable and immovable properties of the Federation.

25.19. To fix the charges for use of its trade mark/brand name.

25.20. To approve the plans, estimates and erection of plant, machinery and other assets for the business of the Federation.

25.21. To approve sale of any land and any other movable properties if not - required for the business of the Federation, provided that no property acquired through or from the State Government shall be sold without prior approval of the State Government.

25.22. To charge the fees for the services rendered by the Federation.

25.23. To review periodically and decide the conversion factor for expression of Fat and SNF or dairy produce into units on the recommendation of the Programme Committee.

25.25. To prepare Agenda for the General Meeting and fix the time, place and date of the Meeting.

25.25.Appointment of Managing Director:

To Board shall have powers to suspend or otherwise punish him provided that so long as IDC loan/interest is not fully repaid by the Federation, this power will be exercised only with the prior consent of the IDC. Appointment of Managing Director and Senior Executive shall be made by the Board of Directors on the recommendation of the panel formed for the purpose. Qualification for the post of Managing Director shall be as under:

Good degree in Food Technology/Engineering/Dairy Technology/Animal Husbandry, preferably with a post graduate qualification in Business Management. Must have at least 10 years" managerial experience out of which three years as over all Incharge of a large dairy/food consumer products processing unit. Should be a man of proved managerial competence, or an officer drawn from Indian Administrative Service who shall be appointed by the State Government in consultation with NDDB shall only be necessary till the loan to

NDDB is repaid.

25.26. The expert panel shall decide the administrative set up which shall include the staff required, qualification, experience, job requirements, scale etc. and will submit its recommendation to the Board for its approval. The panel shall be formed of the following members:

- (1) A nominee of the Government.
- (2) The Managing Director of the Federation
- (3) Representative of the IDC/ NDDB.

After the approval of the recommendation of these panel the Managing Director shall invite application for recruitment of the staff and the expert panel shall recruit suitable candidates. This panel shall be responsible for the selection of candidates for the post of Senior Officers except the Managing Director. For selection and requirement of the following members:

- (1) Representative of Government
- (2) Chairman of the Federation
- (3) Representative of IDC/NDDB:

Provided that if the Managing Director is appointed by the State Government the procedure for selection and recruitment of Managing Director as provided under this clause shall not apply.

For recruiting junior staffs of the Federation the Managing Director shall have powers to form the panel of at least three officers of the Federation.

25.27. To ensure compliance of terms and conditions of agreement with the financing institution for loan and grant as mutually agreed upon.

27. These provisions would indicate that the appointment of the Managing Director and Senior Executive shall be made by the Board of Directors on the recommendation of the panel formed for this purpose. The Expert Panel shall decide the administrative set up which shall include staff required, qualification etc. For selection and recruitment of the Managing Director, the Expert Panel shall comprise of representative of the Government, Chairman of the Federation and representative of IDC/NDDB. Though the Managing Director is an I.A.S. officer, he comes to Federation on foreign posting and works on deputation. So long as he works in the Federation, he earns his salary from the Federation. He in no way will be guided by the State Government and even his service conditions will be governed by the service rules of the Federation.

28. Rule 28, which is reproduced below, deals with the powers of the Managing Director.

28. Power of the Managing Director.--28.1 In addition to the powers mentioned

under, 28.2, the Board may by resolution vest in the Managing Director further powers and such powers may be made exercisable for such period or periods and upon such conditions and subject to such restriction as it may determine.

28.2. The General powers, duties and responsibilities of the Managing Director are as under.--28.2.1. He shall have general control over the administrative and business of the Federation.

28.2.2. He shall purchase or take on lease or acquire any land, building or properties not exceeding the value of one lakh rupees.

28.2.3. He shall be the officer to sue or to be sued on behalf of the Federation and all bonds and agreement made in favour of the Federation shall be in his name.

28.2.4. He shall have powers for and on behalf of the Federation to endorse, sign, negotiate cheques and other negotiable instruments on behalf of the Federation. He shall also sign all deposit receipts and operate on the accounts of the Federation with any bank.

28.2.5. He shall award punishment including dismissal from service to employees for whom he has powers of appointment.

28.2.6. He shall allow credits to buyers within limits fixed by the Board from time to time.

28.2.7. He shall undertake to import and export business for/on behalf of the Federation.

28.2.8. He shall carry out negotiation with the Government and other organisation.

28.2.9. He shall make necessary arrangements for transport and storage of dairy and allied produce.

28.2.10. He shall arrange to insure all properties of the Federation against risks of all kinds.

28.2.11. He shall arrange to impart training to the staff members of the Federation, unions and societies.

28.2.12. He shall enter into agreements or contract for purchase, sales, lease of land, building required for the working of the Federation and to execute documents on behalf of the Federation and to represent it.

28.2.13 He shall arrange to maintain proper accounts of the Federation.

28.2.14 He shall arrange to prepare Annual Report, Balance Sheet of the preceding financial year and Budget of the Federation for the ensuing year for placing before the Board Directors.

28.2.15. He shall convene the meeting of the Board of Directors as required

under these bye-laws and General Meeting as and when directed by the Board or found necessary or on receipt of requisition from the required number of members or upon requisition from the Registrar.

28.2.16. He shall arrange to supervise the member unions and the societies or member unions.

28.2.17. He shall appoint consultant/experts and fix the remunerations.

28.2.18. Managing Director may delegate his powers to such assisting officers as he may deem fit.

This rule provides that the Managing Director shall carry out negotiation with the Government and other organisations. This clearly indicates that the Managing Director is the Chief representative of the Federation and not part and parcel of the Government.

29. Rules 5 and 6 of the Service Rules of the Federation, which deal with the service rule of the Federation, have been pointed out with reference to the appointment of every employee of the Federation. It is filed as Annexure-C.

30. The relevant rules reiterate that every policy decision of the Federation has to be placed before the Board of Directors and is to be assented by the General Body. For example, in the meeting of Board or Director held on 16.8.1983, the Board has taken a resolution that Federation will request the State Government to send one person for the post of Managing Director, the said resolution was duly confirmed by the General Body. Thereafter one person was appointed as Managing Director on deputation. Consequently, he was appointed only in pursuance of the decision of the General Body. As such, it goes to show that the State Government has no role to play in the matter of appointment of any of the officials of the Federation including the Managing Director. Though there may be some representation of the Government official in the Federation, neither any sanction is required, nor any approval is necessary with regard to the appointment by the State Government. At best, the role of the State Government can be termed as regulatory.

31. There is no provision in the bye-laws to indicate that the State Government has any power to review or interfere in policy making or day to day business of the Federation. The Federation has its own service rules and own pay-scales which are different from that of the Government and any change in the service rules requires no approval by the State Government. It is not pointed out that there is any rule of the State Government which is binding on the Federation; on the other hand, it has its own rules and it has its own holiday list. As such, no rule or service condition of the State Government is binding on the Federation. The Federation has its own bye-laws and service conditions and it is only the General Body which can take policy decisions and the Government has no role to play to review the said decision. It is also noticed that the Government also filed an affidavit that the Government has no financial control, administrative control

and functional control over the Federation.

32. From the above discussion, the following aspects are clear:

(1) The Federation is an Apex Federation Of three-tier Co-operative Society. It has General Body of shareholders which the supreme authority. No provision of bye-laws would allow the State Government to have control over the management of the Federation.

(2) The Federation has its own Managing Committee to administer, the Society. It has its own bye-laws and service rules and no decision of the State Government is binding unless it is approved by the General Body of the Federation.

(3) The promotion policy of the Federation employees is different from the State Government. The Federation is totally independent to make recruitment of personnel or to give promotion without any interference of the Government. The Officer may come on deputation from the Government, but they have to earn from the Federation and are guided by the service conditions of the Federation and not by the service conditions of the State Government.

(4) The Federation is totally independent for formulating its policies for conduct of its business, establishment of various plants, acquisition and disposal of assets etc. it is in no way subservient to the State Government in conduct of its business!

(5) The Federation supports its business out of its own resources generated through its products and borrowings from the financial institutions. There is no financial control of any nature of the State Government over the Federation.

(6) The Federation is a business like organisation and it has to compete in the open market with other agencies dealing with the same products. As such, the Federation does not enjoy monopoly status over the market. The market is open for other agencies also and it is neither State conferred, nor State protected.

(7) It is true that some nominees of the State Government are members of the Board of Directors but there is no direct control of the State Government over the affairs of the Apex Co-operative Society and nothing is there in the bye-laws to show that the State Government provides necessary funds for the business of the Federation, nor there is anything to indicate that there is control of the State Government over day to day functioning of the respondent Federation, which (control over day to day functioning) is the responsibility of the General Body, which, as indicated above, is the supreme authority.

(8) There is no deep rooted or pervasive control of the State Government over the Federation. Some of the Annexures shown by the petitioners would indicate that this role is only regulatory in nature not indicating pervasive control of the State Government over the functioning of the Federation.

33. In view of the above facts and circumstances and in the light of the above analysis of different provisions of the bye-laws and service rules, this Full Bench

is constrained to conclude and answer the reference accordingly. To sum up, "the Federation in question can in no way be termed as an agency of the State Government as there is no financial, functional and administrative control of the State Government over It and at best, the role of the State Government over the Federation can be termed as regulatory and not pervasive and as such, the Federation does not come within the meaning of Article 12 of the Constitution of India."

34. In view of the above answer, writ petitions are not maintainable and they are dismissed. The reference is answered accordingly.

Narendra Nath Tiwari, J.

35. I agree.

D.P. Singh, J.

36. I agree.