REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO .2442 OF 2009
(Arising out of SLP (C) No.25505 of 2007)

M.P. State Co-op. Dairy Fedn. Ltd. & Anr. … Appellants

Versus

Rajnesh Kumar Jamindar & Ors. … Respondents

WITH

CIVIL APPEAL NOs. 2443,2446, 2447, 2449,
2452, 2454, 2456, 2458, 2460, 2462, 2464, 2467, 2469, 2471, 2472,
2473, 2474, 2475, 2477, 2478, 2480, 2481, 2482, 2483, 2484, 2485,
2486, 2487, 2489, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2502,
2503, 2504, 2505, 2506, 2507, 2508-2525, 2526, 2527, 2528, 2529,
2530-2531, 2532, 2533 OF 2009
(Arising out of SLP (C) Nos.9, 11, 12, 20, 26, 52, 87, 184, 185, 202,
205, 249, 342, 345, 351, 353, 357, 386, 389, 396, 462, 585, 586,624,
692, 770, 779, 784, 804, 806, 816, 817, 825, 1360, 1716, 1772, 2205,
2208, 2211, 2235, 5123, 2249, 2478, 5102-5119, 6418, 6477, 6995,
7502, 4879-4880 of 2008, 24873 of 2007 and 17705 of 2008)

J U D G M E N T

S.B. Sinha, J.

1. Leave granted.

2. Whether Madhya Pradesh State Co-operative Dairy Federation Limited (for short "the Federation") is a 'State' within the meaning of

Article 12 of the Constitution of India is the question involved in these appeals.

3. Before us, there are 52 matters. Out of 52 concerned employees, 16 Writ Petitions were allowed by a learned Single Judge. Writ appeals filed there against by the Federation were dismissed but only 50% back wages had been granted to the employees. Respondents have not questioned the correctness of the said judgment. Remaining 36 writ petitions were dismissed by a learned Single Judge. However, writ appeals filed there against have been allowed directing reinstatement of the concerned respondents with only 20% back wages.

4. Federation is a society registered and incorporated under the provisions of the Madhya Pradesh Cooperative Societies Act, 1960 (for short "the Act"). It is an apex society classified as a Central Society. It is registered under Section 9 of the Act. The Government of Madhya Pradesh through its Veterinary Department had been carrying out in certain areas of the State activities of supply of milk through its offices established for the said purpose. A company known as Madhya Pradesh State Dairy Development Corporation Limited was incorporated on or about 22.03.1975 for carrying out the business of sale of milk and its products. It was

registered under the Indian Companies Act, 1956. Its object was development and procurement of milk and for bringing out a 'white revolution'.

5. Federation was constituted to promote sale of milk and its products inter alia with a view to providing employment to agriculturists, milk suppliers so as to enable it to implement a World Bank scheme effectively. The said company underwent voluntary winding up. Its assets both movable and immovable were transferred to the Federation as part of shareholdings of the State Government.

6. Federation is a federal society within the meaning of Section 2(k) of the Act. It is also an apex society within the meaning of Section 2(a-1) of the Act. It has its own bye-laws. Bye-law No. 3 provides for betterment of the economic conditions of agriculturists and milk producers by monitoring the activities as also different programmes relating to production, collection, Processing, distribution and marketing of milk and milk products. From time to time, it helps and provides technical assistance to the primary societies, independent bodies which are engaged in the production of milk and its proper distribution in urban areas. It also issues guidelines. Its functions are enumerated in Bye-law Nos. 3.2.1 to 3.2.26.

7. In terms of Section 55 of the Act, the Registrar framed regulations known as the M.P. State Cooperative Dairy Federation Ltd. Employees Recruitment, Classification and Conditions of Service Regulations, 1985 (for short "the Regulations"). Indisputably, terms and conditions of employment of the employees of the Federation are governed by the said Regulations; Regulation 13 whereof provides for compulsory retirement of an employee on attaining the age of 55 years or on completion of 25 years of service. Regulation 13 was amended with effect from 24.12.2001 providing for compulsory retirement of an employee of the Federation on attaining the age of 50 years or completion of 20 years of service. It reads as under:

> "**13. Compulsory Retirement**
>
> 1. The appointing officer has the powers that he can without giving any reason compulsory retire any employee on completion of twenty years of his service and on this ground any claim for special compensation would not be rejected, however, this power would be exercised in those circumstances when the appointing officer is of the view that it is in the interest of the Federation and it can be done by giving 3 months prior intimation otherwise not.
>
> 2. Any employee who has completed 20 years of service at any time would be able to retire from the Federation, however, before

> retiring at least three months notice in writing has to be given to the concerned officer in this regard. If he wants to retire before the completion of the period of notice, then he would be paid the amount equivalent to the salary and allowances which is less than three months."

8. The said provision is at par with Rule 42(b) of the Madhya Pradesh Civil Service (Pension) Rules, 1976 applicable to the government servants. The said provision is also at par with the circular letter issued by the State Government on 22.08.2000.

9. Indisputably, pursuant to or in furtherance of Regulation 13 of the Regulations, a Scrutiny Committee as also a Review Committee were constituted for the purpose of finding out as to how many employees can be compulsorily retired in terms thereof.

10. It is also not in dispute that during the period 1975 to 1981, no guideline had been laid down in regard to the mode and manner for recording of annual confidential reports. Such parameters, however, were introduced in the year 1986-87.

11. Respondents indisputably have completed 20 years of service. A Scrutiny Committee constituted therefor scrutinized the service records of the respondents for about 20 years. The formula for determination of the fitness of the concerned employees to continue in the service of the Federation was the same which is made applicable to the case of the government servants; in terms whereof the entire service records of the employees were required to be considered wherefor the grading in the confidential reports was to be made on the following basis:

> "For "Outstanding" category four marks, for "Very Good" category three marks, for "Good" category two marks, for "Average" category one mark, and for "Poor" category zero marks has been allotted. The total marks are to be divided by the number of years for which the confidential reports are available and which have been considered. It is further stated that in case the average marks are two or more than two then the employee should not be compulsorily retired and on the other hand if he gets less than two average marks he should be compulsorily retired."

12. The circular letter issued by the Government of Madhya Pradesh dated 22.08.2000 inter alia provides:

> "**(d)** An evaluation of complete service records should not be below 'good' Cagetory – B. Simultaneously, it will be seen whether

> there is any decline in the working efficiency of the Government servant. It is to be seen whether the working efficiency, especially in preceding five years has declined or not."

Yet again, by a circular letter dated 20.03.2003, it was directed:

> "Under above mentioned subject State Government has decided accordingly :
>
> (1) referred memorandum dated 12.12.2001 issued by this Department which was having directions for drawing average marks on the basis of service period by showing the classification marks of the confidential reports of the government employee on average basis for the purpose of screening, is being hereby cancelled.
>
> (2) The standards for screening that were fixed by the referred memorandum dated 22.03.2000 in its para 2(1), now deleting its standard No.4 following standards are now being prescribed :
>
> Standard No. (4)
>
> (one) though at the time of screening whole record of the employee should be checked, even then any government employee should not be held retired on the basis of normal disability, if his previous 5 years of service has been found satisfactory, or if he has been promoted on some higher grade in last 5 years and his services on the higher grade have been found satisfactory.
>
> (two) any of the Government Employee, shall not be retired from the service on the ground of normal

> disability, if within one year of the date of screening he is going to be retired after completing his age of superannuation. Abovesaid condition shall not be applicable in cases of employees having doubtful integrity."

13. The report of the Scrutiny Committee was placed before the Review Committee, which in its report recorded:

> "…During the course of examination, it has also been observed on perusal of the Confidential Reports that in some Confidential Reports for certain years, the group/category have not been marked but the marks have been awarded. The Confidential Report has the categories of 'poor' and 'very poor' while on the circular for evaluation issued by the State, there being no category 'very poor', the 'very poor' category has been treated as 'poor', 'poor' has been treated as 'average', 'average' has been considered as 'good' and 'good' has been considered as 'very good' for the purpose of evaluation.
>
> On making a review, following criteria have been prescribed by the Government for the purpose of compulsory retirement:-
>
> 1. Recommendations may be made after considering complete records of the employee for the purpose of his honesty and integrity being in doubt.
>
> 2. Depletion in physical capacities.
>
> 3. An evaluation of the goodwill and working efficiency of a Government servant may be carried out on the basis of complete service records of the Government servant. It is not

> necessary that every adverse comment and/or such comment which can be given the nomenclature of adverse comment must be communicated to the employees.
>
> 4. An all round evaluation of records of total period of service : must not below "good" category. Simultaneously, it may also be seen that is there any decline in the working efficiency of the Government servant. Especially, whether there is any decline in the working efficiency in preceding five years,"

14. The question as to whether the Federation is a 'State' within the meaning of Article 12 of the Constitution of India or not came up for consideration before a Full Bench of the Madhya Pradesh High Court in Dinesh Kumar Sharma v. M.P. Dugdh Mahasangh Sahakari Samiti Maryadit [1993 MPLJ 786]. Inter alia relying on or on the basis of the decisions of this Court in Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722], Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] and Chander Mohan Khanna v. National Council of Educational Research and Training [(1991) 4 SCC 578 : AIR 1992 SC 76], it was held that the Federation is not a 'State', opining:

(i) The entire share capital is not held by the State Government.

(ii) The entire expenditure of the cooperative societies is not met by the State Government.

(iii) It does not enjoy a monopoly status.

(iv) The State Government does not have any deep and pervasive control over the societies.

It was, however, noticed that the Managing Director is appointed by the State Government but the Chairman of the Federation has a right to contest election; its functions inter alia being to encourage the villagers, the persons engaged in the sale of milk and milk products, to give them employment, primarily resting on the cooperative principles which are not carried out pursuant to the State requirements in discharge of State's obligations for health, safety or general welfare of public generally.

15. The matter, however, was referred to a Special Bench in M.P. State Co-operative Dairy Federation and Others v. Madan Lal Chourasia [2007 (2) M.P.L.J. 594] for reconsideration of the said decision. Speaking for the Special Bench, consisting of five Hon'ble Judges, the Chief Justice of the High Court noticed that the six authoritative tests culled out in the case of Ajay Hasia (supra) having been reconsidered in Pradeep Kumar Biswas v.

Indian Institute of Chemical Biology [(2002) 5 SCC 111], the tests laid down therein only were required to be considered, holding:

> "…The Federation was registered as a Co-operative Society under the M.P. Co-operative Societies Act, 1960 on or about 13-5-1980. Bye-law 3.1 of the Bye-laws of the Federation states that the main object of the Federation comprised of conducting various programmes of manufacture, collection, processing, distribution and sale of milk and milk products for the economic development of the farmers and for developing and safeguarding the milk business, milk producing animals and for the economic development of the groups engaged in milk production and spreading and developing other joint activities…the main object of the Federation discussed above clearly show that the work of the Federation relates to economic development of farmers, who are engaged in production and sale of milk in the State of Madhya Pradesh and this work has been taken up by the State Government through the agency of the Federation because development of milk and milk products and economic development of farmers carrying the business of sale of milk and milk products are part of the functions of a welfare State."

It was found that the State Government and the Central Government were having more than 91% of shares in terms of Bye-laws 4.0, 4.9 and 4.9.1. It was noticed:

> "17. Bye-law 2.2 of the bye-laws of the Federation defines the Board of Directors of the Federation to

> mean the Board constituted, elected and nominated under the bye-laws. Bye-law 22 provides for composition of the Board of Directors and the Council for Federation."

It noticed the composition of the Board of Directors of the Federation to hold:

> "It will be clear from the aforesaid composition of the Board of Directors of the Federation that out of 13 members of the Board of Directors as many as 8 members are the nominees of the State Government, Central Government and their agencies.
> 18. Under bye-law 27 of the bye-laws of the Federation, vast powers have been vested in the Board of Directors of the Federation including the power to appoint, dismiss, suspend and regularize the services of the employees of the Federation such as Managers, Secretaries, Officers, Clerks and to fix their powers, duties, wages and allowances. The Board of Directors of the Federation appear to have under the bye-laws of the Federation over all administrative powers and since the majority of the Board of Directors are nominees of the State Government and the Central Government as representatives of their respective departments and not as experts as contended by Mr. Singh, we hold that the administrative control of the Federation is with the Government.
> 19. Bye law 30 of the bye-laws of the Federation is titled 'Managing Director' and bye-law 30.1 states that for managing the business of the Federation, Managing Director shall be appointed by the State Government. Bye law 30.2 states that the Managing Director of the Federation shall be a Chief Executive and will work under the control, direction and guidance of the Board of Directors.

> Bye law 30.3 of the bye-laws states that the Managing Director shall execute the business and work as per powers given to him, from time to time, by the Board of Directors and he can delegate his powers given by the Board of Directors to his subordinate officers and he will place the information of delegation of his powers to subordinate officers in the next meeting of the Board of Directors. It will thus be clear that the Managing Director is not only appointed by the State Government but is also under the control, direction and guidance of the Board of Directors, which is dominated by the Government nominee. Hence, day to day functioning of the Federation is also controlled by the Government though the Managing Director and the Board of Directors of the Federation…"

It was furthermore noticed:

> "20. Bye law 17 of the bye-laws is titled 'General Assembly' and bye law 17.1 states that the General Assembly of the Federation will have the supremacy under the Act, Rules and Bye-laws. Bye law 17.2 deals with the composition of the General Assembly and says that it will comprise of elected members of the Milk Union and all the nominated members of Board of Directors. Bye law 17.3 states that the Federation will call a General Assembly every year, which will be before three months of the end of financial year and bye law 17.4 states that the Federation can at any time call a General Assembly to discuss emergency work. Bye law 18 states that the General Assembly will consider the subjects mentioned therein and these are mainly the budget and programme presented by the Board of Directors, the annual financial report placed by the

> Board of Directors of the Federation, the distribution of profits and decision on the audit application and audit removal report of the Board of Directors. These provisions relating to the General Assembly of the Federation show that the General Assembly was also dominated by the Board of Directors. As the Board of Directors is dominated by the nominees of the Government, the General Assembly will also take decisions in its meeting in the manner as desired by the Government. Hence, the Federation is also dominated and controlled by the Government administratively and functionally as in the cases of Pradeep Kumar Biswas and Virendra Kumar Srivastava (supra)."

On the aforementioned findings, the decision of the Full Bench in Dinesh Kumar Sharma (supra) was overruled.

16. Mr. C.N. Sreekumar, learned counsel appearing on behalf of the Federation, in support of the appeals, would contend:

(i) The Special Bench of the High Court committed a serious error in refusing to consider the authoritative pronouncement of this Court in Ajay Hasia (supra) as also its earlier decision in Dinesh Kumar Sharma (supra) to hold that the Federation is a 'State' within the meaning of Article 12 of the Constitution of India.

(ii) The Federation having been running into huge losses, the conditions precedent for retirement of the employees of the Federation as contained in Regulation 13 of the Regulations having been satisfied, the impugned judgment cannot be sustained.

17. Mr. Vivek K. Tankha, learned senior counsel appearing on behalf of contesting respondents and Ms. Pragati Neekhra, learned counsel appearing on behalf of the appellant in Civil Appeal arising out of SLP (C) No. 17705 of 2008, on the other hand, would urge:

(i) The share capital, functional control and the administrative control being completely in the hands of the Government of the State, the Federation is a 'State' within the meaning of Article 12 of the Constitution of India.

(ii) As the decision of this Court in Pradeep Kumar Biswas (supra) governs the field and the criteria laid down therein being satisfied, no exception can be taken to the impugned judgment.

(iii) Regulations governing the conditions of service being statutory in character and the Federation, having adopted the government circulars and rules for the purpose of implementation of its policy

to retire compulsorily a large number of employees, were bound to follow the same.

(iv) The Scrutiny Committee and the Review Committee having not only consisted of the officers of the State but also the Registrar of the Cooperative Societies, it was futile to move to the Registrar of the Cooperative Societies for setting aside the impugned circulars issued with regard to compulsory retirement.

(v) Having regard to the Regulations governing payment of back wages, as contained in Regulation 49(2) of the Regulations, the entire back wages should be directed to be paid.

18. An additional contention has been raised in the Civil Appeal arising out of SLP (C) No. 17705 of 2008 that the appellant therein having been suffering from disability within the meaning of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "the 1995 Act"), Section 47 thereof would be attracted and, thus, the appellant was entitled to entire back wages.

19. Article 12 of the Constitution of India reads as under:

> "12. Definition.—In this part, unless the context otherwise requires, 'the State' includes 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."

20. The development of law in this regard in view of the decisions rendered by this Court beginning from the Rajasthan State Electricity Board v. Mohan Lal [(1967) 3 SCR 377], Ajay Hasia (supra) and other decisions including a Seven – Judge Bench decision of this Court in Pradeep Kumar Biswas (supra), is to say the least phenomenal.

21. We may also notice that P.K. Ramachandra Iyer and Others v. Union of India and Others [(1984) 2 SCC 141] wherein Indian Council for Agricultural Research (ICAR) was held to be a 'State' within the meaning of Article 12 of the Constitution of India, was distinguished in Chander Mohan Khanna (supra). However, Chander Mohan Khanna (supra) was overruled in Pradeep Kumar Biswas (supra) to the extent it followed the decision in Sabhajit Tewary v. Union of India [(1975) 1 SCC 485].

22. In Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers' Association and Another [(2002) 2 SCC 167] Mysore Paper Mills Ltd. was

held to be a 'State' within the meaning of Article 12 of the Constitution of India as it was substantially financed and controlled by the Government, managed by the Board of Directors nominated and removable at the instance of the Government and carrying on functions of public interest under its control.

23. In Pradeep Kumar Biswas (supra), the following tests have been laid down by a Seven-Judge Bench of this Court:

(i) Formation of the body

(ii) Objects and functions

(iii) Management and control

(iv) Financial aid, etc.

The dicta of Mathew, J. in Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi [(1975) 1 SCC 421] was quoted with approval therein is in the following terms:

> "17. For identifying such an agency or instrumentality he propounded four indicia:
> (1) "A finding of the State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action." (SCC p. 454, para 96)

> (2) "Another factor which might be considered is whether the operation is an important public function." (SCC p. 454, para 97)
> (3) "The combination of State aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a State agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a governmental agency, then even the presence or absence of State financial aid might be irrelevant in making a finding of State action. If the function does not fall within such a description, then mere addition of State money would not influence the conclusion." (SCC p. 454, para 97)
> (4) "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?" (SCC p. 458, para 111)"

This Court referred to Ajay Hasia (supra) wherein the tests gathered from the decision of this Court in Ramana Dayaram Shetty (supra) were stated in the following terms:

> "(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. (SCC p. 507, para 14)
> (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. (SCC p. 508, para 15)
> (3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State conferred or State protected. (SCC p. 508, para 15)
> (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)
> (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. (SCC p. 509, para 16)
> (6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government." (SCC p. 510, para 18)"

It was held in Pradeep Kumar Biswas (supra):

> "40. 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."

24. In Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam and Another [(2005) 1 SCC 149], this Court held the respondent therein to be a 'State' within the meaning of Article 12 of the Constitution of India, applying the tests of administrative control, financial control and functional control.

25. The question as to whether the Board of Control for Cricket in India (BCCI) which is a private body but had a control over the sport of cricket in India is a 'State' within the meaning of Article 12 of the Constitution of India came up for consideration before a Constitution Bench of this Court in Zee Telefilms Ltd. and Another v. Union of India and Others [(2005) 4 SCC 649] wherein the majority felt bound by the dicta laid down in Pradeep Kumar Biswas (supra) to opine that it was not a 'State' within the meaning of Article 12 of the Constitution of India.

However, the minority noticed:

> "70. Broadly, there are three different concepts which exist for determining the questions which fall within the expression "other authorities":
> (i) The corporations and the societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution wherefor the capital, infrastructure, initial investment and

> financial aid, etc. are provided by the State and it also exercises regulation and control thereover.
>
> (ii) Bodies created for research and other developmental works which are otherwise governmental functions but may or may not be a part of the sovereign function.
>
> (iii) A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the Government.
>
> 71. There cannot be same standard or yardstick for judging different bodies for the purpose of ascertaining as to whether any of them fulfils the requirements of law therefor or not.
>
> 80. The concept that all public sector undertakings incorporated under the Companies Act or the Societies Registration Act or any other Act for answering the description of State must be financed by the Central Government and be under its deep and pervasive control has in the past three decades undergone a sea change. The thrust now is not upon the composition of the body but the duties and functions performed by it. The primary question which is required to be posed is whether the body in question exercises public function.
>
> 110. Tests evolved by the courts have, thus, been expanded from time to time and applied having regard to the factual matrix obtaining in each case. Development in this branch of law as in others has always found differences. Development of law had never been an easy task and probably would never be."

The majority despite holding that BCCI is not a 'State' within the meaning of Article 12 of the Constitution of India opined that a writ petition

under Article 226 of the Constitution of India would be maintainable against it.

26. In State of U.P. v. Neeraj Awasthi and Others [(2006) 1 SCC 667], U.P. State Agricultural Produce Market Board has been held to be a 'State', holding:

> "33. The Board is "State" within the meaning of Article 12 of the Constitution. It was constituted in terms of the provisions of the said Act. As the powers and functions of the Board as also the State in terms of the provisions of the statute having been delineated, they must act strictly in terms thereof. It is a statutory authority. Its powers, duties and functions are governed by the statute. It is responsible for constitution of the Market Committees for the purpose of overseeing that agriculturists while selling their agricultural produce receive the just price therefor. It not only regulates sale and purchase of the agricultural produce but also controls the markets where such agricultural produces are bought and sold. The Board is entitled to levy market fee and recover the same from the buyers and sellers through Market Committees. Indisputably, the Market Committees and the Board have power to appoint officers and servants. Although the power of the Board in this respect is not circumscribed, that of the Market Committees is. The Market Committees can appoint only such number of secretaries and other officers as may be necessary for efficient discharge of its functions. Terms and conditions of such services are to be provided by it. Section 19 of the Act, however, imposes further restriction on the power of the Market Committee by limiting the

> annual expenditure made in this regard not exceeding 10% of the total annual receipt of the Committee."

27. In S.S. Rana v. Registrar, Coop. Societies and Another [(2006) 11 SCC 634], Pradeep Kumar Biswas (supra) has been followed.

28. We have noticed the history of the Federation. It 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., nutritional 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.

29. We, therefore, 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.

30. The learned Single Judge called for the records. It was found that the Regulations were amended in conformity with the government circulars and,

thus, the said amendment was valid. It was noticed that at least in cases of 16 employees, the average grading being "good", their services could not have been dispensed with.

31. The Division Bench of the High Court, furthermore, noticed that although in many cases, the ACRs were not available but an attempt had been made to grant "average" on the basis of the year. It was furthermore found that although the Scrutiny Committee was required to lay emphasis on the grading of last five years, there was no justification why the last two years' grading had not been taken into consideration. It was furthermore held that the process of weeding out does not satisfy the test of rationalization, stating:

> "(a) There has been no rationalization of marking system when conversion has taken place from grading to award of marks by the Screening Committee.
>
> (b) The principle of average that has been applied by the Screening Committee is not an acceptable one as the best average principle should have ordinarily been applied in the absence of non-availability of the ACR, for the ACRs are maintained and kept by the employer.

(c) There was no justification to fix a cut off date when the Screening Committee met at a later stage.

(d) Though the Circular postulates that last five years ACRs have to be taken into consideration for the purpose of finding out whether there has been declining of progress in the performance of the employee the last two years ACRs were not considered.

(e) In certain cases benefit of promotion were conferred by the said facet has not been taken into consideration at all which reflects non-application of mind."

It was, however, opined that back wages to the employees should be confined to 20%.

32. The law relating to compulsory retirement in public interest is no longer res integra. The provisions had been made principally for weeding out dead wood. An order of compulsory retirement being not penal in nature can be subject to judicial review inter alia:

(i) When it is based on no material;

(ii) When it is arbitrary;

(iii) When it is without application of mind; and

(iv) When there is no evidence in support of the case.

In Baikuntha Nath Das and Another v. Chief District Medical Officer, Baripada and Another [(1992) 2 SCC 299], this Court held:

> "34. The following principles emerge from the above discussion:
>
> (i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.
>
> (ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.
>
> (iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary — in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.
>
> (iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter — of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

> (v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

In State of Gujarat v. Umedbhai M. Patel [(2001) 3 SCC 314], this Court held:

> "11. The law relating to compulsory retirement has now crystallised into definite principles, which could be broadly summarised thus:
> (i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.
> (ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.
> (iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.
> (iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.
> (v) Even uncommunicated entries in the confidential record can also be taken into consideration.
> (vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.
> (vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

In Pritam Singh v. Union of India & Ors. [(2005) 9 SCC 748], this Court held:

"13. In our opinion, the High Court has committed an error in not interfering with the punishment of compulsory retirement even though the appellant submitted that the misconduct alleged against him was not at all an offence or even a serious mistake. The act of misconduct alleged against him was that he supplied a list of absentee details to one of the employees, who was fighting a case before the Tribunal against the Railways. This list contained the ticket numbers of the workers of a shop, who were absent on that date. This was neither a confidential document nor a privileged document. It contained details to which the employee concerned had a right of information. The appellant being a Superintendent Grade II and in charge of the information acted bona fide in good faith while supplying the information. In our opinion, this kind of an act was neither a misconduct nor a serious mistake. When the charges were found proved against the appellant, the appellant admitted that he had supplied the absentee details.

*** *** ***

16. This Court in the case of Union of India v. G. Ganayutham while examining the scope of judicial review held that "reasonableness", "rationality" and "proportionality" are the grounds on the basis of which judicial review of the administrative order can be undertaken. Considering the facts extracted hereinbefore, we find that the exercise of

> power by the respondent falls in the category of arbitrary exercise of power."

33. Before us, like before the learned Single Judge and the Division Bench of the High Court, various discrepancies in the report of the Scrutiny Committee as approved by the Review Committee were pointed out. The examples placed before us clearly demonstrate that neither the Scrutiny Committee nor the Review Committee took into consideration the relevant factors germane for the purpose of passing such an order and in fact had taken into consideration irrelevant factors which were not germane therefor.

34. Some of the employees, for a number of years, had been shown to be good officers; ACRs of some of whom in some of the years have been "very good". As has been noticed hereinbefore, the Scrutiny Committee as also the Review Committee proceeded to determine each individual case keeping in view the ACRs of the employees concerned from 1980, since when the Federation had started functioning, to the year 2000, when the decision had been taken to compulsorily retire the employees, by amending the Regulations. We have noticed hereinbefore that although criteria adopted by the State were required to be considered for the purpose of determining the suitability or otherwise of the employees to continue in service, the necessity

to give special consideration to the performance of the employees for the last five years before the order was passed had been given a complete go-by. The learned Single Judge as also the Division Bench, as noticed hereinbefore, clearly held that for the purpose of weeding out the dead wood, it was absolutely necessary to take into consideration the performance of each of the employees at least for the last two years.

35. Each case, thus, was required to be considered on its own merit. The broad criteria, which are not only applicable generally for the aforementioned purpose, were required to be followed but there cannot be any doubt or dispute that the criteria laid down by the State was imperative in character. Thus, the Federation adopted the rules and circulars made or issued by the State Government. The Federation itself having formulated the criteria required to be applied for passing orders of compulsory retirement was, thus, bound thereby. It is now a well-settled principle of law that the employer would be bound by the rule of game. It must follow the standard laid down by itself. If procedures have been laid down for arriving at some kinds of decisions, the same should substantially be complied with even if the same are directory in nature.

36. This rule was enunciated by Mr. Justice Frankfurter in Vitarelli v. Seaton [359 US 535], wherein the learned Judge said:

> 'An executive agency must be rigorously held to the standards by which it professes its action to be judged. … Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. … This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.' "

[See also H.V. Nirmala v. Karnataka State Financial Corporation (2008) 7 SCC 639]

37. The power of judicial review of a superior court although a restricted one, has many facets. Its jurisdiction is not only limited in the cases where the administrative orders are perverse or arbitrary but also in the cases where a statutory authority has failed to perform its statutory duty in accordance with law. An order which is passed for unauthorized purpose would attract the principles of malice in law. [See Managaer, Government Branch Press and Another v. D.B. Belliappa (1979) 1 SCC 477 : AIR 1979 SC 429, Smt. S.R. Venkataraman v. Union of India and Another (1979) 2 SCC 491 : AIR 1979 SC 49 and P. Mohanan Pillai v. State of Kerala and Others (2007) 9 SCC 497]

38. It is a well-settled principle of law that an order of compulsory retirement is found to be stigmatic inter alia, in the event the employer has lost confidence [See Chandu Lal v. Management of M/s. Pan American World Airways Inc. (1985) 2 SCC 727 at 730, para 8], or he has concealed his earlier record [See Jagdish Parsad v. Sachiv, Zila Ganna Committee, Muzaffarnagar and Another (1986) 2 SCC 338 at 342-343, para 9].

He can, however, be subjected to compulsory retirement inter alia if he has outlived his utility [The State of Uttar Pradesh v. Madan Mohan Nagar, AIR 1967 SC 1260 at 1262].

In Allahabad Bank Officers' Association and Another v. Allahabad Bank and Others [(1996) 4 SCC 504], it was held:

> **"17.** The above discussion of case-law makes it clear that if the order of compulsory retirement casts a stigma on the government servant in the sense that it contains a statement casting aspersion on his conduct or character, then the court will treat that order as an order of punishment, attracting provisions of Article 311(2) of the Constitution. The reason is that as a charge or imputation is made the condition for passing the order, the court would infer therefrom that the real intention of the Government was to punish the

> government servant on the basis of that charge or imputation and not to exercise the power of compulsory retirement. But mere reference to the rule, even if it mentions grounds for compulsory retirement, cannot be regarded as sufficient for treating the order of compulsory retirement as an order of punishment. In such a case, the order can be said to have been passed in terms of the rule and, therefore, a different intention cannot be inferred. So also, if the statement in the order refers only to the assessment of his work and does not at the same time cast an aspersion on the conduct or character of the government servant, then it will not be proper to hold that the order of compulsory retirement is in reality an order of punishment. Whether the statement in the order is stigmatic or not will have to be judged by adopting the test of how a reasonable person would read or understand it."

The question came up for consideration before a Division Bench of this Court in State of Gujarat v. Umedbhai M. Patel [(2001) 3 SCC 314] wherein Balakrishnan, J., as the learned Chief Justice then was, summarized the law, thus:

> "11. The law relating to compulsory retirement has now crystallised into definite principles, which could be broadly summarised thus:
>
> (i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

> (ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.
>
> (iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.
>
> (iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.
>
> (v) Even uncommunicated entries in the confidential record can also be taken into consideration.
>
> (vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.
>
> (vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.
>
> (viii) Compulsory retirement shall not be imposed as a punitive measure."

39. It is also a well-settled principle of law that an authority discharging a public function must act fairly. It, for the aforementioned purpose, cannot take into consideration an irrelevant or extraneous matter which is not germane for the purpose for which the power is sought to be exercised. The Scrutiny Committee as also the Review Committee was required to pose unto themselves a correct question of law so as to enable them to find out a correct answer. It was, therefore, imperative that the criteria laid down in

the circulars issued by the State of Madhya Pradesh should have been scrupulously followed.

40. Federation, therefore, in our opinion, having regard to the fact that there was no material to show that the respondents – employees had become dead wood, inefficient or corrupt, must be held to have abused its power.

41. 'Interest of the Federation' as contained in Regulation 13 of the Regulations would not mean that services of a large number of employees should be dispensed with only for the purpose of cutting administrative expenses. Even such a power does not exist in terms of the Regulations nor any such ground had been taken in the counter-affidavit before the High Court.

42. Strong reliance has been placed by Mr. Sreekumar on a recent decision of this Court in Mundrika Dubey and Others v. State of Bihar and Others [(2008) 4 SCC 458] wherein orders of compulsory retirement by way of an economic measure had been found to be in the interest of the employer.

43. It may be placed on record that neither there exist any such provision nor such a stand had been taken before the High Court. Furthermore, it is well-settled that while a power is exercised by an authority, ordinarily, the reasons contained in the order should be supported by the materials on records.

44. Submission of Mr. Sreekumar, that the High Court should not have interfered with the order of compulsory retirement keeping in view the fact that no malafide has been alleged in the Scrutiny Committee nor any case of discrimination has been made out, cannot be accepted. It is one thing to say that a yardstick has been fixed for the purpose of taking recourse to the power of compulsory retirement but there cannot be any doubt or dispute that such yardstick must be based on relevant criteria. If the relevant criteria, as has been laid down by the State, which has been adopted by the Federation, had not been acted upon, the order must be held to have been suffering from jurisdictional error.

45. It may be true that the superior courts in exercise of their power of judicial review ordinarily would not go into the factual findings as to which section of the employees should be brought within the parameters of

Regulation 13 of the Regulations and which of them would not, but, in this case, we are concerned with a different question.

46. We, therefore, do not find any infirmity in the judgment of the High Court.

47. So far as the question of payment of back wages is concerned, we may notice Regulation 49(2) of the Regulations, which reads as under:

> "49 (2) When the termination or retirement of an employee from his service has been set aside by the court and the employee is reinstated without any further departmental proceeding, then the period of absence from the period of suspension, will be treated s the period on duty for all purposes including the grant of salary and allowances. The amount of subsistence allowance to him if has been paid will be deducted from the payable amount under this sub rule."

A bare perusal of the said Regulation would clearly show that it applies in a case where an order of dismissal and/ or compulsory retirement by way of punishment is set aside. It is not a case where order of compulsory retirement had been passed by way of punishment. Respondents – employees herein were not charged with any misconduct.

The order of compulsory retirement was issued in terms of the Regulation 13 of the Regulations only.

48. Various decisions have been placed before us with regard to grant of back wages. Even the learned Single Judge had granted 50% back wages in favour of 16 employees. The Division Bench did not interfere therewith. We, therefore, fail to understand as to why the Division Bench thought fit to grant 20% back wages in respect of other employees. The decisions placed before us show that this Court keeping in view the facts and circumstances of each case had refused to grant 75% back wages.

49. We, therefore, are of the opinion that 50% back wages should have been granted.

50. In Civil Appeal arising out of SLP (C) No. 17705 of 2008, as noticed hereinbefore, an additional ground has been taken that Section 47 of the 1995 Act would be attracted in the case of the appellant. Section 47 of the 1995 Act reads as under:

> "47 - Non-discrimination in Government employment

> (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:
>
> Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:
>
> Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.
>
> (2) No promotion shall be denied to a person merely on the ground of his disability:
>
> Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

51. The learned counsel submits that his client suffered disability in 1991. The 1995 Act, thus, did not come into force at that point of time. His services were continued not as a disabled person within the provisions of the 1995 Act. He was treated equally and, thus, we see no reason as to why the entire back wages should be granted in his favour whereas all other employees would be given 50% of their back wages.

52. Furthermore, such a contention had not been raised before the Division Bench. It may be true that in a given case, this Court may allow the appellant to raise such a contention, as was done in the case of Kunal Singh v. Union of India and Another [(2003) 4 SCC 524] whereupon strong reliance has been placed, but it is not automatic.

It is evident from the record that even before the learned Single Judge the said contention was not raised at the first instance. Only in the review petition, the said contention was raised. But, the said review petition was dismissed. As indicated hereinbefore, the said contention was again not raised before the Division Bench. We, therefore, are not inclined to agree with the contention that in terms of the 1995 Act, the appellant should be given 100% back wages.

53. For the reasons aforementioned, the appeals filed by the Federation are dismissed and that of the employees are allowed to the extent aforementioned with costs. Counsel's fee assessed at Rs. 10,000/- in each appeal.

.....J.
[S.B. Sinha]

.....J.
[Asok Kumar Ganguly]

New Delhi;
April 15, 2009