(2010) 06 DEL CK 0036

In the Delhi High Court

Case No : W.P (C) 16699 of 2006

LT. Col. Ashok M. Chacko Retd. APPELLANT

Vs

UOI and Others RESPONDENT

Date of Decision : 02-06-2010

Acts Referred:
Constitution of India, 1950 — Article 12, 226

Citation : (2010) 06 DEL CK 0036

Hon'ble Judges : Indermeet Kaur, J;Gita Mittal, J

Bench : Division Bench

Advocate : S.R. Kalkal, for the Appellant; Amardeep Joshi for Ms. Jyoti Singh, Advocate for UOI/R-1, Mr. R.K. Handoo, Yoginder Handoo, Aditya Chaudhary and Mr. Atul Sharma, Advocates for R-2 and R-3, for the Respondent

Final Decision : Dismissed

Judgement

Gita Mittal, J.—This writ petition is premised on a claim for entitlement to the physical allotment of a flat constructed by the Air Force Naval Housing Board (''AFNHB'' hereinafter for brevity) in ''Jalvayu Tower'' AFNHB Phase II project at Bangalore.

2. The respondents have vehemently opposed the writ petition not only on merits but have also raised a preliminary objection to its maintainability on the ground that the AFNHB is a welfare society registered under the Societies Registration Act, 1860 which is working on a no-profit no loss basis. The AFNHB is not an instrumentality of the State and is not covered within the meaning of "State" or "other authority" as in Article 12 of the Constitution of India. Consequently, the present writ petition is not maintainable against the answering respondent.

3. We have heard the learned counsel for the parties on this issue.

4. The petitioner has arrayed Union of India as respondent no. 1 and the AFNHB as respondent no. 2. In its counter affidavit the respondent no. 2 has explained that the Union of India does not control it financially or otherwise. AFNHB is

stated to be a private welfare society functioning with the object of providing dwelling units to service personnel of the Indian Navy and the Indian Air Force. No measure of pervasive control is being exercised by the respondent no. 1 over such society.

The object and purpose of registration of the society has also been detailed. It is pointed out that for the reason that Air Force and Navy personnel are required to be posted in different places all over the country, they are unable to acquire dwelling units for their personal use on account of exigencies of service. In order to facilitate acquisition of such dwelling units for these personnel, the AFNHB undertakes to construct dwelling units on a no-profit no-loss basis. The object of the society is to construct dwelling units at cheap rates for these personnel.

So far as allotments are concerned, priority is given to the widows of the service personnel i.e. to the personnel of Air Force and Navy alone. On some occasions, the scheme is stated to have been opened for registration for other services including the paramilitary forces and other central government employees. The same is subject to the rider that the allotment would be made only as per seniority in the respective list on first come first serve basis after making confirmed allotments and not otherwise.

5. The respondent no. 2 has further stated that the Union of India has no control over the society. In order to manage its functioning, the two services i.e. the navy and the air force, alternatively depute some persons on deputation to the AFNHB. The expenses for the services of such personnel are borne by the society to the concerned service.

6. The respondent no. 1 has also filed a counter affidavit explaining that the funding for the activities of the AFNHB is provided by the contributions made by the registrants. The society has its own staff whose salaries are being paid from its own resources. The respondent no. 1 has also asserted that it has no involvement or control over the working of the respondent no. 2 or its functions.

7. So far as the governance of society is concerned, the same is not prescribed by any statutory provisions or rules or regulations. The functioning of the society is governed by its Memorandum of Association and the rules and regulations (bye-laws) approved by the Registrar of Societies.

8. It has been explained that so far as the construction work undertaken by the society is concerned, when the interest is expressed by a number of personnel to acquire dwelling units at a particular place in India, the respondent no. 2 negotiates with the local authority and purchases land. Schemes are then floated by the respondent no. 2 and subscriptions are invited from the registrants. Tenders are floated for construction work and private architects are appointed. When the dwelling units at a particular place become habitable or are in the process of become habitable, a local society is formed for the regular welfare and smooth functioning of the work of the society at such location. The entire project is thereafter handed over to the local society.

9. A categorical stand has been taken by respondent no. 1 that the executives and employees of respondent no. 2 are answerable to the registrants; they are paid from its own resources and not from the consolidated fund of India.

10. We find that there is no dispute to these assertions on record except an assertion that the persons who are deputed to respondent no. 2 from the Air Force or the Indian Navy are enjoying the benefits of government accommodation and transport. There is otherwise no material challenge to the other submissions made by the respondents.

11. The objection to the maintainability of the writ petition raised by the respondents is required to be examined in this background.

12. The principles governing adjudication on this issue are well settled and really need no elaboration. Mr.R.K.Handoo, learned counsel for the respondent no. 2 has placed reliance on the well settled principles laid down by the Apex court in Lt. Governor of Delhi and Others Vs. V.K. Sodhi and Others, We may usefully refer to the same. In this case the Supreme Court was concerned with examination of an issue as to whether the State Council of Education, Research and Training ("SCERT") is a "State" within the meaning of the expression in Article 12 of the Constitution of India. The observations of the Apex court in paras 9, 11 & 14 in this regard are relevant and read as follows:

9. As the decisions of this Court show, there is no simple litmus test, to determine whether an entity is a State or other authority within the meaning of Article 12 of the Constitution of India. What is clear from the decisions is that the various facets of the foundation and the working of the entity would be relevant in determining the question in the context of the duties entrusted to it or taken up by it for performance. It is in that context that in the latest larger Bench decision in Pradeep Kumar Biswas (supra), the majority summed up the position in paragraph 40 thus:-

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 hypothesis ,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.

xxx xxx xxx

11. The two elements, one, of a function of the State, namely, the coordinating of education and the other, of the Council being dependant on the funding by the State, satisfied two of the tests indicated by the decisions of this Court. But, at the same time, from that alone it could not be assumed that SCERT is a State. It

has to be noted that though finance is made available by the State, in the matter of administration of that finance, the Council is supreme. The administration is also completely with the Council. There is no governmental interference or control either financially, functionally or administratively, in the working of the Council. These were the aspects taken note of in Chander Mohan Khanna (Supra) to come to the conclusion that NCERT is not a State or other authority within the meaning of Article 12 of the Constitution of India. No doubt, in Chander Mohan Khanna (supra), the Bench noted that the fact that education was a State function could not make any difference. This part of the reasoning in Chander Mohan Khanna (supra) case has been specifically disapproved by the majority in Pradeep Kumar Biswas (supra). The majority noted that the objects of forming Indian Institute of Chemical Biology was with the view of entrusting it with a function that is fundamental to the governance of the country and quoted with approval the following passage in Rajasthan SEB v. Mohan Lal :-

The State, as defined in Article 12, is thus comprehended to include bodies created for the purpose of promoting the education and economic interests of the people.

The majority then stated:

We are in respectful agreement with this statement of the law. The observations to the contrary in Chander Mohan Khanna V. NCERT relied on by the learned Attorney General in this context, do not represent the correct legal position.

xxx xxx xxx

14. As we understand it, even going by paragraph 40 of the judgment in Pradeep Kumar Biswas (supra), which we have quoted above, we have to consider the cumulative effect of all the facts available in the case. So considered, we are inclined to hold that SCERT is not a State or other authority within the meaning of Article 12 of the Constitution of India. As we see it, the High Court has not independently discussed the relevant rules governing the functioning and administration of SCERT. It has proceeded on the basis that in the face of Pradeep Kumar Biswas (supra) decision, the decision in Chander Mohan Khanna (supra) must be taken to be overruled and no further discussion of the question is necessary. But, in our view, even going by Pradeep Kumar Biswas (supra), each case has to be considered with reference to the facts available for determining whether the body concerned is a State or other authority within the meaning of Article 12 of the Constitution of India. So considered, we find that the Government does not have deep and pervasive control over the working of SCERT. It does not have financial control in the sense that once the finances are made available to it, the administration of those finances is left to SCERT and there is no further governmental control. In this situation, we accept the submission on behalf of the appellants and hold that SCERT is not a State or other authority within the meaning of Article 12 of the Constitution of India. After all, the very formation of an independent society under the Societies Registration

Act would also suggest that intention was not to make the body a mere appendage of the State. We reverse the finding of the High Court on this aspect.

13. On a consideration of these principles the Apex Court had examined the structure and functions of the SCERT and concluded that it was the master of its own affairs; it was not subservient to the Government and that the Government did not have any effective or pervasive control over the working of the society which was governed by the committee constituted by its bye-laws. It is noteworthy that the court also observed that the mere fact that the Government was making available grants to the State Council and that it was entrusted with the looking after a facet of education, which was part of the duty of the State and some ex officio members who were government employees existed in the Committee were not sufficient to uphold the plea that SCERT was a State. The Supreme Court has also relied on the principles laid down in its prior judgment reported in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others,

14. In the instant case, there is not even a whisper of a suggestion to the effect that the respondent no. 2 is discharging any part of the duty of the State. No control of any kind of the Union of India over the working of the respondent no. 2 has been pointed out. As noticed above, the respondent no. 2 is governed and functions in terms of its bye-laws. No material has been placed before us which could even suggest any contribution from the coffers of the State to the funding of respondent no. 2.

15. We also find that in order to carry out its objectives the respondent no. 2 is conducting private purchases for the purpose of acquisition of land on which this construction is undertaken of the flats which are raised and thereafter allotted to its members. Respondent no. 2 appears to be functioning in a completely independent manner and is dependent on the funds which are deposited with it by its members for its functioning.

16. Looked at from any angle, there is no association of Respondent no. 1 with the functioning of the society other than making available certain officers for discharging its functions and looking after the interest of the personnel who are members of the society. It is also an admitted position so far as the expenses of these deputationists are concerned, the same are also borne by the society. The mere fact that these loaned personnel enjoy certain facilities by virtue of their employment makes no difference so far as the status of the respondent no. 2 is concerned.

17. Learned counsel for the respondent has also relied upon a Division Bench pronouncement of this court dated 2.1.2006 rendered in LPA no. 2618/2005 titled as Air Vice Marshal J.S. Kumar vs. Governing Council of Air Force Sports Complex & Another wherein the court rejected the contention that the governing council of the Air Force Sports Complex (AFSC) was a "State" under Article 12 of the Constitution of India as the Government has no effective and pervasive

control over it. It was held by this court that a writ will lie against a private body only if it is performing a public function and that it could not be held that the AFSC which was a society registered under the Societies Registration Act, funded from private contributions, was performing public functions or discharging public duties. It was accordingly held that no writ petition would lie against such a society under Article 226 of the Constitution of India.

18. Our attention is drawn by Mr. Handoo, learned counsel for the respondent no. 2 to a Single Bench decision of this court dated 7.11.2001 in Civil Writ nos. 1722 and 1798/99 and CCP 24/2001 in Asha Vij and Ors. vs. The Chief of the Army Staff and Ors. wherein it was held that the Army Welfare Educational Society which was running a school did not fall within the meaning of "State" for the reason that it was not being run and managed out of the regimental funds and there was no measure of control of the Central or State Government over its functioning. The Army Welfare Education Society was also a society related under the provisions of the Societies Registration Act, 1860.

19. In view of the above discussion, it is held that the respondent no. 1 has no involvement or measure of control over the functioning of respondent no. 2. It is also not the contention of the petitioner, and rightly so, that the functions which are being discharged by respondent no. 2 are functions of the State. Accordingly, we find substance in the objection raised by the respondent that the respondent is not "State" or "other authority".

20. Even on application of the functional test to the objectives and activities of the respondent no. 2, the petition must fail. Thus, in view of the clear principles laid down by the Supreme Court it has to be held that the respondent no. 2 does not fall within the meaning of the expressions "State" or "other authority" under Article 12 of the Constitution of India and would normally be not amenable to the jurisdiction of this court in exercise of its power under Article 226 of the Constitution of India.

21. In view of the above finding on the preliminary objection raised by the learned counsel for the respondent further adjudication on the merits in the present proceedings would be appropriate or legally permissible. Accordingly, this writ petition is dismissed on the ground that the writ petition against the respondent no. 2 is not maintainable.

22. In view of the above, the interim order made on 10.11.2006 also stands vacated.

23. At this stage, learned counsel for the petitioner has made a prayer that since the petitioner has deposited certain amounts with the respondent no. 2, the same be refunded to him. A prayer for interest thereon is made. It is submitted by Mr. R.K. Handoo, learned counsel for the respondent no. 2 that the petitioner has deposited an amount of Rs.1 lakh which shall be refunded to him as per the prescribed procedure. He further submits that the respondents had offered this refund by a letter dated 7.12.2004 and 31.8.2005 but the same was not

accepted by the petitioner.

In view of the above, the respondents are directed to refund the amount deposited by the petitioner within a period of eight weeks from today. The petitioner shall not be entitled to interest thereon.

24. Learned counsel for the petitioner has further explained circumstances in which he was not present on 23rd April, 2010 and a request for waiver of costs imposed on that date is made. Mr. Handoo, learned counsel for the respondent no. 2 has no objection to same. In view of the same, costs imposed on the last date of hearing stand waived.

