

(2006) 03 AHC CK 0210

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 11910 of 2000

Jyoti Kumar Malviya

APPELLANT

Vs

Indian Farmers Fertilizers Co-operative Limited, Phoolpur Project, Chief Manager (Finance and Accounts), Indian Farmers Fertilizers Co-operative Limited, Phoolpur Project, Managing Director (Appellate Authority), IFFCO Head Office and Dr. A.K. Pandey, Chief Medical Officer, Indian Farmers Fertilizers Co-operative Limited (IFFCO), Phoolpur Project

RESPONDENT

Date of Decision : 21-03-2006

Acts Referred:

Banking Regulation Act, 1949 — Section 5
Constitution of India, 1950 — Article 12, 14, 16, 226, 311
Uttar Pradesh Co-operative Land Development Bank Act, 1964 — Section 30

Citation : (2006) 7 AWC 6717

Hon'ble Judges : Dilip Gupta, J;B.S. Chauhan, J

Bench : Division Bench

Advocate : K.P. Agrawal, R.N. Singh, J.K. Malviya, V.K. Singh, G.K. Malviya, U.K. Pandey, Rajesh Singh and Anuradha Sundram, for the Appellant; S.P. Gupta and V.K. Agrawal, for the Respondent

Final Decision : Disposed Of

Judgement

B.S. Gupta and Dilip Gupta, JJ.—A learned Judge of this Court has referred the following two questions for decision by a Larger Bench:

- (1) Whether IFFCO can be said to be an "instrumentality " of the State?
- (2) Whether IFFCO discharges "Public Functions " because of which it is amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution of India?

2. The need to refer these two questions arose because the learned Judge felt that the decision of this Court given on 17.12.1991 in W.P. No. 6143 of 1984 (Shyam Lal v. IFFCO and Ors.) and another decision of this Court given on

26.11.1996 in W.P. No. 34064 of 1996 (IFFCO Employees Union and Ors. v. Executive Director and Anr.) on which reliance was placed by the learned Counsel for the respondent Indian Farmers Fertilizers Co-operative Ltd. (hereinafter referred to as "IFFCO") in support of his contention that the said body was not amenable to the writ jurisdiction of the High Court required reconsideration in view of the decision of the Supreme Court in U.P. State Cooperative Land Development Bank Ltd. Vs. Chandra Bhan Dubey and Others, and a Division Bench decision of this Court in Jagveer Singh v. Chairman Co-operative Textile Mills Ltd. Shahkari Nagar, Bulandshahr and Ors. (1999) 2 UPLBEC 1521.

3. Article 226 of the Constitution provides that every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose. Part III of the Constitution deals with the fundamental rights and Article 12 which defines "The State" is contained in Part III of the Constitution. The significance of Article 12 of the Constitution has been emphasised by a Constitution Bench of the Hon"ble Supreme Court consisting of seven Hon"ble Judges in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, in the following words:

But before considering the decisions it must be emphasized that the significance of Article 12 lies in the fact that it occurs in Part III of the Constitution which deals with fundamental rights. The various Articles in Part III have placed responsibilities and obligations on the "State" vis-a-vis the individual to ensure constitutional protection of the individual's rights against the State, including the right to equality under Article 14 and equality of opportunity in matters of public employment under Article 16 and most importantly, the right to enforce all or any of these fundamental rights against the "State" as defined in Article 12 either under Article 32 by this Court or under Article 226 by the High Courts by issuance of writs or directions or orders.

(emphasis supplied)

4. As seen above, Article 226 of the Constitution confers powers on the High Courts to issue to "any person" or "authority" writs for enforcement of "the fundamental rights" as well as "for any other purpose". The power to issue writs of the nature expressly mentioned "to any person" can only mean the power to issue such writ to any person to whom, according to well established principles the writ lay and the words "for any other purpose" must mean a purpose other than enforcement of fundamental rights for which any of the writs would, according to established principles issue i.e. for enforcement of some other legal right and the performance of some legal duty.

5. The word "State" has been defined in Article 12 to include the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

6. Dr. B.R. Ambedkar explained the scope of Article 12 and the reason why this Article was placed in the chapter of fundamental rights in the Constituent Assembly by stating:

The object of the fundamental rights is twofold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority - I shall presently explain what the word "authority" means - upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the fundamental rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards, Municipalities, even Village Panchayats and Taluk Boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules, or make bye-laws.

If that proposition is accepted - and I do not see anyone who cares for fundamental rights can object to such a universal obligation being imposed upon every authority created by law - then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as "the State", as we have done in Article 7; or, to keep on repeating every time, "the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Post Trust, or any other authority". It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority. The wisest course is to have this comprehensive phrase and to economise in words.

7. The definition of "State" was initially treated to be exhaustive confined to the authorities stipulated under Article 12 and those which could be read ejusdem generis with the authorities mentioned in Article 12 itself because till about the year 1967 the Courts had taken the view that even statutory bodies, Universities, Selection Committee for admission to Government Colleges were not "other authorities" for the purpose of Article 12. It was only in the year 1967 that a Constitution Bench of the Supreme Court consisting of five Hon'ble Judges in the case of Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others, held that the expression "other authorities" was wide enough to include all Constitutional or Statutory Authorities on whom powers were conferred by law and it was not at all material that some of the powers conferred were for the purpose of carrying on commercial activities. It was observed:

The expression "other authorities" is wide enough to include within it, every

authority created by a Statute and functioning within the territory of India or under the control of the Government of India; and we do not see any reason to narrow down these meanings in that context in which the word "other authorities" are used in Article 12 .

8. Thus, though the definition of "State" was expanded but it followed that since a company incorporated under the Companies Act was not formed statutorily and was not subject to any statutory duty, it was excluded from the purview of the "State". Reference in this connection may be made to the decision of the Supreme Court in *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*,

9. Then came the decision of another Constitution Bench of the Supreme Court consisting of five Hon'ble Judges 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 question involved in the said case was whether Oil and Natural Gas Commission, The Industrial Finance Corporation and Life Insurance Corporation, each of which were public corporations set up by Statutes, were other authorities and, therefore, within the definition of State in Article 12 even though they were constituted for commercial purposes. Chief Justice A.N. Ray, gave the majority judgment. Mathew, J. who gave the concurring judgment gave the following reasons for the necessity to expand the definition of "other authorities":

The concept of state has undergone drastic changes in recent years. Today state cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation.... A state is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the state acting through a corporation and making it an agency or instrumentality of the State...The tasks of government multiplied with the advent of the welfare state and consequently, the framework of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialised and highly technical character. At the same time "bureaucracy" came under a cloud. The distrust of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through separate corporations which would operate largely according to business principles and be separately accountable...The public corporation, therefore, became a third arm of the Government...The employees of public corporation are not civil servants.... In so far as public corporations fulfil public tasks on behalf of government, they are public authorities and as such subject to control by government.... The emerging principle appears to be that a public corporation being a creation of the State is subject to the constitutional limitation as the State itself. The preconditions of this are two, namely, that the corporation is created by State, and, the existence of power in the corporation to invade the constitutional right of individual.... The governing power wherever located must

be subject to the fundamental constitutional limitations.... The ultimate question which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business.

(Emphasis supplied)

10. It must also be noticed that on the same day and by the same Constitution Bench of the Supreme Court, *Sabhajit Tewary Vs. Union of India (UOI) and Others*, was decided. The Council of Scientific and Industrial Research was held not to be an authority for two reasons. The first was that the society did not have a statutory character like the Oil and Natural Gas Commission or the Life Insurance Corporation or the Industrial Finance Corporation but was merely a society incorporated in accordance with the provisions of Societies Registration Act and secondly the employees did not enjoy the protection available to government servants as contemplated under Article 311 and, therefore, could not be held to be a department of the Government.

11. The next important decision is *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and we consider it useful to reproduce this passage from the judgment of the Supreme Court:

A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the corporation by Government enough or is it necessary that in addition, there should be a certain amount of direct control exercised by Government and, if so, what should be the nature of such control? Should the functions which the corporation is charged to carry out possess any particular nature of the functions immaterial? Now, one thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. But, as is quite often the case, a corporation established by statute may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by Government, though this

consideration also may not be determinative, because even where the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions. What then are the tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate an all-inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not.

(emphasis supplied).

12. The Supreme Court in the aforesaid decision propounded certain tests which were subsequently reformulated after two years by another Constitution Bench of five Hon'ble Judges in the case of *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*. This case was in respect of a Regional Engineering College whose administration was carried on by a society registered under the provisions of Societies Act, 1898. An objection was raised by the society in response to the petition filed by the candidates challenging the admission procedure that it was not "State" within Article 12 and, therefore, not amenable to the writ jurisdiction of the Supreme Court under Article 32 of the Constitution. The Court observed that the society cannot be equated with the Government of India or the Government of any State and nor could it be said to be a local authority. It, therefore, was required to be seen whether it would fall within the expression "other authorities" for it to be a State under Article 12 of the Constitution. The Court also emphasised that the concept of instrumentality or agency of the Government is not limited to a corporation created by a Statute but is also equally applicable to a company or a society and in each individual case it would have to be decided, on a consideration of the relevant factors, whether the company or the society was an instrumentality or the agency of the Government so as to come within the meaning of the expression "other authority" under Article 12. The tests laid down by the Supreme Court in *International Airport Authority* were summarized as follows:

The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government with the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the *International Airport Authority's* case as follows :

(1) One thing is clear that if the entire share capital of the corporation is held by

Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor...whether the corporation enjoys monopoly status which is the State conferred or State protected

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

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Govt. is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

(emphasis supplied).

13. The society was found to be an instrumentality or agency of the State for the following reasons:

...The composition of the Society is dominated by the representatives appointed by the Central Government and. the Governments of Jammu & Kashmir, Punjab, Rajasthan and Uttar Pradesh with the approval of the Central Government. The monies required for running the college are provided entirely by the Central Government and the Government of Jammu & Kashmir and even if any other monies are to be received by the Society, it can be done only with the approval of the State and the Central Governments. The Rules to be made by the Society are also required to have the prior approval of the State and. the Central Governments and the accounts of the Society have also to be submitted to both the Governments for their scrutiny and satisfaction. The Society is also to comply with all such directions as may be issued by the State Government with the approval of the Central Government in respect of any matters dealt with in. the report of the Reviewing Committee. The control of the State and the Central Governments is indeed, so deep and pervasive that no immovable property of the Society can be disposed of in any manner without the approval of both the Governments. The State and the Central Governments have even the power to appoint any other person or persons to be members of the Society and any member of the Society other than a member representing the State or Central Govt. can be removed from the membership of the Society by the State Government with the approval of the Central Government, The Board of Governors, which is in-charge of general superintendence, direction and control of the affairs of Society and of its income and property is also largely controlled by nominees of the State and the Central Governments. It will thus be seen that

the State Government and by reason of the provision for approval, the Central Government also, have full control of the working of the Society and it would not be incorrect to say that the Society is merely a projection of the State and the Central Governments...

14. The Constitution Bench of the Supreme Court in *Pradeep Kumar Biswas*, upon a consideration of the above referred cases and a number of other cases, made the following observations:

The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi*, be considered to be a State within the meaning of Article 12. The question in each case would be - whether In the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

(emphasis supplied).

15. The issue involved in *Pradeep Kumar Biswas* was whether Council for Scientific and Industrial Research (CSIR) was an "authority" within the meaning of Article 12 of Constitution so that the writ petition could be maintainable against it. It was found that CSIR was "created" by the Government to carry on in an organized manner what was being done earlier by the Department of Commerce of the Central Government and it was set up in national interest to further the economic welfare of the society by fostering planned industrial development in the country. In respect of the management it was found that the Government of India played a dominant role in the governing body and the control of the Government in CSIR was also ubiquitous while in connection with the financial aid it was found that though the initial capital of Rs.10,00,000/- was made available by the Central Government but even the existing financial position indicated that at least 70% of the funds were made available by the Government of India. It was, therefore, found that CSIR was both historically and in its existing operation subject to the financial control of the Government of India and the assets and funds of CSIR though nominally owned by the society were in the ultimate analysis owned by the Government. Thus, it was held to be "State" within the meaning of Article 12 of the Constitution and *Sabhajeet Tiwari* was overruled.

16. The issue whether *Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P.*, a Cooperative Society registered under the provisions of U.P. Co-operative Societies Act, 1965, was amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution came up for decision before the Supreme Court in *General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrugan Nishad and Others*, The High Court had held that it was amenable to

the writ jurisdiction as it was an instrumentality of the State but after considering a number of its earlier decisions, the Supreme Court observed:

...Therefore, even if it is taken to be admitted due to non-traverse, the share of the State Government would be only 50% and not entire. Thus, the first test laid down is not fulfilled by the Mill. It has been stated on behalf of the contesting respondents that the Mill used to receive some financial assistance from the Government. According to the Mill, the Government had advanced some loans to the Mill. It has nowhere been stated that the State used to meet any expenditure of the Mill much less almost the entire one, but, as a matter of fact, it operates on the basis of self-generated finances. There is nothing to show that the Mill enjoys monopoly status in the matter of production of sugar. A perusal of the bye-laws of the Mill would show that its membership is open to canegrowers, other societies, Gram Sabha, State Government etc. and under Bye-law 52, a Committee of Management consists of fifteen members is constituted, out of whom, five members are required to be elected by the representatives of individual members, three out of the cooperative society and other institutions and two representatives of financial institutions besides five members who are required to be nominated by the State Government which shall be inclusive of the Chairman and Administrator. Thus, the ratio of the nominees of the State Government in the Committee is only 1/3rd and the management of the Committee is dominated by 2/3rd non-government members. Under the bye-laws, the State Government can neither issue any direction to the Mill nor determine its policy as it is an autonomous body. The State has no control at all in the functioning of the Mill much less a deep and pervasive one. The role of the Federation, which is the apex body and whose ex officio Chairman-cum-Managing Director is the Secretary, Department of Sugar Industry and Cane, Government of Uttar Pradesh, is only advisory and to guide its members.... Thus, we find none of the indicia exists in the case of the Mill, as such the same being neither an instrumentality nor an agency of the Government cannot be said to be an authority and, therefore, it is not State within the meaning of Article 12 of the Constitution.

(emphasis supplied)

17. Hardly a month after the aforesaid decision, yet another decision was rendered by the Supreme Court in *Federal Bank Ltd. Vs. Sagar Thomas and Others*, The Federal Bank was held not to be an instrumentality or agency of the "State" and, therefore, not amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution for the following reasons:

As indicated earlier, share capital of the appellant bank is not held at all by the government nor any financial assistance is provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant bank does not enjoy any monopoly status nor it can be said to be an institution having State protection. So far control over the affairs of the appellant bank is concerned, they are managed by

the Board of Directors elected by its share-holders. No governmental agency or officer is connected with the affairs of the appellant bank nor anyone of them is a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purposes of maintaining the healthy economic atmosphere in the country... Any business or commercial activity, may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, such which do have impact on the economy of the country in general. But such activities cannot be classified as one falling in the category of discharging duties or functions of a public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of *Ajay Hasia*. Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the Government and transferred to the appellant company.

(emphasis supplied)

18. In *G. Basi Reddy Vs. International Crops Research Instt. and Another*, the Supreme Court examined whether a writ petition would lie under Article 226 of the Constitution against International Crops Research Institute and after referring to the tests laid down in *International Airport Authority* observed:

The facts which have been narrated earlier clearly show that ICRISAT does not fulfil any of these tests. It was not set up by the Government and it gives its services voluntarily to a large number of countries besides India. It is not controlled by nor is it accountable to the Government. The Indian Government's financial contribution to ICRISAT is minimal. Its participation in ICRISAT's administration is limited to 3 out of 15 members. It cannot, therefore, be said that ICRISAT is a State or other authority as defined in Article 12 of the Constitution.

19. The issue was again examined by a Constitution Bench of the Supreme Court of five Hon''ble Judges in *Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others*, The question that had come for consideration was whether a Writ Petition under Article 32 of the Constitution was maintainable against the Board of Control for Cricket in India and after considering the principles formulated in *Pradeep Kumar Biswas* it was observed by Hon''ble Santosh Hegde, J. in the majority judgment:

The facts established in this case shows the following :-

1. Board is not created by a statute.
2. No part of the share capital of the Board is held by the Government.

3. Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board.

4. The Board does enjoy a monopoly status in the field of cricket but such status is not State conferred or State protected.

5. There is no existence of a deep and pervasive State control. The control if any is only regulatory in nature as applicable to other similar bodies. This control is not specifically exercised under any special statute applicable to the Board. All functions of the Board are not public functions nor are they closely related to governmental functions.

6. The Board is not created by transfer of a Government owned corporation. It is an autonomous body.

...

To these facts if we apply the principles laid down by seven-Judge Bench in *Pradeep Kumar Biswas* (supra), it would be clear that the facts established do not cumulatively show that the Board is financially, functionally or administratively dominated by or is under the control of the Government. Thus the little control that the Government may be said to have on the Board is not pervasive in nature. Such limited control is purely regulatory control and nothing more.

20. The Board of Control for Cricket in India was, therefore, held not to be "State" for the purpose of Article 12 of the Constitution. It needs to be pointed out also that the Supreme Court sounded a note of caution in this case that the situation prevailing at the time of *Rajasthan State Electricity* and *Sukhdev Singh* is no longer in existence as in the meantime the socio-economic policy of the Government of India has changed and hence there is no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation. The relevant passage is quoted below:

In conclusion, it should be noted that there can be no two views about the fact that the Constitution of this country is a living organism and it is the duty of Courts to interpret the same to fulfil the needs and aspirations of the people depending on the needs of the time. It is noticed earlier in this judgment that in Article 12 the term "other authorities" was introduced at the time of framing of the Constitution with a limited objective of granting judicial review of actions of such authorities which are created under the Statute and which discharge State functions. However, because of the need of the day this Court in *Rajasthan State Electricity Board* (supra) and *Sukhdev Singh* (supra) noticing the socio-economic policy of the country thought it fit to expand the definition of the term "other authorities" to include bodies other than statutory bodies. This development of law by judicial interpretation culminated in the judgment of the 7-Judge Bench in the case of *Pradeep Kumar Biswas* (supra). It is to be noted that in the meantime the socio-economic policy of the Government of India has changed [See *BALCO Employees Union (Regd.) Vs. Union of India and Others*, and the State is today

distancing itself from commercial activities and concentrating on governance rather than on business. Therefore, the situation prevailing at the time of Sukhdev Singh (supra) is not in existence at least for the time being, hence, there seems to be no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation at least for the time being. It should also be borne in mind that as noticed above, in a democracy there is a dividing line between a State enterprise and non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.

(emphasis supplied)

Having examined the decisions of the Supreme Court on this aspect, we can now proceed to examine whether IFFCO can be held to be "State" so that it could be amenable to the writ jurisdiction of this Court under Article 226 of the Constitution.

21. IFFCO is a Co-operative Society registered under the provisions of Multi-State Co-operative Societies Act, 2002 (hereinafter referred to as the "Act") which came into force on 19th August, 2002. Earlier it was registered under the provisions of the Multi-State Co-operative Societies Act, 1984 which Act was repealed by the aforesaid Act but it has been provided in Section 126(3) of the Act that every Multi-State Co-operative Society existing immediately before the commencement of the Act which was registered under the provisions of the Multi-State Co-operative Societies Act, 1984 shall be deemed to be registered under the corresponding provisions of the Act and the Bye-laws of such Society shall insofar as they are not inconsistent with the provisions of the Act, or the Rules, continue to be in force, until altered or rescinded. After the Act came into force en-block amendments were made in the Bye-laws of IFFCO which were made effective from 19th August, 2002 and these amendments have also been registered by the Central Registrar of Cooperative Societies subject to certain additions/deletions. The relevant provisions of the Act and the Bye-laws of IFFCO have, therefore, to be examined for determining whether it would be amenable to the writ jurisdiction of this Court.

22. The preamble to the Act reads:

An Act to consolidate and amend the law relating to co-operative societies, with objects not confined to one State and serving the interests of members in more than one State, to facilitate the voluntary formation and democratic functioning of co-operative as people's institutions based on self-help and mutual aid and to enable them to promote their economic and social betterment and to provide functional autonomy and for matters connected therewith or incidental thereto.

(emphasis supplied).

23. Section 5 of the Act provides that no multi-State Co-operative Society shall be registered under the Act unless its main objects are to serve the interests of

members in more than one State and its bye-laws provide for social and economic betterment of its members through self help and mutual aid in accordance with the co-operative principles.

24. Section 3 (g) of the Act defines the "Co-operative Principles" to mean those specified in the First Schedule and those relevant for our purpose are:

1. Voluntary and Open Membership.- Cooperatives are voluntary organisations, open to all persons capable of using their services and willing to accept the responsibilities of membership, without discrimination on basis of gender, social inequality, racial, political ideologies or religious consideration.

2. Democratic Member Control.- Cooperatives are democratic organisations controlled by their members, who actively participate in setting their policies and decision making. Elected representative of these co-operatives are responsible and accountable to their members.

3. Member's Economic Participation.- Members contribute equally and control the capital of their Co-operative democratically. At least a part of the surplus arising out of the economic results would be the common property of the co-operatives. The remaining surplus could be utilized benefiting the members in proportion to their share in the Cooperative.

4. Autonomy and Independence.- Cooperatives are autonomous, self-help organisations controlled by their members. If co-operatives enter into agreement with other organisations including Government or raise capital from external sources, they do so on terms that ensure their democratic control by members and maintenance of Cooperative autonomy.

25. Section 10 of the Act provides that every multi-State Co-operative Society may make its bye-laws consistent with the provisions of the Act while Section 11 of the Act deals with amendment of bye-laws and provides that they shall be made by a resolution passed by two-third majority of the members present and voting at the general meeting of the society.

26. It is in accordance with the aforesaid provisions of the Act that Bye-Laws have been framed by IFFCO and those dealing with its name, objects and membership are:

NAME AND ADDRESS

1. (iii) IFFCO shall be a body corporate and shall have the power to acquire, hold and dispose of property, both moveable and immovable, enter into contract, institute and defend suit and other legal proceedings and to do all things necessary for the purpose of furthering the interests of its members based on co-operative principles. IFFCO shall conduct its operations in a professional and commercial manner to ensure the social and economic development of its members and optimum returns to its members on their contributions in IFFCO.

OBJECTS

3. (a) The objects of IFFCO shall be to promote the economic interest of its members by conducting its affairs in professional, democratic and autonomous manner through self help and mutual cooperation for undertaking manufacture/ production/ development of chemical fertilizers, bio-fertilisers, petrochemicals, refining industrial chemicals, and hydrocarbons, their inputs & technologies, and allied products bye-products and conversion, storage, transportation and marketing; undertaking manufacture/processing/conversion of farm and forestry products, bio-technology, pisciculture and aqua-farming, agriculture machinery and implements and other agricultural inputs/outputs and their conversion, storage, transportation and marketing and undertake trading, shipping, transportation, communication and telecommunication, information technology; power generation and distribution from conventional or non-conventional energy sources, housing, real estate, construction, banking and insurance and to undertake such other activities which are conducive and incidental thereto.

(b) In furtherance of above objects, IFFCO may undertake one or more of the following activities which are indicative but not limited to (i) to set up Plant or Plants for manufacture of chemical fertilisers and allied products/bye products...

(c) IFFCO shall take all steps necessary to:

i) conduct its affairs with Professional Management;

ii) solicit participation of the Cooperative Societies in terms of contribution to equity and participation in the Business;

iii) give effect to the provisions in letter and in spirit of the Multi-State Cooperative Societies Act, 2002 (hereinafter referred to as "the Act")

MEMBERSHIP

4. No individual shall be eligible for membership of IFFCO. The membership of IFFCO will be open to the following:

(i) National Cooperative Federations of agricultural credit marketing/processing/ supply and other agricultural Cooperative Societies;

(ii) State level Cooperative Federations of agricultural credit marketing/ processing/supply and other agricultural Cooperative Societies;

(iii) District, Regional and Primary Cooperative credit marketing/processing/ supply and other agricultural Cooperative Societies including Cane Unions;

(iv) Primary Agricultural Cooperative credit, service, multi purpose, cane, irrigation, farming societies and other village agricultural societies;

(v) National Cooperative Development Corporation;

(vi) Govt. of India, to the extent that the Board/General Body of IFFCO require and request;

(vii) Public Financing Institutions to the extent required/requested by the Board/ General Body of IFFCO;

(viii) Any cooperative society activities of which are augmentative to the activities and conducive to overall growth of IFFCO.

27. Section 38 of the Act deals with Constitution, powers and functions of general body and amongst others, provides that the ultimate authority of a multi-State co-operative society shall vest in the general body of its members. Section 41 deals with the Board of Directors and provides that there shall be a board of directors for every multi-State co-operative society consisting of such number of directors as may be specified in the bye-laws, provided that the maximum number of directors in no case shall exceed twenty-one but the board may co-opt two directors in addition to twenty-one directors. The directors are elected by the members of the multi-State Co-operative Society by a resolution in the general meeting. Section 44 of the Act deals with prohibition to hold office of Chairperson or Vice-chairperson and provides that no member of a board shall be eligible to be elected as the Chairperson or Vice-chairperson of a multi-State co-operative society if such member is a Minister in the Central Government or State Government. Section 45 of the Act provides that the conduct of elections to the board of a multi-State co-operative society shall be the responsibility of the existing board and the election shall be held by secret ballot in the prescribed manner. Section 48 of the Act deals with nominee of Central Government or State Government on board. The relevant Bye-Laws of IFFCO in this regard are:

BOARD OF DIRECTOR

34. The Board of Directors of IFFCO shall not exceed 21 Directors excluding Functional Directors and Co-opted Directors. It shall consist of:

(i) One nominee each of the Apex Cooperative Marketing Federation who has contributed atleast Rs. 2 crore individually as equity from 1st August, 2000 through admission/additional contribution;

However, the states from where the total share capital from all the cooperatives was Rs. 1 crore as on July 31, 2000, the concerned Apex Cooperative Marketing Federation will continue to enjoy the rights and privileges of sending their nominee Director directly as before.

In case there are more than 10 such member federations then the first ten in descending order of their ranking would be eligible to nominate one Director each to the Board of IFFCO. The ranking will be based on weighted average of the percentage equity share capital of the concerned State in the total issued share capital of IFFCO and the average sales of IFFCO products in that State as a percentage of the total sales of IFFCO in equal proportion.

Such nominee shall be in accordance with the provisions of the Multi-State Co-operative Societies Act, 2002/Rules.

(ii) Eight Directors to be elected by the General Body.

(iii) Not more than three persons to be nominated by the Central Government based on equity share capital held by the Central Government i.e. one person if the equity share capital is less than 26%, two persons if the equity share capital is 26% or more but less than 51%; and three persons if the equity share capital is 51% or more of the total issued share capital;

(iv) The Board may co-opt two experts in the field of Management, Finance, Cooperation, Technical and/or Banking or such other professionals who would professionally strengthen IFFCO;

(v) The Managing Director, Finance Director and Marketing Director of IFFCO (all ex-officio);

(vi) The Financing agency or agencies, if any, providing long term credit to IFFCO shall also be eligible to nominate one Director if there is a provision to that effect in the loan agreement; subject to overall limit of 21 Directors.

FUNCTIONAL DIRECTORS

46. i) There shall be three functional directors i.e. Managing Director, Finance Director and Marketing Director. They shall be in whole time employment of IFFCO and members of the Board of Directors.

ii) The Managing Director shall be the Chief Executive of IFFCO and shall aid and assist the Board of Directors in its functions. He shall be member of all the committees, sub-committees and sub-groups of the Board of Directors as may be constituted.

Section 49 of the Act deals with the powers and functions of the board and includes the power to appoint and remove a Chief Executive and such other employees of the Society as are not required to be appointed by the Chief Executive, to make provisions for regulating the appointment of employees and the service conditions, to place the annual report, annual financial statements, annual plan and budget for the approval of the general body, to acquire or dispose of immovable property, to review membership in other co-operatives and to sanction loans to the members, Section 51 of the Act stipulates that the Chief Executive of every multi-State co-operative society shall be appointed by the board and he shall be a full-time employee of such multi-State co-operative society. It has further been provided in Section 52 of the Act that the Chief Executive shall under the general superintendence, direction and control of the board, exercise the powers and discharge the functions and some of the functions enumerated in the said Section are for making the appointment to the post in the Society, assisting the board in the formulation of policies, objectives and planning and furnishing to the board periodical information necessary for appraising the operations and functions of the multi-State co-operative society.

28. Section 61 of the Act deals with the government aid to multi-State

Cooperative Society and is as follows:

Notwithstanding anything contained in any law for the time being in force, the Central Government or a State Government, on receipt of request from a multi-State co-operative society and with a view to promoting co-operative movement, may,-

- (a) subscribe to the share capital of a multi-State co-operative society;
- (b) give loans or make advances to a multi-State co-operative society;
- (c) guarantee the repayment of principal and payment of interest on debentures issued by a multi-State co-operative society;
- (d) guarantee the repayment of share capital of a multi-State co-operative society and dividends thereon at such rates as may be specified by the Central Government or the State Government;
- (e) guarantee the repayment of principal and payment of interest on loans and advances to a multi-State co-operative society;
- (f) give financial assistance in any other form, including subsidies, to any multi-State cooperative society; and
- (g) provide aid to any other multi-State cooperative society on such terms and conditions as may be prescribed.

29. Section 70 of the Act deals with appointment and remuneration of auditors and provides that every multi-State Co-operative Society shall appoint an auditor at each annual general meeting. Section 77 of the Act deals with power of Central Government to direct special audit in certain cases where the affairs of any multi-State co-operative society are not being managed in accordance with self-help and mutual aid and co-operative principles or prudent commercial practices; or with sound business principles; or that any multi-State co-operative society is being managed in a manner likely to cause serious injury or damage to the interests of the trade, industry or business to which it pertains; or that the financial position of any multi-State co-operative society is such as to endanger its solvency.

30. Chapter X of the Act deals with winding up of multi-State Co-operative Society. Section 122 contained in Chapter XV deals with the power of the Central Government to give directions to specified multi-State co-operative societies in public interest and is quoted below:

If the Central Government is satisfied that in the public interest or for the purposes of securing proper implementation of co-operative production and other developmental programmes approved or undertaken by the Central Government or to secure proper management of the business of the specified multi-State co-operative societies generally or for preventing the affairs of such society being conducted in a manner detrimental to the interests of the members, any

depositors or creditors thereof, it is necessary to issue directions to any class of the specified multi-State co-operative societies generally or to any specified multi-State co-operative society or societies in particular, the Central Government may issue directions to it or to them, from time to time, and all such specified multi-State co-operative society or the societies concerned, as the case may be, shall be bound to comply with such directions.

31. The provisions contained in the Bye-Laws relating to Share Capital and Funds are as below :-

SHARE CAPITAL

5. The authorised share capital of IFFCO shall be Rs. 1000 crore made up on the following three categories of shares :

(i) 90,000 shares with face value of Rs. 1.00 lakh each to be allotted generally to the Government of India, the National Cooperative Development Corporation, Public Financing Institutions, National/State/Regional Federations and large Processing Cooperatives such as Cooperative Sugar Mills, Cooperative Cane Unions, District and Central Cooperative Banks, and Central/other cooperative societies, as are willing to subscribe to the shares voluntarily;

(ii) 50,000 shares with face value of Rs. 10,000 each to be allotted generally to District and Primary Marketing Processing/Supply and other Cooperative Societies including Cane Unions;

(iii) 5,00,000 shares with face value of Rs. 1,000 each to be allotted generally to Primary Societies at the village level.

Provided that the societies mentioned in Sub-clause (i) which have taken at least one share of Rs. 1 lakh and societies mentioned in Sub-clause (ii) which have taken at least one share of Rs. 10,000/- are eligible to take shares of lower denomination as well.

Provided also that societies mentioned in Sub-clause (ii) and (iii) are eligible for the allotment of higher denomination shares.

6. IFFCO shall quarterly retire the shares held by the non co-operative members like Government of India, and Public Financing Institutions to the extent that the cooperative members subscribe to the equity of IFFCO in order to facilitate greater participation and representation of cooperative members in IFFCO.

7. The value of share(s) may be paid one lumpsum or in instalments as specified in these Bye-laws. Shares of IFFCO shall be allotted, transferred, redeemed and/or repatriated at face value as per provisions of the Act.

FUNDS

22. IFFCO may raise funds from one or more of the following sources :

(i) Admission fee;

- (ii) Share capital;
- (iii) Loans and deposits within India and abroad;
- (iv) Debentures, Bonds and Commercial Papers within India and abroad;
- (v) Grants-in-aid and donations; and
- (vi) Profit.

32. Sri K.P. Agrawal, and Sri R.N. Singh learned Senior Counsel advanced the arguments on behalf of the petitioners and contended that the IFFCO was amenable to the writ jurisdiction of this Court under Article 226 of the Constitution while Sri S.P. Gupta, learned Senior Counsel for the respondents contended that it was not amenable to the writ jurisdiction.

33. On behalf of the petitioners it was contended by the learned Senior Counsel that IFFCO was an agency and instrumentality of the Government for carrying on the business for the benefit of the public as it satisfies the tests laid down by the Supreme Court in International Airport Authority. In support of this contention, reference was made to the averments made in paragraph 21 of the writ petition wherein it has been stated that in the report for the year 1980-81 the total paid up capital of IFFCO was Rs. 82.83/- crores out of which the share money subscribed by the Government of India was 49.2/- crores and as such Union of India owned about 66% of the share capital of IFFCO. Reliance was also placed on the averments made in paragraph 4 of the affidavit filed subsequently which indicate that towards the end of 1964, Co-operative League of USA informed the Government of India that American Cooperatives have shown interest in collaborating Co-operatives in India for establishing a fertilizer plant in India. They sent a survey team, which submitted a report that it was feasible to have a fertilizer plant (s) in India owned and operated by the Co-operatives of India. The capital cost was estimated at Rs. 90/- crores and the source of finance was to be as follows:

(Rs. in crores) Equity from Co-operative Members 9.00 Equity from Government of India 18.00 Loan from Government of India or financing agencies 24.00 Loan from U.S. AID (dollar loan) 38.00 89.00 crores OR Say 90.00 crores

34. IFFCO was then registered by the Central Registrar of Co-operative Societies on 3rd November, 1967 as a Co-operative Society under the multi-State Co-operative Society Act, 1942. The fertilizer plant at Kandla and Kalol were initially set up while the Phoolpur plant near Allahabad was set up in the year 1974, which started production in 1980. Sri K.P.Agrawal, learned Senior Counsel also submitted that even if the Government share from capital investment was subsequently redeemed, still it cannot function on its own accord as various kinds of restrictions have been made under the provisions of the Act and Bye-Laws of IFFCO which go to show that there is an all pervasive control of the Government.

35. Sri S.P. Gupta, learned Senior Counsel appearing for the respondents, however, submitted that in view of the provisions of the Act and the Bye-Laws, it is clear that the tests laid down by the Supreme Court in the case of International Airport Authority are not satisfied and, therefore, it cannot be said to be an instrumentality or agency of the State. He also placed reliance upon the averments made in the third supplementary counter affidavit wherein it has been stated that IFFCO has repatriated 100% of the equity held by the Government of India and the Government of India at present does not have any share holding in IFFCO.

36. We have carefully considered the submissions advanced by the learned Counsel for the parties.

37. In order to find out whether IFFCO can be said to be an instrumentality or agency of the State so that it can be said to be an "authority" amenable to the writ jurisdiction of this Court, we would have to fall back on the tests laid down by the Supreme Court in International Airport Authority but at the same time, we must also keep in mind the observations made by the Supreme Court in Pradeep Kumar Biswas that these tests are not a rigid set of principles so that if a body falls within anyone of them, it must be considered to be a State within the meaning of Article 12 and in each case it would have been examined, in the light of the cumulative facts, whether the body is financially, functionally and administratively dominated by or under the control of the Government and that such control is not only particular to the body in question but is all pervasive for if the control is merely regulatory, it would not make the body a State,

38. The preamble to the Act clearly shows that it has been enacted to facilitate the voluntary formation and democratic functioning of cooperatives as people's institutions based on self help and mutual aid and to enable them to promote their economic and social betterment and to provide functional autonomy. A multi-State co-operative society can be registered only if its objects are to serve the interest of the members in more than one State and the bye-laws provide for social and economic betterment of its members through self help and mutual aid in accordance with the co-operative principles. The co-operative principles which have been spelt out in the First Schedule indicate that Co-operatives are voluntary organizations, open to all persons capable of using their services and willing to accept responsibilities of membership and are democratic organizations controlled by their members, who effectively participate in setting their policies and decision making. The members contribute equitably and control the capital of their Cooperatives democratically. In fact, the Co-operatives are autonomous, self help organisations controlled by their members and if they enter into agreement with other organisations including Government or raise capital from external sources, they do so on terms that ensure their democratic control by members and maintenance of co-operative autonomy. The Bye-Laws of IFFCO have been amended when the Act come into force in the year 2002 so that they fall in line with the provisions of the Act. The ultimate authority of IFFCO vests in

the general body as provided for in Clause 27 of the Bye-Laws. The membership of IFFCO is open to, amongst others, National Co-operative Federations and State Level Co-operative Federations of agricultural credit, marketing and other agricultural Co-operative Societies, District, Regional and Primary Co-operative Societies and Government of India to the extent that the Board/General Body of IFFCO require and request.

39. The strength of the Board of Directors cannot also exceed 21 Directors excluding the Functional Directors and Co-opted Directors. Out of these, 8 Directors are to be elected by the General Body, 10 are nominees of the Apex Co-operative Marketing Federation and not more than 3 persons can be nominated by the Central Government. It is also open to the Board to co-opt two experts in the field of management, finance, co-operation, technical and/or banking who would professionally strengthen the IFFCO. This apart, there are three Functional Directors i.e. Managing Director, Finance Director and Marketing Director who shall be in whole time of employment of IFFCO. Thus, even if, the Central Government nominates three persons to the Board then too the percentage of Government nominees would be very nominal. The Managing Director is the Chief Executive of IFFCO and he has the general control over the Administration of IFFCO and he shall also aid and assist the Board of Directors in its functions. The Board of Directors have all such powers as are considered necessary or expedient for the purpose of carrying out its functions under the Act and it includes the power to admit members, to recommend to the General Body distribution of profit, to appoint or remove the Chief Executive, employees of the society, to make provisions for regulating the appointment of the employees and the service conditions, to acquire/dispose of immovable property, to review the membership in other cooperative and to sanction loan to the members.

40. What is also to be noticed is that u/s 44 of the Act, there is a complete bar for a Minister in the Central Government or the State Government to hold office of the Chairperson or Vice Chairperson. The Chairman and Vice Chairman are elected by the Board from among themselves. The Central Government cannot determine its policy as it is an autonomous body. u/s 122 of the Act, the Central Government can only issue certain directions in public interest or for the purpose of securing proper implementation of co-operative production and other development programmes approved or undertaken by the Central Government or to secure proper management of the business generally or for preventing the affairs being conducted in a manner detrimental to the interest of the members. These are merely regulatory measures and it cannot be inferred from these regulatory measures that the State has any deep or pervasive control over IFFCO. IFFCO also does not enjoy any monopoly status in the matter of production of Urea as it has been pointed out that there are about 129 companies in the private sector which are manufacturing and selling urea. The formation of IFFCO also does not show that it was created by transfer of a government owned corporation.

41. In matters of financial control, the Co-operative principles clearly define that members contribute equitably and control the capital democratically. The authorised share capital of IFFCO as provided in Clause 5 of the Bye-Laws is Rs. 1,000 crores made up of the three categories. The Government of India initially did have some share but in terms of Clause 6 of the Bye-Laws which provides that IFFCO shall quarterly retire the shares held by the non-cooperative members like Government of India and public financing institutions, IFFCO repatriated 100% of equity held by the Government of India as a result of which at present Government of India does not have any share holding in IFFCO. This apart, a perusal of the Bye-Laws further shows that it is the Board of Directors which has to decide matters relating to withdrawal, transfer and forfeiture of shares; to raise funds for the business of IFFCO and to charge the assets, properties of the Society as security for loans that may be raised by it and to settle the terms and conditions of share capital contributed by Government of India and National Co-operative Development Corporation. Clause 56 of the Bye-Laws deals with Distribution of profits of the Society which shall be as follows:

- (i) at least 25 percent shall be carried to the Reserve Fund;
- (ii) credit such portion, as is prescribed, to the Cooperative Education Fund maintained by the National Cooperative Union of India; or any other agency designated by the Committee to administer the Fund;
- (iii) the remaining amount may be allocated to any or all the purposes detailed below;
 - (a) dividend on shares subject to a ceiling of maximum 20% in a year;
 - (b) rebate to members on purchases;
 - (c) building, education, charitable or any other funds.
- (iv) the undisturbed profits shall be added to the Reserve Fund of IFFCO. However, an amount of at least 10% shall be transferred to the reserve fund for meeting unforeseen losses;
- (v) payment of ex-gratia to the employees of IFFCO in accordance with the scheme approved by the Board.

42. Thus, from the aforesaid it is clear that IFFCO is not created by a Statute; that no part of the share capital is held by the Government; that practically no financial assistance is given by the Government to meet the whole or entire expenditure of IFFCO; that IFFCO does not enjoy a monopoly status; that there is no existence of deep and pervasive State control and whatever control is there, is merely regulatory in nature; that IFFCO does not perform public functions and nor are they closely related to Government functions and that IFFCO is an autonomous body which has not been created by transfer of a Government owned corporation.

43. The principles laid down by the Constitution Bench in Pradeep Kumar Biswas

when applied to the aforesaid facts do not cumulatively demonstrate that IFFCO is financially, functionally or administratively dominated by the Government or is under its control.

44. Sri K.P. Agrawal, learned Senior Counsel appearing for the petitioner, however, placed strong reliance upon the decision of the Supreme Court in Land Development Bank Ltd. in which it was found that the control of the State in the affairs of the Bank was all pervasive and, therefore, was an instrumentality of the State and amenable to the writ jurisdiction of this Court. The said decision was considered and distinguished by the Supreme Court in Federal Bank Ltd. We, therefore, consider it appropriate to refer to the relevant observations made by the Supreme Court in this regard:

U.P. State Coop. Land Development Bank Ltd. has been relied upon by the Division Bench while passing the impugned order dismissing the appeal. We may examine the position as involved in that case in some detail. It is registered as a cooperative society under the provisions of the U.P. Co-operative Societies Act. While holding it to be an instrumentality of the State, the Court took note of the fact that though registered as a cooperative society, it was constituted under the provisions of the U.P. Cooperative Land Development Bank Act, 1964. The Managing Director and the Chief General Manager of the Bank are officials of the State, who are at the helm of the affairs of the Bank. The service rules for the employees and officers of the Bank were framed by the State Government in exercise of powers u/s 30 of the U.P. Cooperative Land Development Bank Act, 1964. The rules are called the U.P. Cooperative Land Development Bank Rules, 1971, which lay down the conditions of service of the employees. The Institutional Service Boards constituted u/s 122 of the Cooperative Societies Act has also framed service rules according to which dismissal of an employee can be ordered only after its approval by the Institutional Service Board. U.P. State Cooperative Land Development Bank Ltd. is the only bank constituted under the provisions of the U.P. Cooperative Land Development Bank Act and there cannot be any other State-level land development bank for the whole of the State. Apart from the fact that the Bank had exclusive jurisdiction over the whole of the State of Uttar Pradesh, the other land development banks could also be made members of U.P. State Cooperative Land Development Bank, in any number, as the Registrar of the Cooperative Societies may deem it necessary. It is further found that the Registrar of the Cooperative Societies, U.P. is the trustee for the purpose of securing the fulfillment of the obligations of State Land Development Bank to the holders of debentures issued by the Board of Directors. The Board of Directors is entitled to issue debentures from time to time with the previous sanction of the State Government and the trustee, against the unconditional guarantee by the State Government for the repayment in full of the principal and interest thereon, or on the security of mortgages, charges or hypothecations etc. The State Government constitutes a Guarantee Fund u/s 9 of the Act for the purpose of meeting losses that might accrue on account of loans advanced by the land development banks. The Guarantee Fund is maintained by the Finance

Department of the State Government. On the basis of the facts noted above, the Court took the view that U.P. State Cooperative Land Development Bank Ltd., though registered as a cooperative society, is an instrumentality of the State and its employees have a statutory protection under the statutory rules.

It is quite apparent that the decision in the case of U.P. State Coop. Land Development Bank Ltd. would in no way be applicable to the case in hand. The participation and control of the State in the whole activity of U.P. Land Development Bank Ltd. is all-pervasive. Its officers head the institution. U.P. Land Development Bank is constituted as the only State-level bank in the State. Under the statutory provision there cannot be any other land development bank at the State level. The Government guarantees repayment in the event of losses suffered by the Bank and with the approval of the State, the Bank may also issue debentures. To cap it all, the service conditions of the employees are governed by the statutory rules.

(emphasis supplied)

45. In the present case we have found as a fact that the State does not have any pervasive control over IFFCO and as such the said decision in the case of Land Development Bank Ltd. does not help the petitioner.

46. Sri K.P. Agrawal, learned Senior Counsel also placed reliance upon the judgment of this Court given in Jagveer Singh in which a Co-operative Society registered under the provisions of U.P. Co-operative Societies Act, 1965 was held to be an instrumentality or agency of the State in view of the provisions of the said Act. However, in Kisan Sahkari Chini Mills the Supreme Court clearly held that the mill which was also Co-operative Society registered under the provisions of the aforesaid Uttar Pradesh Co-operative Societies Act, 1965 was not an instrumentality or agency of the State Government as it did not have any deep or pervasive control over the mill. Thus, the decision in the case of Jagveer Singh does not also help the petitioner.

47. IFFCO is, therefore, not a "State" for the purposes of Article 12 of the Constitution.

48. It, however, needs to be examined whether a writ petition would be maintainable against IFFCO even if it is a private person or body.

49. Sri K.P. Agrawal, learned Senior Counsel for the petitioner submitted that even if it is held by this Court that IFFCO is not an "authority" then too it would still be amenable to the writ jurisdiction of this Court as IFFCO discharges public functions. Sri S.P. Gupta, learned Senior Counsel for IFFCO, however, submitted that IFFCO was a purely private body and was not amenable to the writ jurisdiction of this Court as it was not performing any public function.

50. The scope of Article 226 of the Constitution has been explained by the Supreme Court in Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, as under:

This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself.

51. Unlike Article 32 of the Constitution under which power has been given to the Supreme Court to issue directions, orders or writs including writs in the nature of habeas corpus, prohibition, quo-warranto and certiorari for the enforcement of any of the rights conferred by Part III of the Constitution (fundamental rights), High Courts under Article 226 of the Constitution have the power to issue directions, orders or writs to "any person" or "authority" for the enforcement of any of the rights conferred by Part III and for any other purpose. Thus, a Writ Petition can be entertained and mandamus can be issued under Article 226 of the Constitution against any person or authority which would include any private person or body. However, mandamus can be issued against a private person or body only if the infraction alleged is in the performance of the public duty. This aspect was examined by the Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, and it was observed:

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

...

Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the

development of this law, Professor de Smith states : "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view...

(emphasis supplied)

52. In *VST Industries Ltd. v. VST Industries Workers' Union and Anr.* (2001) 1 SCC 298 the Supreme Court after considering *Andi Mukta*, examined whether a writ would lie against an industry which was engaged in manufacture and sale of cigarettes and it was observed:

The High Court has relied very strongly on the decision of a learned Single Judge in *T. Gattaiah* case wherein it was stated that a writ may lie under Article 226 of the Constitution against a company incorporated under the Companies Act, 1956 as it is permissible to issue a writ against any person. Prima facie, therefore, a private person or an incorporated company cannot be taken out of the sweep and contemplation of Article 226 of the Constitution. That decision does not take note of the fact as to the nature of the functions that a person or an incorporated company should be performing to attract judicial review under Article 226 of the Constitution. In *Anadi Mukta* case this Court examined the various aspects and the distinction between an authority and a person and after analysis of the decisions referred in that regard came to the conclusion that it is only in the circumstances when the authority or the person performs a public function or discharges a public duty that Article 226 of the Constitution can be invoked. In the present case, the appellant is engaged in the manufacture and sale of cigarettes. Manufacture and sale of cigarettes will not involve any public function...

(emphasis supplied).

53. It is upon a consideration of the aforesaid two cases rendered by the Supreme Court in *Andi Mukta* and *VST Industries Ltd.* that it was observed in *Kisan Sahkari Chini Mills* that the sale of sugar would not involve public function and, therefore, the jurisdiction of the High Court under Article 226 of the Constitution could not have been invoked.

54. This issue was also considered by the Supreme Court in *Federal Bank Ltd.* and it was observed:

Merely because Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interest of the depositors etc. as provided u/s 5 (c) (a) of the Banking Regulation Act does not mean that the private companies carrying on the business or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as

indicated in the Act itself...in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it.

(emphasis supplied)

55. In *Zee Tele Films Ltd.* the Supreme Court made the following observation:

Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226.

56. In *G. Bassi Reddy* the Supreme Court observed:

A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty...ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world.

(emphasis supplied).

57. This aspect was also elaborately dealt with by the Supreme Court in *Binny Ltd. and Another Vs. V. Sadasivan and Others*, and the relevant passage is quoted below:

Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a

purely private authority. A body is performing a "public functions" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.

(emphasis supplied)

58. The aforesaid decisions of the Supreme Court clearly hold that it is only when a private person or body performs a public function and discharges a public duty that Article 226 of the Constitution can be invoked and that although it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The Supreme Court has further observed that a body performs a public function when it seeks to achieve some collective benefit for the public or a section of public and is expected by the public or that section of the public as having authority to do so.

59. In VST Industries the Supreme Court held that manufacture and sale of cigarettes will not involve any public function and in Kisan Sahkari Chini Mills it was held that manufacture and sale of sugar will not involve any public function. It must be remembered that any business or commercial activity, may be manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are such which do have an impact on the economy of the country in general but such activity cannot be classified as one falling in the category of discharging duties or functions of public nature. This is what was observed by the Supreme Court in Federal Bank. We have, therefore, no difficulty in concluding that manufacturing and selling of urea will also not involve any public function,

60. Sri K.P. Agrawal, learned Senior Counsel for the petitioner, however, placed reliance upon the decisions of this Court in Jagveer Singh and Vijai Narain Ojha v. Banaras State Bank 2001 ALJ 1264 in support of his contention that even if IFFCO is not an agency or instrumentality of the State then too it would be amenable to the writ jurisdiction as it performs public functions. In Jagveer Singh the Court held that a Co-operative Society registered under the provisions of the U.P. Co-operative Societies Act, 1965 performs public function but the Supreme Court in Kisan Sahkari Chini Mills clearly held that such a Co-operative Society does not perform any public function.

61. In Banaras Bank Ltd. , after placing reliance upon the decision of the Supreme Court in Land Development Bank Ltd. and of this Court in Jagveer Singh, the Court observed that the Banaras Bank is engaged in generating capital which is used for various developmental activities which is a function akin to the State function and an element of public interest is, therefore, necessarily involved. However, the Supreme Court in Federal Bank Ltd. clearly held that such banking activities cannot be classified as one falling in the category of

discharging duties or functions of public nature and whatever control the Reserve Bank of India has, is merely regulatory in nature.

62. In view of the aforesaid discussion the inevitable conclusion that follows is that IFFCO is not amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution. Shyam Lal and IFFCO Employees Union lay down the correct position of law and do not require any reconsideration because of the decision of the Supreme Court in Land Development Bank Ltd. or of this Court in Jagveer Singh.

63. Thus, our answer to the two questions referred to us are as follows:

1. IFFCO cannot be said to be an "instrumentality" of the State.
2. IFFCO does not discharge any "public function" and so it cannot be said to be amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution.

64. Let the matter be now placed before the learned Judge for passing appropriate orders.