(1981) 11 RAJ CK 0019

In the Rajasthan High Court

Case No : Civil Writ Petition No. 446 of 1981

Vallabh Chand Mehta APPELLANT

Vs

Rajasthan Co-operative Diary Federation Limited and Others RESPONDENT

Date of Decision : 13-11-1981

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 309, 310, 311
Industrial Disputes Act, 1947 — Section 10

Citation : (1981) WLN 341

Hon'ble Judges : M.C. Jain, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.C. Jain, J.—This writ petition raises a question as to whether the petitioner has been absorbed in the service of the non-petitioner No. 1 or he continues to be in the service of non-petitioner No. 2. In pursuance of the advertisement, the petitioner was appointed as Accounts trainee by the non-petitioner No. 2 namely : Paschimi Rajasthan Dugdh Utpadak Sangh Limited (hereinafter referred to as ''the Sangh'') vide order dated November 5, 1976 (Anx. 1). The petitioner was appointed as Accounts trainee along with three other persons and his position was at No. 2. It was mentioned in the order that on satisfactory completion of the training, the candidates may be considered for regular appointment, if vacancies available in the cadre of the Junior Accountants. It appears that the diary plant and chilling centres of the Sangh along with their staff were taken over and transferred to the non-petitioner No. 1 namely : Rajasthan Co-operative Dairy Federation Limited (for short ''the Federation''). The Sangh issued a notice (Anx. 5) dated April 12, 1980 to the employee of the Sangh including the petitioner. This notice makes mention of amalgamation of the Sangh with the Federation but admittedly, it is incorrect. By this notice, the employees were asked to give their option of their service within a month. It was stated that it has been decided by the Sangh that all posts existing in the Sangh be abolished and service of all the employees has been transferred on deputation with effect from the date on which the Sangh is amalgamated with the Federation arid at the same time, the Federation is willing and prepared to absorb all such employees of the Sangh, who opt for the Federation Services on the terms and conditions of service as are prevalent in the Federation and that may be revised or modified in future. It was also stated in the notice that that the option submitted by the employees shall be final and no employee shall be allowed to change his option. It was also provided that employees, who will opt for the Federation, shall be demeed to have joined the Federation on the day, they, submit their option. In pursuance of this notice, the petitioner gave his option on May 24, 1980 wherein, he clearly and categorically mentioned that this option is subject to the regular appointment as a Junior Accountant. The petitioner, thereafter, came to know that the Sangh has appointed Shri D.S. Chouhah and Shri P.M. Dugar as Junior Accountants vide office order dated Augitst 18, 1980 (Anx. 2). In the origninal order of the appointment as Accountant trainees Shri P.M. Dugar was at S. No. 3, while the petitioner was at S. No. 2. On August 25, 1980 the petitioner madea representation (Anx, 3) to the Sangh for his appointment as Junior Accountant. It was further; averred that the petitioner was never absorbed in the service of the Pederation and the Federation made it clear by its letters dated September 16, 1980, (Anx. 7) and September 27, 1980 (Anx. 9). The Sangh, on the other hand, took the stand that the service of the petitioner stands transferred to the Federation so it is only the Federation, which is competent to give him appointment as Junior Accountant, as is evident from the Sangh''s letter dated September 12, 1980 (Anx. 4). The petitioner''s stand is that the petitioner having not been absorbed by the Federation, so he continues in the service of the Sangh and he is entitled to be appointed as Junior Accountant after the appointment of Shri D.S. Chouhan. Although, the petitioner stated that Shr P.M. Dugar will not be affected as there are five posts of Junior Accountants in the Sangh and as against five posts only two are working; vide office note dated November 20, 1977 (Anx. 10). The petitioner, therefore, prayed for his appointment to the post of Junior Accountant in the Sangh. It may also be stated that during the pendency of the writ petition, the Federation directed the petitioner to report himself to the Sangh by office order dated August 1, 1981 (Anx. 10A). It was also stated in the order that the petitioner gave the conditional option to continue in the service of the Federation. He appeared before the Selection Committee for the post of Junior Accountant, but he was rejected on August 20, 1980.

2. The Federation in its reply, took a clear stand that the petitioner was not absorbed in the service of the Federation and his option was conditional. The petitioner was not selected for the post of Junior Accountant, so he was sent back to the Sangh.

3. The Sangh, on the other hand, took the stand that the petitioner ceased to be in the service of the Sangh and he is in the employment of the Federation. The petitioner gave an option for the service of the Federation. The Sangh also raised some preliminary objections in its reply.

4. The petitioner submitted a rejoinder to the reply filed by the non-petitioner No. 1 and further, submitted an additional rejoinder to the reply of the non-petitioners. I shall refer to the pleas taken by the parties in respect of the preliminary objections, while dealing with the same.

5. I have heard Mr. M. Mridul, learned Counsel for the petitioner, Mr. D.K. Parihar, learned Counsel for the Federation, Mr. B.C. Mehta, learned Counsel for the Sangh and Mr. M.R. Singhvi for the non-petitioner No. 3.

6. Before considering the petition on its merit, I may first advert to the two objections raised by Mr. Mehta, learned Counsel for the Sangh. Mr. Mehta contended that the Sangh (non-petitioner No. 2) is not a ''State'' within the meaning of Article 12 of the Constitution of India, so the Sangh is not amenable to the writ jurisdiction of the court under Article 226 of the Constitution. He submitted that the Sangh is a Co-operative Society registered under the Rajasthan Co-operative Societies Act, 1965. At present, the Board of Directors is nominated by the Government having 11 members including the five representatives of the Primary Milk Societies, as per the provisions of the Bye-laws of the Sangh. The Commissioner, Desert Development, Government of Rajasthan is the Ex-officio Chairman. The Sangh is not a statutory body. Thus, it is not a State.

7. As against this, the petitioner''s case is that the Sangh has been constituted for the purpose of serving a public purpose and its capital consists mainly of the Government grant-in-aid The entire functioning of the Sangh is under control of the Government and it is the Government, which appoints a Manager of the Sangh. The necessary funds are provided by the Government. The petitioner also referred to the document Ex.R/1/3 wherein, it was stated that the Government has imposed a ban by the order dated 29-12-1977 on filling of the existing vacancies except for replacement. The petitioner was informed vide letter dated December 29, 1977 (Ex. R/1/3) that he will be informed for his appointment for the post of Junior Accountant as soon as the ban is lifted. The petitioner, thus, by reference to the finances provided by the Government and by the actual control exercised by the Government contended that the Sangh is an authority under the control of the Government and so is a State within the meaning of Article 12 of the Constitution. Both the learned Counsel referred to same case law.

8. Whether the Sangh is an instrumentality or agency of the Government or not, would depend on the question as to whether the Sangh is an authority under the control of the Government and this question is dependent on the facts. Simply because, the Sangh is registered as a Co-operative Society under the Rajasthan Co-operative Societies Act, it can not be said that it is not an authority under the control of the Government. For the question, whether the Sangh is an instrumentality or an agency of the Government, what is to be seen is as to who'' provides the financial recourses and in whom, the actual control vests.

9. In Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, their

Lordships of the Supreme Court observed as under:

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 id 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, 1860 or any other similar statute. Whatever be its genetical origin, it would be art "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 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 instrumentaliy or agency of the Government so as to come within the meaning of the expression "authority" in Article 12.

It is also necessary to add hat merely because a juristic may be an "authority" and'' therefore "State''" within the meaning of Article 12, it may not be elevated to the position of "State" for the purpose of Articles 309, 310 and 311 which find a place in part XIV. The definition of "State''s in Article 12, which includes an "authority" within the territory of India or under the control of the Government of India is not limited in its application only to part III and by vireo of Article 36, to part IV, it does not extend to the other provisions of the Constitution and hence a a juristic entity, which may be "State" for the purpose of Parts III and IV would not be so for the purpose of part XIV or any other provision of the Constitution. That is why the decisions of this Court in Dr. S.L. Agarwal Vs. The General Manager, Hindustan Steel Ltd., and other cases involving the applicability of Article 311 have no relevance to, the issue before us.

In that case, on facts it was found that although the Regional Engineering College, Srinagar was run by a Society duly registered under, the Jammu & Kashmir Registration of Societies Act, 1898 still as its control vested in the State Government as well as the Central Government, as it was held that the Society is amenable to the jurisdiction of the Supreme Court under Article 32 of the Constitution. Their Lordships considered as to how the control was being exercised by the Central Government and the State Government and as to how the fund was provided.

10. In Som Prakash Rakhi v. Union of India , the case law on the subject was reviewed and in paras 52 and 57, Hon''ble Krishna Iyer, J. observed as under:

A study of 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, (a Constitution Bench decision of this Court) yields the clear result that the preponderant considerations for pronouncing an ; entity as State agency or instrumentality are (1) financial resources of the State being the Chief funding source (2) functional character being governmental in essence, (3) plenary control residing in Government, (4) prior history of the same activity having been carried on by Government and made over to the new body and (5) some element or authority or command. Whether the legal person is a corporation created by a statute, is not an important criterion although it may be an indicium''s. Applying the constellation of criteria collected by us from Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, on a cumulative basis, to the given case, there is enough material to hold that the Bharat Petroleum Corporation is ''State'' within the enlarged meaning of Article 12.

The common sense signification of the expression "other authorities under the control of the Government of India" is plain and there is no reason to make exclusions on sophisticated grounds such as that the legal person must be a statutory corporation, must have power to make laws, must be created by and not under a statuts and so on. The jurisprudence of Third world countries cannot afford the luxury against which Salmond cavilled, Salmond, Jurisprudence, 10th End. P. 51.

Partly through the methods of its historical development, and partly through the influence of that love of sublety which has always been the besetting sin of the legal mind, our law is filled with needless distinctions, which add enormously to its bulk and nothing to its value, while they render a great part of it unintelligible to any but the expert.

11. Mr. Mehta, learned Counsel placed reliance on the decisions in Re: In Re: Badri Narayan Thakur, Executive committee of Vaish Degree College v. Lakshmi Narain and Ors. AIR 1976 SC 888 , Sabhajit Tewary Vs. Union of India (UOI) and Others, and Khetri Tamba Shramik Sangh v. Union of India and Ors. 1976 WLN 708 It may be stated that these cases are distinguishable on facts, Had the Sangh been simply registered under the Co-operative Societies Act, it could be successfully argued that this by itself is insufficient to hold it to be a State with in the meaning of Article 12 of the Constitution. But, where any society id created under the Statute and it is actually financed, run and controlled by the Government then such a society comes within the ambit of the definition of ''State'' as has, been considered in Ajqi Hasia''s case and Som Prakash''s case supra. It has not been contended before me that the control of the Sangh does not vest in the Government. On the basis of the pleadings of the parties, it can safely be found that the Sangh actually financed by the Government and it exercises complete control over the Sangh. Bye laws would have been the best document to establish how, in what manner and 1o what extent, the control is being exercised by the Government, but the bye-laws have not been produced, in the absence of the bye- laws, on the basis of the pleadings of the parties, it can reasonably be found that the Sangh is being financed by the Government &

the actual control over its activities is exercised by the Government. Thus, on that basis, I hold that the Sangh is an instrumentality or agency or an authority under the control of the Government and so is a ''State'' within the meaning of Article 12 of the Constitution. This preliminary objection is therefore, over ruled.

12. The next preliminary objection raised by Mr. Mehta is that the petitioner should have pursued the, remedy under the Industrial ''Disputes Act. This objection has no validity and substance. Jin Nagaur Central Co-operative Bank Ltd. v. Kesaram and Ors. 1979 WLN 408, a Division Bench of this Court has observed that, the making of reference u/s 10 of the Industrial Disputes Act is exclusively within the discretion of the Government and the respondents can not claim this relief as a matter of right. So it has held that it cannot be said that the respondents had an alternative remedy under the Industrial Disputes Act. Besides that having regard to the nature of the disputes and having heard the matter on merit, I am not inclined to direct the petitioner to avail any alternate remedy.

13. Coming to the merits of the matter. I may straight away say that the petitioner has a very strong case, if viewed in the light of the documents placed on the record, particularly, the option (Anx. 6) submitted by the petitioner. The option was a conditional option. He opted for the service of the Federation subject to the condition that her nay be given a regular appointment as a Junior Accountant. Admittedly, this condition was not fulfilled. On the contrary, the petitioner, was not selected as a Junior Accountant by the Federation. Even, Annexure 5 states that the service of the employees have, been transferred on deputation with effect from the date on which the Sangh, is amalgamated with the Federation and the Federation is willing and prepared to absorb all such employees of the Sangh. The letter of the Sangh dated September 20,1980 (Anx.8) further states that the petitioner is in the service of the Federation on deputation and the Sangh requested the Federation as to why the petitioner be not appointed regularly on the vacant post after screening. The contents of the letter (Anx. 8) make it clear that the petitioner was never absorbed in the service of the Federation as the Sangh described the service of the petitioner as on deputation and further the Federation was allowed to screen the petitioner and then give him the regular appointment thereafter. I have been referred to the various resolutions of the Federation submitted by the Sangh along with its reply. A perusal of these resolutions simply make out a case that the Federation has accepted the staff working in the Diary Plants and Chilling Centers. The resolutions do not deal with the other staff The Federation has placed on record, the result of; the interviews held on 19th and 20th August, 1980 (Ex. R/I/2). In the names of 11 candidates, the petitioner''s name does not land place as he was hot found suitable for the post of Junior Accountant. Simply because, the petitioner services were transferred to the Federation, it cannot be taken that he became the employee of the Federation. It is true that the petitioner did give option but firstly his option was conditional and secondly, he was never absorbed by the, Federation. Thirdly, there is no agreement or resolutions of the Sangh

and the Federation with regard to the absorption of the nature of the service like that of the petitioner so for these reasons emanating from the bare perusal of the documents, placed on the record, to my mind, the conclusion is irresoluble that the petitioner has not been absorbed by the Federation and the Federation is within its right to direct the petitioner to report himself back to the Sangh, and in this manner, the petitioner continues to be in the service and in the employment of the Sangh. As such, the petitioner has a right to be considered for the post of Junior Accountant on his completion of requisite period of service. This Court can not direct the Sangh to appoint the petitioner as Junior Accountant. The petitioner has only a right to be considered for the appointment to the post of Junior Accountant. If there ate vacancies in the Sangh for the post of Junior Accountant, the petitioner may be considered against the vacancies or if there is no vacancies, then the petitioner has to be considered to the post of second Junior Accountant in plea of Shri P.M. Dugar. It has not beep pleaded by the Sangh, in this writ petition that there are no vacancies. In any case, this matter is to be taken up by the Sangh and this Court can only give a direction to the Sangh for consideration of the petitioner for the appointment to the post of Junior Accountant.

14. The writ petition is, therefore, allowed against the Sangh and the Sangh is directed to consider the petitioner for the appointment to the post of Junior Accountant, treating him to be in the service of the Sangh. The petition fails as against the Federation. In the circumstances of the case, the petitioner shall get the costs of this petition for the Sangh (non-petitioner No. 2).