
(2010) 04 MAD CK 0352

In the Madras High Court

Case No : W.A. No's. 204 to 206 of 2000 and C.M.P. No's. 1823 to 1827 of 2000

Tamil Nadu Co-operative Milk Producers' Federation Ltd.

APPELLANT

Vs

Triad Trading Services Ltd.

RESPONDENT

Date of Decision : 13-04-2010

Acts Referred:

Companies Act, 1956 — Section 617

Constitution of India, 1950 — Article 12, 14, 19, 21, 226

Monopolies and Restrictive Trade Practices Act, 1969 — Section 10, 11, 2, 3, 3(1)

Tamil Nadu Co-operative Societies Act, 1961 — Section 9(1)

Citation : (2010) 4 LW 289

Hon'ble Judges : R. Banumathi, J; M. Venugopal, J

Bench : Division Bench

Advocate : M. Kempraj and S. Subbiah, for the Appellant; Prakash Goklaney, for R1, A. Arumugham, Special Government Pleader for R2 to R4 and P.B. Krishnamoorthy, for R5, for the Respondent

Judgement

M. Venugopal, J.—The Appellant/Third Respondent has preferred these Writ Appeals as against the common order dated 30.08.1999 passed by the learned Single Judge in W.P. Nos. 4652 to 4654 of 1999.

2. The learned single Judge while passing common order on 30.08.1999 in the above writ petitions has among other things observed that ... "Even in these cases, the Petitioners are being regulated under the provisions of Monopolies And Restrictive Trade Practices Act, 1969. So, in the event of non-supply of the said products, it is the duty of the Court to enforce the same. Moreover, the third Respondent is under the all pervasive control of the State Government. In view of the above, the submission of the learned Counsel for the third Respondent that these writ petitions are not maintainable against the third Respondent cannot be sustained in law and accordingly allowed the writ petitions with costs of Rs. 2,000/- to be paid by the fifth Respondent."

3. According to the learned Counsel for the Appellant/Third Respondent, the

learned single Judge has committed an error in issuing the writ petitions against the Appellant, a Cooperative Society registered under the Tamil Nadu Cooperative Societies Act 1961 and in fact, as per the Full Bench decisions of this Court in 1992 1 MLJ 154 and Phillip Jeyasingh Vs. The Joint Registrar of Co-operative Societies and Others, , no writ will Lie against a Cooperative Society. But this aspect of the matter has not been properly appreciated by the learned single Judge in a real perspective.

4. Proceeding further, the learned Counsel for the Appellant/Third Respondent submits that the learned Single Judge has misdirected himself in coming to the conclusion that the Appellant/Third Respondent, a Cooperative Society registered under the Tamii Nadu Cooperative Societies Act is amenable to the writ jurisdiction of this Court since it is under all pervasive control of the Tamil Nadu Government.

5. It is the contention of the learned Counsel for the Appellant/Third Respondent that as per Section 3 of the Monopolies And Restrictive Trade Practices Act, 1969 unless the Central Government by notification in the official gazette otherwise direct the said Act, shall not apply to any undertaking owned or controlled by a Corporation (not being a company) established by or under any Central provincial or State Act (vide Section 3(b) and (c) of the Act) and such being the clear cut legal position, the learned single Judge ought not to have allowed the writ petitions.

6. As a matter of fact, the learned single Judge should have directed the First Respondents/Petitioners to approach Monopolies and Restrictive Trade Practices Commission as per Section 10 of the MRTP Act so as to enable the Commission to exercise its power u/s 11 for an investigation by the Director before issuance of process in certain cases and in case of its satisfaction of the existence of prima facie case of any restrictive trade practice as per Section 2(o) of the MRTP Act, 1969 to initiate a full-fledged enquiry as per Section 37 of the Act.

7. That apart, the Learned Counsel for the Appellant/Third Respondent takes a plea that the Fifth Respondent/Dealer of the Appellant/Society will be well within its rights to withhold supplies of Butter from any wholesaler or retailer or to cause or procure another supplier to do so if it has a reasonable cause to believe that the wholesaler or the retailer has been using as loss leaders any goods of the same or a similar description whether obtained from the supplier or not and the same shall not be rendered as an unlawful one by virtue of Section 40(2) of the MRTP Act.

8. Advancing his arguments, the learned Counsel for the Appellant/Third Respondent contends that the learned single Judge has gone wrong in rendering a finding that the First Respondents/Petitioners are getting profit of 6 paise and this cannot be termed as a loss and that the Respondents cannot insist the First Respondents/Petitioners to sell the said products only at the rate fixed as maximum retail price. In short, the learned single Judge has committed an error

in mixing the two different legal aspects viz., the First Respondents/Petitioners selling the Butter at a lesser profit margin well below the recommended maximum retail price and the meaning of the term "Loss Leaders" employed in Section 40(2) of the MRTP Act as explained in Explanation II to the Section 40 of the Act and this has resulted in a wrong order being passed against the Appellant/Third Respondent and therefore prays for allowing the writ appeals in furtherance of substantial cause of justice.

9. In response, the learned Counsel for the First Respondents/Petitioners submits that they are Dealers of various fast moving consumer goods, Groceries and Dairy products and was purchasing Butter/Ghee/Flavoured milk and other products of the Appellant/Third Respondent sold under the name of. "Aavin" from the Fifth Respondent/Distributor for the area and the Fifth Respondent refused to sell its dairy products to them on the ground that they were selling the products to consumers at prices lesser than maximum retail price (M.R.P.) fixed for these products. In this regard, the First Respondents/Petitioners sent a letter dated 09.02.1999 explaining the position and also called upon the Fifth Respondent to resume supplies, etc.,

10. Added further, the learned Counsel for the First Respondents/Petitioners contends that the First Respondents/Petitioners addressed a letter dated 18.02.1999 to the Managing Director of the Appellant /Third Respondent by setting out the facts and pointing out that its distributors (wholesalers) had violated and were continuing to violate the provisions of the Essential Commodities Act as well as Section 39 and 40 of the Monopolies and Restrictive Trade Practices Act, 1969.

11. Projecting the arguments, the learned Counsel for the First Respondents/Petitioners further contends that the Appellant/Third Respondent, being an instrumentality of the State, owes a public duty to ensure that its agents/distributors/wholesalers appointed for the sale of its products act in compliance with the laws and also of the Government policy of ensuring that products marketed by it are sold to purchasers desirous of purchasing the same and it is inappropriate for a Government controlled agency to allow its distributor to refuse to sell products to an individual for the reason that the said interested purchaser is willing to resell it at a smaller margin of profit normally allowed to the trade and in short, the action of the Fifth Respondent, an appointee of the Appellant/Third Respondent affects the right of the First Respondents/Petitioners to carry on business and is violation of Articles 19 and 14 of the Constitution of India.

12. According to the learned Counsel for the First Respondents/Petitioners, the learned single Judge while allowing the writ petitions was right in observing that "in event of non supply of the products it is the duty of the Court to enforce the same", etc., and consequently allowed the writ petitions with costs of Rs. 2,000/- to be paid by the Fifth Respondent in each cases.

13. Countering the submissions of the Learned Counsel for the First Respondents/Petitioners, the Learned Counsel for the Appellant/Third Respondent submits that the Appellant/Third Respondent is marketing its Dairy products under the name "Aavin" in the city of Madras through wholesale Dealers/Franchise Retail Dealers and through parlours run by it and the wholesale dealers are paying the entire product costs in advance by means of Bank Drafts and they take delivery of Aavin products and distribute to the Retailers as per the prices determined by the Appellant/Third Respondent from time to time.

14. As a matter of fact, the wholesale dealers are given the trade commission at the rate of 4% and the Appellant/Third Respondent allows 6% retailers' margin and the retailers are selling the dairy products at the recommended maximum retail price and not more than that and in regard to the retailers appointed by the Appellant/Federation they are given 6% margin for Dairy products.

15. Expatiating his submissions, the Learned Counsel for the Appellant/Third Respondent contends that there is no privity of contract between the First Respondents/Petitioners and the Appellant/Third Respondent and indeed the privity of contract is between the Appellant/Third Respondent and its wholesale Dealers/Franchisees only. Moreover, the Appellant/Third Respondent is not legally competent to compel either its wholesale Distributors or its Franchise Retailers to supply its Aavin products to the First Respondents/Petitioners, when they are acting under the provisions of the Monopolies and Restrictive Trade Practices Act, 1969.

16. The other contention of the Learned Counsel for the Appellant/Third Respondent is that the First Respondents/Petitioners are the Franchisees of M/s. Subhiksha Trading Services Ltd., Chennai are making use of Aavin brand butter marketed by the the Appellant/Third Respondent as "Loss Leaders" when it re-sell them otherwise than in a genuine seasonal or clearance sale not for the purpose of making a profit on resale but for the purpose of attracting to the establishment at which the goods are sold customers likely to purchase other goods, etc., and as per Section 40(2) of the Monopolies and Restrictive Trade Practices Act, the wholesalers/Retailers of the Appellant/Third Respondent are entitled to withhold supplies of Aavin butter if they have reasonable cause to believe that the First Respondents/Petitioners have been using as Loss Leaders any goods of the same or similar description whether obtained from that supplier or not, etc.,

17. It is the specific contention of the Learned Counsel for the Appellant/Third Respondent that the First Respondents/Petitioners have an alternative, viable and effective remedy of lodging a complaint with the MRTP Commission under the Act and without existing the remedy, they have approached this Court by means of writ petitions under Article 226 of the Constitution of India and therefore the writ petitions are not maintainable in law.

18. In the counter to W.P. No. 4653 of 1999 filed by the Managing Direction of

the Fifth Respondent, it is mentioned that it pays the entire product cost in advance by means of Bank Draft to the Appellant/Third Respondent and will take delivery to Aavin products and distribute to the dealers as per the prices determined by the third Respondent from time to time and in this process, a normal trade commission at 4% will be received by the fifth Respondent and other dealers and the Appellant/Third Respondent further allows 6% to the retailers and that any product should not be sold to the consumer beyond the maximum retail price fixed by the Appellant/Third Respondent.

19. The fifth Respondent to its shock and surprise received complaints from various retailers that the First Respondents/Petitioners is obtaining the product from the fifth Respondent and sold it to the consumer with a margin of 0.06%. For example, the Petitioner purchases 500gm butter from the fifth Respondent at the rate of Rs. 51/- and sold it to the consumer at Rs. 51.95/- hardly 0.06% margin. The consumers complaint before the other retail vendors including the FR Os and parlours directly run by the Appellant/Third Respondent that the product viz., 500gm butter is being sold for Rs. 51.95/- by the First Respondents/Petitioners at its retail shops whereas the same product is sold as Aavin parlour as well as other retail shops for Rs. 55/-.

20. The Fifth Respondent wrote a complaint to the Appellant/Third Respondent on 25.11.1998 to take action against the First Respondents/Petitioners to curb the unfair trade practice of the First Respondents/Petitioners. The Appellant/Third Respondent has instructed the First Respondents/Petitioners not to supply the products of the Appellant/Third Respondent to the First Respondents/Petitioners unless the First Respondents/Petitioners ensure the selling price of the Appellant/Third Respondent product to the consumer only at the maximum retail price as being sold by other retailers and since the First Respondents/Petitioners have not changed its under cutting trade, the fifth Respondent has been left with no other option except to stop supply to the First Respondents/Petitioners.

21. In the counter to W.P. No. 4654 of 1999 filed by the Fifth Respondent, it is mentioned that the Appellant/Third Respondent is a Cooperative Society, registered under the Tamil Nadu Cooperative Societies Act and is not fully controlled by the State and therefore it does not come within the ambit of Article 12 of the Constitution of India and therefore the writ petition is not maintainable, also because of the fact that being a private individual, no writ will lie against the Fifth Respondent.

22. Further, the Fifth Respondent has inter alia stated that it supplies Aavin products more particularly Butter and Ghee to the First Respondents/Petitioners by adhering to the guidelines given by the Appellant/Third Respondent and the First Respondents/Petitioners with the motive of advertising his Business at the costs of the Respondents resold the products without profit otherwise than in a genuine seasonal or clearance sale, etc., and the First Respondents/Petitioners used to sell the goods with a sole motive of attracting the customers to sell its other goods at the cost of the Respondent and spoiled the reputation of the

Respondent and as per guidelines, it took steps to avoid unwanted trade competition in the locality which is not in anyway violation of Article 14 and 19 of the Constitution of India.

23. The Learned Counsel for the Appellant/Third Respondent in support of the contention that the Tamil Nadu Government is not having any pervasive control over the ad-ministration and therefore, the Appellant/Third Respondent cannot be construed to be a State coming within the ambit of Article 12 of the Constitution of India, relies on the Larger Bench decision of this Court K. Marappan Vs. The Deputy Registrar of Co-operative Societies and The Special Officer, Vattur Co-operative Agricultural Bank, in paragraph 21, it is observed as follows:

... From the above discussion, the following propositions emerge:

(i) If a particular co-operative society can be characterised as a "State" within the meaning of Article 12 of the Constitution (applying the tests evolved by the Supreme Court in that behalf), it would also be "an authority" within the meaning and for the purpose of Article 226 of the Constitution. In such a situation, an order passed by a society in violation of the bye-laws can be corrected by way of Writ Petition;

(ii) Applying the test in *Ajay Hasia* it is held that a co-operative society carrying on banking business cannot be termed as an instrumentality of the State within the meaning of Article 12 of the Constitution.

(iii) Even if a society cannot be characterised as a "State" within the meaning of Article 12 of the Constitution, a Writ would lie against it to enforce a statutory public duty cast upon the society. In such a case, it is unnecessary to go into the question whether the Society is being treated as a "person" or "an authority" within the meaning of Article 226 of the Constitution and what is material is the nature of the statutory duty placed upon it and the Court will enforce such statutory public duty. Although it is not easy to define what a public function or public duty is, it can reasonably said that such functions are similar to or closely related to those performable by the State in its sovereign capacity.

(iv) A society, which is not a "State" would not normally be amenable to the writ jurisdiction under Article 226 of the Constitution, but in certain circumstances, a writ may issue to such private bodies or persons as there may be statutory provisions which need to be complied with by all concerned including societies. If they violate such statutory provisions a writ would be issued for compliance of those provisions.

(v) Where a Special Officer is appointed in respect of a Co-operative society which cannot be characterised as a "State" a writ would lie when the case falls under Clauses (iii) and (iv) above.

(vi) The bye-laws made by a Co-operative society registered under the Tamil Nadu Co-operative Societies Act, 1983 do not have the force of law. Hence,

where a society cannot be characterised as a "State", the service conditions of its employees governed by its bye-laws cannot be enforced through a Writ Petition.

(vii) In the absence of special circumstances, the Court will not ordinarily exercise power under Article 226 of the Constitution of India when the Act provides for an alternative remedy.

24. He also invites the attention of this Court to the Full Bench decision *T.K. Ananda Sayanan Vs. The Joint Registrar co-operative Societies, Vellore Region and The Special Officer, Sinampattadai Primary Agricultural Co-operative Bank*, wherein it is among other things held that "every case of suspension or deprivation of wages for period or termination will not entitle employee of Co-operative Society to invoke writ jurisdiction and plead violation of Article 21 of the Constitution of India and that an employee of Co-operative Society cannot invoke writ jurisdiction for every alleged or imagined invasion of his rights." Also in the aforesaid decision, it is observed that "Applications to secure performance of obligations owed by Government or Society towards its employees or to resolve any private dispute cannot be decided on the basis of Article 21 of the Constitution of India."

25. It is worth to recall the observations made in paragraph No. 12 of the Full Bench decision in *T.K. Ananda Sayanan Vs. The Joint Registrar co-operative Societies, Vellore Region and The Special Officer, Sinampattadai Primary Agricultural Co-operative Bank*, which runs as follows:

12. In *Binny Ltd. and Another Vs. V. Sadasivan and Others*, the Supreme Court delineated what would be a private law remedy and a public law remedy and that indication of jurisdiction of the High Court under Article 227 of the Constitution is obtaining a public law remedy. In this case, they also referred to *General Manager, Kisan Sahkar Chini Mills Limited, Sultanpur, U.P. v. Satrugan Nishad and Ors.* (cited supra), wherein it was held that the High Court had no jurisdiction to entertain an Application under Article 226 of the Constitution as the mill was engaged in the manufacture and sale of sugar which would not involve any public function. The following extracts are relevant:

19. In *VST Industries Ltd. Vs. VST Industries Workers' Union and Another*, the very same question came up for consideration. The Appellant Company was engaged in the manufacture and sale of cigarettes. A petition was filed by the first Respondent under Article 226 of the Constitution seeking a writ of mandamus to treat the members of the Respondent Union, who were employees working in the canteen of the Appellant's factory, as employees of the Appellant and for grant of monetary and other consequential benefits. Speaking for the Bench, *Rajendra Babu, J.* (as then he was), held as follows: (SCC p. 305, para 7)

7. In *De Smith, Woolf and Jowell's Judicial Review of Administration Action*, 5th Edn., it is noticed that not all the activities of the private bodies are subject to private law e.g. The activities by private bodies may be governed by the

standards of public law when its decisions are subject to duties conferred by statute or when, by virtue of the function it is performing or possibly its dominant position in the market, it is under an implied duty to act in the public interest. By way of illustration, it is noticed that a private company selected to run a prison although motivated by commercial profit should be regarded, at least in relation to some of its activities, as subject to public law because of the nature of the function it is performing. This is because the prisoners, for whose custody and care it is responsible, are in the prison in consequence of an order of the Court, and the purpose and nature of their detention is a matter of public concern and interest. After detailed discussion, the learned authors have summarised the position with the following propositions-

(1) The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a "public" or a "private" body.

(2) The principles of judicial review prima facie govern the activities of bodies performing public functions.

(3) However, not all decisions taken by bodies in the course of their public functions are the subject-matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function:

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and

(b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute.

26. The order of this Court dated 29.07.2008 in W.P. No. 12483 of 1999 (G. Kalyanaraman and 5 Ors. v. The State of Tamil Nadu rep. By Secretary, Animal Husbandry Department and 2 Ors.) is relied on the side of the Appellant/Third Respondent, whereby and where under at paragraph No. 6, it is observed thus:

In one such case, this Court in Sural Packaging (P) Ltd., rep. By its General Manager, M.K. Karwa, S.S. Iyengar Road, Madras 18 v. State of Tamil Nadu rep. By Secretary, Finance Department, Madras 9 by judgment dated 17.08.1994 in W.P. Nos. 10798 to 10800 of 1994 has gone into the very same issue and held that the Tamil Nadu Co-operative Milk Producers Federation Limited is neither a public sector undertaking nor a State within the meaning of Article 12 of the

Constitution of India and the activities of the said Corporation cannot be brought within the writ jurisdiction under Article 226 of the Constitution of India.

and as such, the writ petitions filed by the First Respondents/Petitioners are not maintainable.

27. Besides the above, the Learned Counsel for the Appellant/Third Respondent cites the order of this Court dated 17.08.1994 in W.P. Nos. 10798 to 10800 of 1994 (Suraj Packaging (P) Ltd., rep. By its General Manager, M.K. Karwa, S.S. Iyengar Road, Madras 18 v. State of Tamil Nadu rep. By Secretary, Finance Department, Madras 9 and Anr.) wherein it is inter alia held that "...in the present case, the milk vending business cannot be called the "Governmental functions" or the "obligatory functions of the State" and consequently dismissed the writ petitions."

28. However, the Learned Counsel for the First Respondents/Petitioners in support of the proposition that the Tamilnadu Government is having all pervasive control over the Appellant/Third Respondent and therefore a Statutory duty or a Public duty is enjoined on the Appellant/Society and hence it is an Authority amenable to the writ jurisdiction, relies on the Full Bench decision of this Court K. Marappan v. The Deputy Registrar of Cooperative Societies and Anr. CD J Law Journal 2006 MHC 2470, wherein it is held thus:

Constitution of India-Article 226 -Co-operative Society-Whether Writ Petition is maintainable against the Co-operative Society-held-Even if a society cannot be characterised as a "State" within the meaning of Article 12 of the Constitution, a Writ would lie against it to enforce a statutory public duty cast upon the society-In such a case, it is unnecessary to go into the question whether the society is being treated as a "person" or "an authority" within the meaning of Article 226 of the Constitution and what is material is the nature of the statutory duty placed upon it and the Court will enforce such statutory public duty-Although it is not easy to define what a public function or public duty is, it can reasonably said that such functions are similar to or closely related to those performable by the State in its sovereign capacity.

Constitution of India-Article 226 -Service-Co-op-erative Society-Whether amenable to Writ jurisdiction Under Article 226-held-A Society, which is not a "State" would not normally be amenable to the writ jurisdiction under Article 226 of the Constitution, but in certain circumstances, a writ may issue to such private bodies or persons as there may be statutory provisions which need to be complied with by all concerned including societies-If they violate such statutory provisions a writ would be issued for compliance of those provisions.

He also places reliance on the decision of the Hon"ble Supreme Court M.P. State Cooperative Dairy Federation Limited and Anr. v. Rajnesh Kumar Jamindar and Ors. CDJ Law Journal 2009 SC 805, wherein it is held that "Federation was a part of the Department of the Government. It not only carries on commercial activities, it works for achieving the better economic development of a section of

the people. It seeks to achieve the principles laid down in Article 47 of the Constitution of India viz., nutrition value and health. It undertakes a training and research work. Guidelines issued by it are binding on the societies. It monitors the functioning of the societies under it. It is an Apex Body. Therefore we are of the opinion that the Appellant herein would come within the purview of the definition of "State" as contained in Article 12 of the Constitution of India."

29. The next limb of argument raised on behalf of the First Respondents/Petitioners is that the issues involved in the writ petitions are not disputes inter se between the members of the Appellant/Third Respondent or its constituent societies nor cases of serious disputes which could be resolved by the machinery under the Tamil Nadu Co-operative Societies Act.

30. Lastly, it is the submission of the Learned Counsel for the First Respondents/Petitioners that when a Statutory or Public duty is to be enforced, one need not be driven to take recourse to an alternative remedy, which is not an efficacious one, moreso, when the M.R.T.P. Act has been replaced by the Competition Act.

31. At this juncture, we aptly point out that Section 3 of the Monopolies and Restrictive Trade Practices Act, 1969 specifies the undertakings to which the M.R.T.P. Act does not apply and by the M.R.T.P. (Amendment) Act 1984 exempted undertakings owned by the Co-operative Societies as also the financial institutions from the scope of the Act and also an explanation was added to clarify that in determining whether an undertaking is owned or controlled by a Statutory Corporation, shares held by financial institutions shall not be taken into account. In fact, the Section seeks to exclude from the ambit of the Act all undertakings owned, controlled or managed by the Central and/or the State Government, Trade Unions or other Associations of workmen, undertakings owned by the Co-operative Societies and the financial institutions as defined Clause (da) of Section 2 of the Act.

32. We deem it appropriate to quote the decision In Re Travancoor Cochin Chemicals Ltd. (1978) 48 Comp Cas 765, wherein it is laid down as follows:

As 80% of the capital of the Respondent-Company was owned by the Government of Kerala, the Fertilisers and Chemicals (Travancore) Limited (a Central Government managed Company) and the Kerala State Industrial Development Corporation, u/s 617 of the Companies Act, 1956, the Company is a Government Company. Therefore, the Monopolies and Restrictive Trade Practices Act, 1969 will not apply to the Respondent-Company, unless notification by the Central Government u/s 3 of the MRTP Act is issued.

33. It is to be borne in mind that the Undertakings owned by a Co-operative Society has been placed outside the scope of the Monopolies And Restrictive Trade Practices Act, presumably in the hope that the relevant state laws would ensure that the Co-operatives do not indulge in monopolistic, restrictive or unfair trade practices. Significantly, the Central Government may, by notification, direct that the Act shall apply to all or any of the exempted category of undertakings.

34. That apart, an Undertaking which is merely controlled, but not owned, by a Government Company or a Corporation would be outside the ambit of the Monopolies And Restrictive Trade Practices Act, it is not so in the case of a Co-operative Society. Mere control by a Co-operative Society is not enough, the undertaking should be owned by the Co-operative Society. Once it is found that the commercial activity engaged in by the Society falls within the definition of undertaking, which is owned by it, it would be outside the ambit of the Monopolies And Restrictive Trade Practices Act and beyond the purview of the Commission due to statutory exemption u/s 3(f) of the Act as per the order dated 12.07.1985 in RTP Enquiry No. 53/1985, In Re Salem District Starch and Sago Manufacturers Service Industrial Cooperative Society Limited and Ors.

35. Be that as it may, by a Notification G.S.R. No. 605(E) dated 27.09.1991, (published in the Gazette of India Extraordinary, Part II Section 3, Sub-section (1)), the public sector undertakings whether owned by the Government or by Government Companies (except those excluded), statutory corporations, undertakings under the management of authorised controller appointed under any law, Co-operative Societies and financial institutions, all have been brought within the purview of the MRTP Act. As such, there is now no distinction in the treatment between public sector undertakings (except the excluded ones and the private sector companies and the public sector undertakings are subject to the same discipline as the private sector companies, in the matter of monopolistic, restrictive and unfair trade practices.

36. We also point out that in the decision of the Hon'ble Supreme Court S.S. Dhanoa Vs. Municipal Corporation, Delhi and Others, , it is observed that "...A Cooperative Society is not a statutory body because it is not created by a statute. It is a body created by an act of a group of individuals in accordance with the provisions of a statute. A Co-operative Society is, therefore, not a corporation established by or under an Act of the Central or State Legislature, etc.,"

37. One cannot ignore an important fact that the term "for any other purpose" in Article 226 of the Constitution enables the jurisdiction of the High Court a wider one, yet the High Court must exercise its discretion with some restraint, and parameter, in our considered view. In this regard, for exercising power as per Article 226 of the Constitution of India for issuance of a Mandamus, a Court of Law must arrive at a Conclusion that an affected party has a, legal right, which entitles him to any of the rights and that such right has been violated. No doubt, a mandamus (command) is available against any which authority including administrative and local bodies and it would lie to any person who is under a duty imposed by a statute or by the common law to perform a certain act. In order to get the relief of mandamus order, a party has to specify that he has a legal right to the performance of a legal duty by the party against whom the mandamus relief is prayed for and such a right must be substituting/available on the date of filing of the petition.

38. It is relevant for this Court to make a mention that the Hon''ble Supreme Court in the decision *M/s. Sri Tirumala Venkateswara Timber And Bamboo Firm v. Commercial Tax Officer, Rajahmundry* AIR 1968 S.C. 784 has among other things observed that "...The question as to whether the transactions in the case are sales or contracts of agency is a mixed question of fact and law and must be investigated with reference to the material which the dealer may be able to place before the appropriate authority. The question is not one which can properly be determined in an application for a writ under Article 226 of the Constitution. 1932 KB 710 and (1983) 8 AC 309, Rel.on."

39. Also in *State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd.*, in para 7, the Hon''ble Supreme Court has observed as follows:

In our view, it is apparent that the order passed by the High Court is on the face of it illegal and erroneous. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the Appellants would justify breach of contract by the Respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in an properly instituted civil suit rather than by a Court exercising prerogative of issuing writs.

40. In *Jai Singh Vs. Union of India and Others*, , the Hon''ble Supreme Court has observed that"...A Court will not grant relief under Article 226 of the Constitution of India when the case involves determination of disputed questions of fact or when the Petitioner has an alternative remedy."

41. In *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, at page 732, the Hon''ble Supreme Court at paragraph No. 11 has observed as follows:

We may point out that it is immaterial for this purpose whether the Corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a Government company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the government is not limited to a

corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the government so as to come within the meaning of the expression "authority" in Article 12.

42. It cannot be gain said that Section 39 of the Monopolies and Restrictive Trade Practices Act which speaks of "Special conditions for avoidance of conditions for maintaining re-sale prices" provides for special treatment to contracts which seek to establish minimum resale price (in contra distinction to "resale price" as understood with reference to the ingredients of Clause (f) of Section 33(1) of the Act). As a matter of fact, in the type of agreements covered by Section 33(1)(f) of the Act which refers to "Registerable agreement relating to Restrictive Trade Practice", no minimum price, as such is prescribed for resale of the Goods by the buyer. To put it differently, the arrangements coming u/s 33(1)(f) among other things will be those whereunder a determined or a maximum re-sale price or a recommended retail price is prescribed. Such arrangements, though deemed to be the nature of restrictive trade practice, will still be permissible till they are subjected to a "cease and desist" order of the Commission.

43. In effect, Section 39(2) of the Monopolies and Restrictive Trade Practices Act prohibits issue of any notice or publication of a price which may be understood as minimum price to be charged on resale of goods by the dealers. Explanation I to Section 40 defines "re-sale price" to include recommended price. However, such recommended price with the stipulation that price lower than that may be (sic) may not come within the mischief of (sic) 140 or Section 39 of the Act as the case (sic) Moreover, Section 40(2) of the Monopolies and Restrictive Trade Practices Act allows the supplier to take measures to protect himself against his goods being used as Loss Leaders and such measures are not actionable under Sub-section (1). This is an exemption under which supplies can be withheld with impunity. Explanation II to Section 40 defines "loss leaders" as goods deliberately offered for sale at a price which shows a loss to the seller in order to attract customers to buy other goods of the seller and thereby make overall profit.

44. It transpires from the perusal of the Bye-Laws of the Appellant/Third Respondent that it is registered as a Co-operative Society as per Section 9(1) of the Tamil Nadu Co-operative Societies Act. Also, some of the fundamental objects of the Appellant/Third Respondent are:

- (i) To carry out activities for promoting production, procurement, processing and marketing of milk and milk products for economic development of the forming community;
- (ii) Development and expansion of such other allied activities as may be conducive for the promotion of the dairy industry, improvement and protection of milch animals and economic betterment of those engaged in milk production. In

particular and without prejudice to the generality of the foregoing objects, the federation may;

(iii) Purchase dairy products and commodities from the members or from other sources, without affecting the interests of its members, pool, process, manufacture and market or distribute the same either under its own trade mark brand name or with its member union's trade mark or brand name.

It will also render technical, administrative, financial and other necessary assistance to the member Unions including assistance in the purchase and distribution of dairy products and commodities and enter into collaboration agreement with any agency, if the need arises. It will advice, guide, assist and control the Milk Unions in all respect of management and supervision. Besides, encourage fodder production by member Unions or societies or individual farmers and advice the member Unions on price fixation, public relations and allied matters.

45. The Bye Laws of the Appellant/Third Respondent speaks of its authorised share capital at Rs. 10 crores dividend into 1,00,000 shares of Rs. 1,000 each, etc., The Membership of the Appellant/Third Respondent shall be of the following types

(i) Ordinary

(ii) Normal

(iii) State Government.

A share Certificate shall be issued every time when a share is subscribed by a member.

46. Furthermore, the Appellant/Third Respondent's Federation Board shall consist of the following:

(i) Chairman of each affiliated milk union;

(ii) Registrar;

(iii) One nominee of the State Government (Dairy Development Department);

(iv) One nominee of the National Dairy Development Board;

(v) One nominee of the Financing Agency (Indian Dairy Corporation) and

(vi) Managing Director of the Federation (Ex-Officio).

Significantly, Byelaw No. 20.4 speaks that "The Government may, at any time, in the interest of the Federation terminate the nomination of any or all members of the Board after giving due opportunity for making representation and nominate others in their place." Added further, the Appellant/Third Respondent has a special bye-laws pertaining to service conditions of its employees of TCMPF Limited about (i) Cadre and Recruitment Rule,

(ii) Promotion Rule

(iii) Classification

(iv) Adhoc Rules

(v) TCMPF Employees (Conduct, Discipline and Appeal) Rules

(vi) Leave Rules and Gratuity Rules

47. In the Full Bench decision *Banabihari Tripathy v. Registrar of Co-operative Societies and Anr.* AIR 1989 Orissa 31, it is laid down as follows:

A Co-operative Society on merely getting registered under the Co-operative Societies Act does not acquire any status of becoming an authority to render it amenable to the writ jurisdiction of the High Court. The supervisory powers given to the Registrar is with the object of better working of the societies and to give them guidance of well trained and expert officers.

48. In the Full Bench decision *Ajmer Singh v. The Registrar Co-operative Societies, Punjab, Chandigarh and Ors.* AIR 1981 Punjab And Haryana 107, it is held that "A Co-operative Society registered under Punjab Co-operative Societies Act is not an authority within Article 12 of the Constitution of India and therefore not amenable to writ jurisdiction,"

49. Though on the side of the Appellant/Third Respondent, it is represented that the First Respondents/Petitioners are the Franchisees of Subhiksha a chain of outlets was closed down, the same is rebutted categorically by the First Respondents/Petitioners stating that such a plea is neither correct nor is of any use because the First Respondents/Petitioners are independent entities and are carrying on Business in their own right and always have the right to do so.

50. On a careful consideration of the respective contentions and on going through the Byelaws of the Appellant/Third Respondent, the formation of share capital and functions of the Appellant/Third Respondent do not establish that there is an existence of any deep and pervasive state control over the affairs of the Appellant/Third Respondent. Further just because the Appellant/Third Respondent, registered under the Tamil Nadu Cooperative Societies Act does not acquire any status of becoming an Authority to render it amenable to the writ jurisdiction of this Court and therefore the writ petitions filed by the First Respondents/Petitioners are not maintainable per se. That apart, there is no privity of contract between the Appellant/Third Respondent and the First Respondents/Petitioners. Really speaking, the privity of contract is only between the Appellant/Third Respondent and its wholesale Dealers/Franchise only. Suffice it for this Court to point out that when the Appellant/Third Respondent has taken a specific stand that it is not legally competent to compel either its wholesale Distributors or its Franchise Dealers to supply its Aavin products to the First Respondents/Petitioners and that too, when they are acting in consonance with the provisions of the Monopolies and Restrictive Trade Practices Act and the same

being repudiated by the First Respondents/Petitioners, then mixed disputed questions of Fact and Law under the Monopolies and Restrictive Trade Practices Act or the Competition Act 2002 are not to be gone into in detail in the discretionary writ jurisdiction. Inasmuch as the dispute between the First Respondents/Petitioners and the Fifth Respondent rests on a contractual obligation, the First Respondents/Petitioners have a remedy of approaching the Civil Court or the one under the earlier Monopolies and Restrictive Trade Practices Act, now the Competition Act 2002 (12 of 2003) and it is open to the First Respondents/Petitioners to choose either of the Fora and it is otiose for this Court to state that the remedies available to the First Respondents/Petitioners under the Monopolies and Restrictive Trade Practices Act or the Competition Act are in addition to the remedies available to it under the Indian Contract Act, 1872. Viewed in that perspective, we are not in agreement with the view taken by the learned Single Judge in allowing the writ petitions and we interfere with the same by set-ting aside the common order dated 30.08.1999 passed in W.P. Nos. 4652 to 4654 of 1999 and allow the writ appeals to prevent an aberration of justice. Considering the facts and circumstances of the case, there shall be no order as to costs. The connected miscellaneous petitions are closed.