
(1981) 02 AP CK 0004

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 3459, 3477 and 5923 of 1978 and 854 of 1979 &
Writ Petition No's. 3459, 3477, 5923 of 1978 and 854 of 1979

B. Satyanarayana and Others

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 05-02-1981

Acts Referred:

Companies Act, 1956 — Section 617
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 21

Citation : (1981) 1 APLJ 444 : (1982) 1 LLJ 224

Hon'ble Judges : K. Ramachandra Rao, J;K. Jayachandra Reddy, J;B.P. Jeevan Reddy, J

Bench : Full Bench

Judgement

B.P. Jeevan Reddy, J.—Writ Petitions Nos. 3477, 3459 respondent-Corporation, viz., the Andhra Pradesh State Irrigation Development Corporation - a corporation created not by a statute but incorporated under the Companies Act, 1956. Before the learned Judges it was contended on behalf of the petitioners that an earlier Bench decision in W.P. No. 5904 of 78, dated 8th December, 1979, was not correctly decided. Reliance was placed upon the decision of the Supreme Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and the opinion of Chinnappa Reddy, J., in U.P. Warehousing Corporation v. Vijay Narayan Vajpayee 1980 II L.L.J. 222. When the matter came up before the Full Bench on 24th November, 1980, it was brought to our notice that the Supreme Court has dealt with this very question in a writ petition relating to the Bharat Petroleum Corporation Ltd., and it would be advisable for this Bench to await a copy of the decision in that case. Accordingly, the matter was adjourned awaiting receipt of a copy of the judgment of the Supreme Court. Meanwhile, W.P. No. 854 of 1979 came up before me sitting singly, and since this writ petition too involved the same question as was already pending before the Full Bench, I directed the matter to be placed before the Full Bench.

2. After receiving a copy of the Supreme Court in Bharat Petroleum Corporation's case (W.P. No. 1212 of 77, dated 13th November, 1980; [1981-1 L.L.J., 79], the Full Bench has again been constituted, and we have heard the counsel on both sides.

3. Article 226 of the Constitution of India empowers the High Court "to issue is any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any or them". Thus, a writ, order or direction under Art. 226 can issue to any person or authority, including the Government. The words "person or authority, must be understood in the context of, and having regard to, the nature of the writ sought for. A writ of habeas corpus can issue both to a private individual, as well as to the State. But, the writs of certiorari, prohibition and mandamus cannot issue to a private person. This is on account of their inherent characteristics. A writ of certiorari prohibition can issue to quash, or restrain the further progress of a quasi judicial order or proceeding, as the case may be. The authority may be a quasi judicial tribunal, or an administrative authority exercising quasi judicial functions. A quasi-judicial function necessarily implies an means a statutory authority to adjudicate. Similarly, a writ of mandamus can issue to the State, a public authority or a statutory authority to compel him to perform the obligation or duty enjoined upon him by law, or to restrain him from acting otherwise than in accordance with law. It can also be issued restraining an executive authority from enforcing an order, action, or demand, which is either contrary to law or has not been arrived at fairly. A writ of quo warranto may issue to a person alleged to be usurping a public office. It is true that, under Art. 226 the High Court is empowered to issue not only the writs mentioned above but also appropriate directions, orders and writs, and is not bound by the technical rules evolved by the English Courts with respect to the aforesaid writs, yet there can be little doubt that the basic principles are the same as obtaining in England. Now, in the matter of issuance of writs of certiorari, prohibition and mandamus what is more material is the nature of the function. For instance, to say that a writ of mandamus can issue to the State, does not mean that it can issue with respect to all the activities of the State; a writ of mandamus cannot issue to State to enforce a purely contractual obligation. Where writs in the nature of certiorari, prohibition and mandamus are sought, private individuals may also be impleaded as necessary, proper or interested parties; but the writ is mainly directed against the order or the action as the case may be, of a quasi judicial tribunal or an authority exercising quasi-judicial functions, or the State or other public or statutory authority, acting in derogation of law. These writs may issue both for the purpose of enforcement of fundamental rights, as well as for any other purpose. The words "for any other purpose" have been the subject-matter of the decisions by the Supreme Court and various High Courts, and need no elaboration here.

4. A company or a Corporation incorporated under the provisions of the

Companies Act, 1956, may be a Private Limited Company or a Public Limited Company or Government Company as defined in S. 617. A Corporation may be brought into existence by a statute, which is generally referred to as a statutory Corporation. A Corporation or a Company - which are indeed interchangeable terms - is a juristic entity, and a legal person. It has a distinct juristic personality of its own. It can own property; enter into contracts; and do all other things which an ordinary individual can. A Corporation is a distinct legal entity for its shareholders, who may be individuals or may themselves be legal persons. But, this does not mean that a Corporation cannot be or become an instrument or agent of another. Just as an individual does not cease to be an individual by acting as an agent of another, so does a Corporation not lose its identity or distinct personality by being or acting as an instrumentality or agency of another; but, in such a case, its function or activity is relatable to the master or the principal, as the case may be. Creation of such Corporations by the Government is the order of the day. They are being created either by a statute or incorporated under the Companies Act. They are designed to prompt efficiency by ridding them from the deadening grip of the governmental red-tape and by introducing business principle and methodology in their working. Large segment of activity, which was hitherto being carried on by the State is now being diverted to such Corporations. Today, these mushrooming Corporations span the entire national economy, from electricity, Transport, trading in foodgrains and other essential goods, to banking, hotels, tourism, defence production, coal and steel production, and so on and on. Probably, they employ as many employees as the Government themselves do. Many of these Corporations are more powerful than many local authorities. Indeed, the employees of these Corporations are now included within the definition of "public servant" in S. 21 of the IPC, and are thus afforded certain protections. Further, in this State, by virtue of S. 52-A of the Revenue Recovery Act, sums of the nature specified therein due to such Corporations are recoverable as arrears of land revenue. The citizens have to deal with these Corporations, in their everyday life, as much as they have to with Government. The question, therefore, arises how far these Corporations are answerable to the Constitution and in particular to the citizens' rights enshrined in Part III or for that matter, Part IV. In other words, are they mere private bodies, or do they partake of the character of the State ? Are they "authorities" within the meaning of Art. 12, and if so, when do they become one ? If they are not "authorities" within the meaning of Art. 12, then how are they answerable to, the subject to Part III ? Are they to be treated as instrumentalities and agencies of the State and their activity as "State Action" ? If so, again, what are the tests to determine, and what is the meaning of "State action" ?

5. The petitioner's case is that the respondent-Corporations viz., the Andhra Pradesh State Irrigation Development Board, and the Andhra Pradesh Leather Industries Development Corporation, though incorporated under the Indian Companies Act, are mere instrumentalities and agencies of the State

Government and the action taken by them is, in truth and in reality, State action. It goes without saying that, if the petitioners succeed in establishing this, the respondent-Corporations will be subject to the sweep of the fundamental rights enshrined in Part III, and they will also be amenable to the writ jurisdiction of this Court under Art 226 of the Constitution of India. We shall, therefore, proceed to examine whether the respondent-Corporations can be termed as instrumentalities or agencies of the State, so as to fall within the definition of "State" in Art. 12.

6. Article 12 of the Constitution of India defines the "State" for the purpose of Part III - it applies equally to Part IV - in the following words :

"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."

It is relevant to note that this article does not really define the word "State". It only provides that "State" includes the authorities specified therein. Though the judiciary is not expressly included within this definition, it is now clear from the decision of the Supreme Court in *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, that judiciary is also included within the definition of "State". The definition expressly speaks of the Government and the Legislatures, both at the Centre and in the States, and "all local or other authorities within the territory of India or under the control of the Government of India". The expression "local authority" is fairly well understood, and has indeed been defined in clause 31 of S. 3 of the General Clauses Act, 1897. The expression "other authorities within the territory of India" has, however, attracted a lot of controversy and fiercely divergent views. The controversy centres round the question : what is the meaning of the words "other authorities" ?

7. So far as the Supreme Court is concerned, the words "other authorities within the territory of India" occurring in Art. 12 fell for consideration for the first time in *Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others*, Overruling the decisions of several High Courts, the Supreme Court held that these words should not be construed ejusdem generis with the preceding words. Bhargava, J., who delivered the majority judgment, adopted the dictionary meaning of the word "authority" as given in Webster's Third New International Dictionary, to the effect : "a public administrative agency or corporation having quasi governmental powers and authorised to administer a revenue-producing public enterprise", and stated "this dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions". After observing that the powers conferred upon such bodies may be commercial as well, the learned Judge stated, "the circumstances that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does

not therefore, give any indication that the Board must be excluded from the scope of the word "State" as used in Art. 12. On the other hand, there are provisions in the Electricity Supply Act which clearly show that the powers conferred on the Board include power to give directions, the disobedience of which is punishable as a criminal offence". Shah, J., who delivered the concurring judgment, however, adopted a slightly different test he observed.

"In my judgment, authorities, constitutional or statutory, invested with power by law not sharing the sovereign power do not fall within the expression "State" as defined in Art. 12. Those authorities which are invested with sovereign power, i.e., power to make rules or regulations, and to administer or enforce them to the detriment of citizens and others, fall within the definitions of "State" in Art. 12, and constitutional or statutory bodies which do not share that sovereign Power of the State are not, in my judgment, "State" within the meaning of Art. 12 of the Constitution".

Reading the opinion of Bhargava, J., as a whole, along with that of Shah, J., several High Courts held that any and every statutory Corporation does not by itself fall within the definition but that, only those statutory Corporations which are invested by law with the power to give directions, the disobedience of which is punishable as a criminal offence, are included in the definition.

8. In 1969 an attempt was made to persuade the Supreme Court to hold that the Praga Tools Corporation, 88% of whose shares were held by the Central Government and the State Government, must be treated as a Government corporation or as an industry run by, or under the authority of the Union Government and, therefore, amenable to writ jurisdiction. This was repelled by holding that the company being non-statutory body and one incorporated under the Companies Act, there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for the enforcement of any such authority or public duty. It was observed that, notwithstanding the fact that the Union Government is the largest shareholder, still the Company, being registered under the Companies Act and governed by the provisions of that Act, is a separate legal entity and cannot be said to be either a Government Corporation, or an industry run by, or under the authority of the Union Government.

9. The same principle was reiterated in Dr. S.L. Agarwal Vs. The General Manager, Hindustan Steel Ltd., where it was held that the employees of the Hindustan Steel Ltd., a Company registered under the Companies Act, are not entitled to the protection contained in Art. 311 of the Constitution of India. It was reiterated that the Hindustan Steel Ltd., being a separate legal entity, cannot be called a department of the Government. It is however, worthwhile to notice that, in neither of these two cases was any fundamental right sought to be invoked or enforced. In other words, in these cases, the answerability of these Corporation to Part III was not raised, gone into, or decided.

10. Meanwhile, two other cases came up before the Supreme Court in Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi, and Indian Airlines Corporation Vs. Sukhdeo Rai, though this precise question was not agitated therein. Both the Corporations concerned therein were statutory Corporations, and inspite of the fact that the conditions of service of their employees were governed by the Regulations made under the Act (delegated legislation), yet the Supreme Court refused to declare the termination in violation of those Regulations as void, and refused to grant a decree for reinstatement.

11. The next major development in this branch of law was the decision of the Supreme Court in Sukhdeo Singh v. Bhagatram, [1975-I L.L.J. 399]. In this case, Ray, C.J., delivered the majority opinion on behalf of himself, Chandrachud and Gupta, JJ., while Mathew, J., delivered a separate but concurring judgment. Alagiriswami, J., dissented. The majority decided two points. It first held that the Regulations made by the statutory Corporations concerned therein, viz., the Oil and Natural Gas Commission, Life Insurance Corporation and the Industrial Finance Corporation, under the respective enactments, being delegated legislation, have the force of law. They are binding both upon the Corporations, as well as upon persons who come to deal with them. Any termination of any employee, therefore, in violation of the said Regulations would make it void, and the employee would be entitled to the relief of reinstatement. In such matters, the Corporations are also obliged to observe the principles of natural justice, besides complying with the Rules and Regulations made under the statute. The second question, which is relevant for the present purposes, considered by the majority is, whether the said Corporations can be said to be "other authorities" within the meaning of Art. 12 of the Constitution of India. After referring to the opinions of Bhargava, J., and Shah, J., in Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others, the majority examined the several provisions of the three Acts concerned therein, and held, on such a review :

"The Oil and Natural Gas Commission is owned by the Government. It is a statutory body and not a company. The Commission has the exclusive privilege of extracting petroleum. The management is by the Government. It can be dissolved only by the Government.

The life Insurance Corporation is owned by the Government. The Life Insurance business is nationalized and vested in the Corporation. No other insurer can carry on life insurance business. The management is by the Government. The dissolution can only be by the Government.

The Industrial Finance Corporation is under the complete control and management of the Central Government. Citizens cannot be shareholders. Certain specified institutions like Scheduled Banks, Insurance Companies, Investment Trusts and Co-operative Banks may apply for the shares. The Central Government may acquire share held by shareholders other than the Development Bank. After such acquisition, the Government may direct that the entire undertaking of the Corporation shall be vested in the Development Bank.

The Corporation cannot be dissolved except by the Government

They then posed the question "in the background of the provisions of the three Acts under consideration the question arises as to whether these Corporations can be described to be authorities within the meaning of Art. 12 of the Constitution". Affirming the test adopted by Bhargava, J, viz., that the power to give directions, the disobedience of which must be punishable as a criminal offence, is one of the tests for holding a body as an "authority" within the meaning of Art. 12, and also approving the test adopted by Shah, J., that the power to make rules and Regulations and to administer or enforce them is one of the characteristics of the authorities contemplated by Art. 12, the majority held that the Oil and Natural Gas Commission satisfies these tests. The other two Corporations were also held to satisfy the said tests. Accordingly, held them to fall within the meaning of "the State".

12. Methew, J., however, examined the question from an entirely different standpoint, viz, that of the citizens and the rights guaranteed to him by Part III of the Constitution. The learned Judge pointed out - and if we may say so, in our opinion, rightly - that while the Oil and Natural Gas Commission can be said to satisfy the aforementioned test evolved by the majority in Electricity Board, Rajasthan v. Mohanlal 1968 II L.L.J. 257 the other two Corporations do not, since "there are no provisions (in the enactments governing them) for issuing binding directions to third-parties, the disobedience of which would entail penal consequence(s)" . He then referred to the meaning of a Public Corporation and its usefulness in the modern age, more particularly in the underdeveloped and poor countries. The learned Judge then made clear the stand-point from which he was examining the question. He said :

"The Constitution was framed on the theory that limitation should exist on the exercise of power by the State. The assumption was that the State alone was competent to wield power. But the essential problem of liberty and equality is one of freedom from arbitrary restriction and discrimination whenever and however imposed. The Constitution, therefore, should, wherever possible, be so construed as to apply to arbitrary application of power against individuals by centres of power. The emerging principle appears to be that a public Corporation being a creation of the State is subject to the constitutional limitation as the State itself. The pre-conditions of this are two, namely, that the Corporation is created by State, and the existence of power in the Corporation to invade the constitutional right of individual ... The governing power, wherever located, must be subject to the fundamental constitutional limitation. The need to subject the power centres to the control of Constitution requires an expansion of the concept of State action. The historical trend in America of judicial decisions has been that of bringing more and more activity within the reach of the limitation of the Constitution" .

After referring to the decision of the Supreme Court of United States in Marsh v. Alabama (1946) 326 U.S. 501 - where a town owned by a private company

(company town) was held to be subject to the fourteenth Amendment - while posing the query how far can this expansion of theory go - the learned Judge defined "State action" in the following words :

"But by and large, unless an act is sanctioned in some way by the State, the action would not be State action. In other words, until some law is passed or some action is taken through officers or agents of the State, there is no action by the State".

For this purpose, the learned Judge evolved three tests, viz., (i) substantial financial aid, (ii) an unusual degree of control over the management and policies; and (iii) the nature of activity viz, where it is an important public function. He explained : "a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action 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 government agency, then even the presence or absence of State financial aid might be irrelevant in making a finding of State action". The learned Judge also observed that State may aid a private Corporation by other means as well, e.g., by giving an organisation the power of eminent domain, by granting tax exemption, or by giving it a monopolistic status for certain purposes. He held that all these factors would be relevant in making an assessment whether the operation is private, or savours of State action. After referring to several American cases, and to the doctrine of "business affected with public interest", the learned Judge observed :

"It has taken English and American Courts many years to concede that the exercise of an industrial or commercial activity on behalf of the State does not deprive such activity of its "governmental" character. But, a great many anomalies in common law remain, in particular as regards the immunities and privileges of the Crown in such matters, immunity from the binding force of statute, debt priority, freedom from taxes and other public charges. The recent English cases appear, at long last, to move towards the abandonment to the totally antiquated notions of "proper" function of Government"

He then referred to the provisions of the Life Insurance Corporation Act, from which it appeared that the Central Government had contributed the original capital; that part of the profit of the Corporation goes to the Government; that, the Central Government exercises control over the policies of the Corporation; that, the Corporation carries on a business, having great public importance; and that, the Corporation enjoys a monopoly in the business, and concluded on this basis that the Corporation is an agency or an instrumentality of the State. The same conclusion was also recorded with respect to the other two Corporations. The learned Judge also proceeded to examine the same question from another angle, viz., whether such Corporation is an agency or instrumentality of the

Government for carrying on a business for the benefit of the public. In other words, the test evolved is : for whose benefit the Corporation is carrying on the business ? After referring to the provisions of the Act, the learned Judge held that the Corporations concerned therein satisfied this test too. "The crux of the matter is that public Corporation is a new type of institution which has sprung from the new social and economic functions of Government and that it, therefore, does not neatly fit into old legal categories. Instead of forcing it into them, the latter should be adopted to the needs of changing times and conditions" said the learned Judge finally.

13. A significant point in the opinion of Mathew, J., is that he did not attach any importance to the manner of incorporation. Instead, he evolved what may be called a "functional test", viz., whether the activity of the body concerned can be called "State action"; and for determining whether it is state action or not, he evolved certain tests. This is the approach which - as we shall presently note - has been carried forward and elucidated by the subsequent decisions of the Supreme Court. But, before referring to them, it would be appropriate to refer to another decision of the Supreme Court, decided by the same Bench which decided *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*, and on the same day too i.e., the one in *Sabhajit Tewary Vs. Union of India (UOI) and Others*, There the petitioner complained of violation of equality clause in Arts. 14 and 16, and, hence, the question arose, whether the Council of Scientific and Industrial Research is an "authority" within the meaning of Art. 12. It was argued that because the Prime Minister is ex officio President and because its governing body is composed of officers of the, Central Government who are appointed and terminated by the Central Government, it is an agency of the Central Government. The Council is a society registered under the Societies Registration Act. It was not argued that there is substantial involvement of the State, nor was any argument addressed that the nature of its activity was a governmental or public one. The only argument, as already stated was that its composition is by the Government and that, it is subject to the control of the Government. This argument was repelled holding that the Council does not have a statutory character, and that it being a separate juristic entity cannot be called an agency or instrumentality of State. As pointed out by Bhagwati, J., in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, there is no discussion in this case as to what are the features which must be present before a Corporation can be regarded as an "authority" within the meaning of Art. 12 : nor does it lay down any principle or test for determining when a Corporation can be said to be an "authority". It was not also explained or clarified, why, if a statutory Corporation can become an agency or instrumentality of the State (as held by the majority also in *Sukhdev's* case (supra), a Corporation incorporated under the Companies Act or registered under the Societies Registration Act, cannot ? It cannot be gainsaid that even a

statutory Corporation is a separate juristic entity, as is a company registered under the Companies Act or a society registered under the societies Registration Act. The ratio of the decision appears to be that the Council cannot be called "an agency of the Government". In these circumstances, it would not be reasonable to deduce from this decision any principle inconsistent with the principles enunciated by the majority opinion, or by Mathew, J., in Sukhdev's case, (supra). If anything, an attempt must be made to confine the decision in this case to the facts of the particular case, in as much as, there is no elucidation of principles or discussion in this case, whereas the decision Sukhdev's case, (supra), is an elaborate and considered one - and that is how the subsequent decisions of the Supreme Court have understood and explained this decision.

14. The ideas and the approach propounded by Mathew, J., found full acceptance at the hands of the Supreme Court in Ramana's case, (supra), a Bench consisting of Bhagwati, Tulzapurkar, and Pathak, JJ. Though the Corporation concerned there therein was a statutory Corporation, the Supreme Court did not attach much significance to that aspect. In other words, merely because it was a statutory Corporation, it was not treated as an "authority" within the meaning of Art. 12. On the contrary, Bhagwati, J., propounded the tests which should be applied for determining whether a Corporation - irrespective of the fact whether it is created by a statute or incorporated under an Act - is an instrumentality or agency of the State. The discussion in paragraph 24 clearly brings out the irrelevance of the manner of incorporation, and paragraphs 15 and 16 affirm the three major tests propounded by Mathew, J., viz., (i) extensive and unusual financial assistance, (ii) deep and pervasive State control, and (iii) the nature of the function, namely, whether the activity of the Corporation can be said to be an important public function. While cautioning that it is not possible to formulate an all inclusive or exhaustive test, nor would it be possible to evolve a cut and dried formula which would provide the correct division of Corporations into those which are instrumentalities or agencies of the Government and those which are not, Bhagwati J., quoted with approval the observations of Douglas, J., in Jackson v. Metropolitan Edison Company, [1974] 417 U.S. 345, to the effect : "the dispositive question in any State action case is not whether any single fact or relationship presents a sufficient degree of State involvement, but rather whether the aggregate of all relevant factors compels a finding of State responsibility". The learned Judge also affirmed the irrelevance of the distinction between governmental and non-governmental functions in modern society, more particularly in the Indian context. Indeed, he cited with approval the observations of the Supreme Court of United States in *Mursh v. Alabama*, [1946] 326 U.S. 501, where the Fourteenth Amendment guaranteeing equal protection of laws was held applicable to a company town, i.e., to a town owned exclusively by a company, to the effect : "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it Thus, the owners of privately held bridges, ferries, turn-pikes and railroads may

not operate them as freely as a framer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function it is subject to State regulation".

15. Bhagwati, J., also took care to indicate the consequences of application of "State action" theory. He said : "where a Corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government ... must apply equally where such Corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance ...". Finally, the learned Judge came to the conclusion, applying the tests indicated by him earlier, that the International Airport authority of India must be held to be an "authority" within the meaning of Art. 12, since it satisfied all those tests.

16. Now, it is relevant to note that, in this decision, Bhagwati, J., refers to the earlier decisions of the Supreme Court in *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, ; *Heavy Engineering Mazdoor Union Vs. State of Bihar and Others*, ; *Dr. S.L. Agarwal Vs. The General Manager, Hindustan Steel Ltd.*, as well as to the decision in *Sabhajit Tewary Vs. Union of India (UOI) and Others*, and points out how and why those decisions cannot be said to run counter to the principle and the theory affirmed by him. So far as *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, is concerned, the learned Judge explained that in that case the question of the Corporation being an agency or instrumentality of the State did not arise and that, the only question there was, whether a mandamus can issue. Since there was no statutory duty imposed on a Corporation, nor any statutory right in the workers, mandamus was refused. Regarding *Heavy Engineering Mazdoor Union's* case, (supra) it is pointed out that the only question there was whether the industry concerned therein was being "carried on under the authority of the Central Government", and it was held not - because it was so carrying on its business under its own Memorandum or Articles of Association. Again, in this case, the question of Art. 12 or the Corporation being the agency or instrumentality of State, did not arise. Regarding *Hindustan Steel's* case, it is pointed out that the only question there was whether its employees are entitled to protection of Art. 311, on which question there could hardly be any doubt. With respect to *Tewary's* case. [1975-I L.L.J. 374], the learned Judge observed :

"The Court no doubt took the view on basis of facts relevant to the constitution and functioning of the Council that it was not an "authority", but we not find any discussion in this case as to what are the features which must be present before a Corporation can be regarded as an "authority" within the meaning of Art. 12. This decision does not lay down any principle or test for the purpose of determining when a Corporation can be said to be an "authority". If at all any

test can be gleaned from the decision, it is whether the Corporation is "really an agency of the Government". The Court seemed to hold on the facts that the Council was not an agency of the Government and was "therefore, no an "authority"".

17. But this decision did not still the controversy. It was argued that the Corporation concerned in Ramana's case (supra) being a statutory Corporation, the discussion of Bhagwati, J., about the theory of State action and the tests affirmed by him in that behalf, were really unnecessary for the purpose of that decision and are in the nature of dicta and that, the decisions in *Sabhajit Tewary v. Union of India*, (supra) and *Praga Tools Corporation's case*, (supra) still hold the field. In other words, it was argued that, so far as the companies incorporated under the Indian Companies Act are concerned - or, for that matter, all nonstatutory Corporations, be they Companies, Councils, or Societies-they are still beyond the pale of the writ jurisdiction of this Court and that, in no event can they be said to fall within the meaning of the expression "other authorities" in Art. 12. This was indeed the argument repeatedly put forward before the Bench which decided the *Bharat Petroleum Corporation's case*, and repelled. Curiously enough, even the Supreme Court decision in *Bharat Petroleum Corporation's case* (supra) does not appear to have stilled the controversy if, the arguments before us are any indication. Certain observations in this judgment relating to the *Bharat Petroleum Corporation* are relied upon to contend that, even this decision must be read in the particular facts of that case. It is pointed out that, in this case, the Court held, on a review of the relevant provisions of the Act concerned, that "although registered as a company under the Indian Companies Act the 2nd respondent (*Bharat Petroleum Corporation Ltd.*) is clearly a creature of the statute, the undertaking having vested in it by force of S. 7 of the Act" and that, it was found to be a "a vicarious creature of statute working on the wheels of the Acquisition Act". The argument is again the same, viz, the *Bharat Petroleum Corporation*, though actually a company incorporated under the Companies Act, was found, in effect, to be a statutory Corporation - like the *Indian Airport Authority* in *Ramana's case*. (supra) - and hence the rest of the discussion is obiter and that so far as nonstatutory Corporation are concerned, they can, in no event, be included within the definition of "State" in Art. 12. With respect, we are unable to agree. This argument overlooks the basic approach of both these judgments. True it is that in *Ramana's case* the Corporation concerned was a statutory Corporation, but the Court did not hold it to be an instrumentality or agency of the State on that account. It applied the tests elaborated by it to the Corporation and finding that it satisfied all of them, held it to be an instrumentality of the State. Bhagwati, J., was at pains to emphasize the irrelevance of the manner of incorporation. So does Krishna Iyer, J., repeatedly, in *Bharat Petroleum Corporation's case*. Indeed, Krishna Iyer, J., prefaces his discussion-which leads to the recording of the finding that the *Bharat Petroleum Corporation* is in effect a statutory corporation - with the note : "Sometimes the test is formulated, oversimplified fashion, by asking

whether the Corporation is formed by a statute or under a statute. The true test is functional. Not how the legal person is born but why it is created". The "obiter" argument is thus ill-founded with respect to both the cases. We reject this argument, repeating the words of Krishna Iyer, J :

"True a tour of case-law runs zig-zag, but guided by principle and jurisprudential discernment, it is possible to reach the same destination to which the two rulings referred to above (Ramana's case and U.P. Warehousing Corporation's case) take us; (again) we are free to confess that the propositions have not been neatly chiselled and presented in any of the rulings and further, some measure of incongruity may be noticed if we search for the same; but our approach is not to deduct contradictions but to discover a broad consensus if there be any and distill the law in accordance therewith"

18. It is argued before that the Benches which decided Ramana's case (supra), as well as Bharat Petroleum Corporation's case, are smaller Benches, while Tewary's case (supra) was decided by a Constitution Bench, and that the principle of these subsequent decisions runs counter to the one in Tewary's case (supra) was decided by a Constitution Bench, and that the principle of these subsequent decisions runs counter to the one in Tewary's case. It is argued that in such a case of conflict, the decision of the larger Bench prevails and must be followed by High Courts. Reliance is placed upon certain decision of the Supreme Court in this behalf. We, however, think it unnecessary to deal with those decisions, for this is not a case where the subsequent decisions do not refer to or explain the earlier decisions. Here, the subsequent decisions expressly refer to the earlier decisions and understand them in a particular manner. This understanding is certainly binding on High Courts. It is not open for us to say that this understanding is wrong, for then we would be sitting in judgment over the decision of the Supreme Court. When the subsequent decision of Supreme Court say that there is no conflict between what they are laying down and the earlier decisions, we cannot say "no; you are wrong; there is inconsistency" and then follow the earlier decisions as we understand them. In any event, we are of the opinion that it is not a case of conflict, but one of changes in emphasis and approach; not of inconsistency but advance of law. It would not be out of place to remind the proponents of "obiter" argument, the circumstances and facts in which the U.S. Supreme Court affirmed the role and power of the judiciary in the famous case *Marbury v. Madison* [1803] 2 L. Ed. 60, which constitutes the bed rock of American Constitutional Law. No one grudges the Court for laying down a principle which was really not necessary for the purpose of that case.

19. Before, however, we proceed to analyse the judgment in Bharat Petroleum Corporation's case (supra), we must refer to the instructive opinion of Chinnappa Reddy, J., in *Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee*, The learned Judge said :

"I find it very hard indeed to discover any distinction on principle, between a person directly under the employment of the Government and a person under

the employment of an agency or instrumentality of the Government, or a Corporation set up under a statute or incorporated but wholly owned by the Government The desire to attain these objectives (set out in the Preamble to the Constitution) has necessarily resulted in intense governmental activity in manifold ways. Legislative and executive activity have reached very far and have touched very many aspects of a citizen's life. The Government, directly or through the Corporations set up by it or owned by it, now owns or manages, a large number of industries and institutions. It is the biggest builder in the country. Mammoth and Minor irrigation projects, heavy and light engineering projects of various projects kinds are undertaken by the Government. The Government is also the biggest trader in the country. The State and the multitudinous agencies and Corporations set up by it are the principal purchasers of the produce and the products of our country and they control a vast and complex machinery of distribution. The Government, its agencies and instrumentalities, Corporations set up by the Government under statutes and Corporations incorporated under the companies Act but owned by the Government have thus become the biggest employers in the country. There is no good reason why, if Government is bound to observe the equality clauses of the Constitution in the matter of employment and in its dealings with the employees, the Corporations set up or owned by the Government should not be equally bound and why, instead, such Corporations could become citadels of patronage and arbitrary action. In a country like ours which teems with population, where the State, its agencies, its instrumentalities and its Corporations are the biggest employer and where millions, seek employment and security, to confine the applicability of the equality clauses of the Constitution, in relation to matters of employment strictly to direct employment, under the Government, is perhaps to mock at the Constitution and the people, some element of public employment is all that is necessary to take the employee beyond the reach of the rule which denies him access to a Court to enforce a contract of employment and denies him the protection of Art. 14 and 16 of the Constitution. After all, employment in the public sector has grown to vast dimensions and employees in the public sector often discharge as onerous duties as civil servants and participate in activities vital to our country's economy. In growing realisation of the importance of employment in the public sector, Parliament and the Legislature of the State have declared persons in the service of local authorities, Government companies and statutory corporations as public servants and, extended to them by express enactment the protection. usually extended to civil servants from suits and prosecution. It is, therefore, but right that the independence and integrity of those employed in the public sector should be secured as much as the independence and integrity of civil servants"

Now, coming back to the case of Bharat Petroleum Corporation (supra) V. R. Krishna Iyer, J., speaking for himself and Chinnpapa Reddy, J., substantially adopted the approach of Mathew, J., in Sukhdev's case (supra), and of Bhagwati, J, in Ramana's case, and also emphasised the words "other

authorities under the control of the Government of India" in Art. 12. His approach is "look at the anatomy of the Corporation, and if you find that it is merely a mini-incarnation of the Government itself, then you should treat it as an instrumentality and agency of the Government, and, therefore, within the definition of "State". He is of the opinion that the juristic veil worn for certain legal purposes cannot obliterate the true character of such a Corporation for the purpose of constitutional law. He says : Article 12 is a special definition with a broader goal. Far from restricting the concept of State it enlarges the scope to embrace all authorities under the control of Government ...", and re-emphasizes the need to ensure the rights guaranteed by Part III to the employees and persons dealing with such Corporations. To quote him :

"But to use the corporate methodology is not to liberate the State from its basic obligation to obey Part III. To don the mantle of company is to free the State from the inevitable constraints of governmental slowmotion, not to play truant with the great rights. Otherwise, a cunning plurality of corporations, taking over almost every State business - the Post and the railroad, TV and the Radio. Every economic ministry's activity, why, even social welfare work, will cheat the people of Part III rights by the easy plea : "no admission for the bill of rights; no State here". From Indian Posts and Telegraphs limited to Indian Defence Manufacturers limited; from Social Welfare Board to Backward Classes Corporation, the nation will be told that "the State has ceased to be, save for the nonnegotiable sovereign functions"; and fundamental rights may suffer eclipse only to be viewed in museum glass-cases ..."

Such a situation he held to be impermissible. Indeed, Krishna Iyer, J., fully affirms the tests evolved by Mathew, J., in Sukhdev's case (supra) and by Bhagwati, J., in Ramana's case (supra), and repeatedly points out that what is relevant is not the manner in which the Corporation is born, but what is its true nature and what are its functions ? It is true that the learned Judge held - on an examination of the provisions of the Burmah Shell (Acquisition of Undertaking of India) Act, 1976 - that the Bharat Petroleum Corporation to which the Central Government transferred the assets and liabilities of Burmah Shell which had vested in it under the Act, is more akin to a statutory Corporation-still, in our opinion, that was not the factor which induced the learned Judges to come to the conclusion they did. To repeat, they held that Bharat Petroleum Corporation is an instrumentality or agency of the State, not on account of the fact that it was found to be virtually a statutory corporation working upon the wheels of the Acquisition Act, but because, on application of the functional test, they found that it is, in truth and in reality, a mini-incarnation of the Central Government, made up of its "blood and bones". In other words, it was so found on account of the fact that it was created for the purpose of transferring an undertaking already vesting in it by law, whose share-capital was entirely contributed by the Central Government, which was subject to its deep and pervasive control, and the functions which it was performing were of a public nature. The fact that it was also found to be more akin to a statutory corporation in spite of being

incorporated under the Companies Act was, no doubt, held also to be a relevant fact but, certainly, it was not the main or the only consideration for arriving at the said conclusion. Krishna Iyer, J., also explained why the earlier cases of the Supreme Court in *Praga Tools Corporation v. C. V. Imanuel*, (supra) *Heavy Engineering Mazdoor Union v. State of Bihar*, (supra) *S. L. Agarwal v. Hindustan Steel Ltd.*, (supra) and *Sabhajit Tewary v. Union of India*, (supra), cannot be said to lay down a principle contrary to the one evolved by Mathew, J., in *Sukhdev's case* (supra) and by Bhagwati, J., in *Ramana's case* (supra). He expressly rejected the contention that the discussion in Bhagwati, J.'s judgment about "State action and Art. 12, are obiter. We too have pointed out herein before why the said argument is ill-founded. Accordingly, we reject the argument that the discussion in Justice Krishna Iyer's judgment on the same topic is equally "obiter". One has to remember and appreciate the approach adopted by the learned Judges, and once that is done, the fallacy in the "obiter" argument becomes immediately apparent.

20. Finally, we may refer to the principles called out by Krishna Iyer, J., from the judgment in *Ramana's case* (supra) for determining whether a Corporation is an instrumentality or agency of the State. They are :

"1. One thing is clear that if the entire share capital of the Corporation is held by Government, it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government.

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

3. It may also be a relevant factor - Whether the Corporation enjoys monopoly status which is State conferred or State protected.

4. 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.

5. 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 ...".

We respectfully adopt the said tests, and add the following few principles by way of clarification, which really emerge from the above decisions and logically flow from them : (i) in applying the above tests, it is not very much relevant whether the Corporation is created by a statute or is incorporated under a statute, e.g., Companies Act, Societies Registration Act, etc. The fact that a Corporation is a statutory Corporation may perhaps be a factor supporting the conclusion of the Corporation being an instrumentality or agency of the state; but, it does not follow that every statutory Corporation is ipso fact an instrumentality or agency of the State. Similarly, every Government company (see its definition in S. 617 of the Indian Companies Act) cannot be called an instrumentality or agency or the

State. Again the above tests have to be applied. (ii) It is not necessary that all the tests pointed out above should be satisfied. It would be a question to be determined in a given case on an aggregate of the relevant circumstances. For instance, if a Corporation is created and the functions of an existing department of the Government are transferred to it, it would no doubt be a strong factor supporting the conclusion of the Corporation being an instrumentality or agency of the Government; but what difference of the Government; but what difference would it make if, instead of doing that, the State creates a Corporation by contributing its total share capital, by retaining total control over it and by calling upon such Corporation to undertake a fresh activity of a public nature and for the benefit of the public ? (iii) If a Corporation is vested by law with power to give directions, the disobedience of which is punishable as a criminal offence or is invested with the power to make Rules and Regulations and to administer or enforce them to the detriment of the citizens and others, they would by themselves be "authorities within the territory of India" within the meaning of Art. 12. In such cases the further test whether they are instrumentalities or agencies of the Central or State Government is unnecessary. They may be or may not be. This test becomes relevant in case of Corporations - statutory or otherwise which are not clothed with the powers a forementioned, and which, therefore, can be brought within the purview of the definition only by treating them as instrumentalities or agencies of the Central or State Government, as the case may be. If, after applying the aforementioned tests, the Court comes to the conclusion that they are instrumentalities or agencies of the Central or State Government, as the case may be, then their activity shall be deemed to be, and can be termed as "State action" and must conform to and answer the rights and injunctions enshrined in Part III of the Constitution. We must make it clear that all this is relevant only for the purposes of Part III and that, by treating a Corporation as an instrumentality or agency of a Government, the Corporation does not cease to be a distinct legal entity, nor to its employees become the employees of that particular Government. (iv) A writ, order or direction can issue under Art. 226 to such Corporation, both for the enforcement of fundamental rights and also for the enforcement of a statutory right.

21. We may mention that in the light of clarification No. (iii), the argument of the learned counsel for respondents, based on certain observation in the earlier part of the judgment Krishna Iyer, J., that a Corporation to be an instrumentality or agency of the State, must have the "ability to affect legal relationship by virtue of power vested in it by law", is liable to be rejected.

22. We may in this context point out the inherent dangers in taking the other view canvassed by the learned counsel for the respondents. Until about 1974-75 the milk-wing in the Animal Husbandry Department of the Andhra Pradesh Government was carrying on the activity of collecting milk from producers and supplying it to the consumers, mainly in the cities and big towns in the State. There was a Milk Commissioner in charge of the activity. Then, the State created the Andhra Pradesh Dairy Development Corporation, and transferred the said

activity and even the employees working in the milk-wing to the Corporation. Instead of Milk Commissioner, the Corporation has a Managing Director. The Corporation is not a statutory Corporation, but one incorporated under the Indian Companies Act. If we are to say that no writ lies against such a Corporation, it may well result in disastrous consequences. If tomorrow the Corporation says that it will give employment only to the sons and daughters of the milk-producers in a particular district or area of the State and to none else, are the Courts to refuse to interfere on the plea that it is only a Company incorporated under the Companies Act and, therefore, not subject to part III of the Constitution, nor amenable to the writ jurisdiction of this Court ? The instances can be multiplied. Suppose, tomorrow the Government creates a Corporation for maintaining the public parks and gardens, suppose, such Corporation says it will not allow members of a particular religion or community into those parks and gardens; are the Courts to remain dumb bystanders ? Further, as repeatedly pointed out by several Judges, there is no such thing as a "governmental function" and a "non-governmental function" under our Constitution. Every activity that the Government undertakes is a governmental activity. Now, defence is undoubtedly, one of the "sovereign and inalienable" functions of the State. No one will dispute that it is a true governmental function. But then, is the production of arms and equipment for the defence personnel a sovereign function, or should it be treated as a private function ? Should Hindustan Aeronautics Ltd., which manufactures aeroplanes and other equipment for our Armed Forces but which is a company incorporated under the Companies Act, be characterized as a Corporation performing a sovereign function, or should it be called a Corporation carrying on a commercial activity ? It may well be argued that in some countries, like the United States of America, even the defence equipment is manufactured in the private sector and sold to the Government. Thus, it is not the form that matters but the reality, and the tests aforementioned are the tests designed to ascertain the reality, ignoring the mask or the form, or the screen.

23. Now, applying the above criteria, let us examine whether the Andhra Pradesh Irrigation Development Board can be called an instrumentality or agency, as the case may be, of the State Government.

24. According to the Memorandum and Articles of Association of the A.P. State Irrigation Development Corporation Ltd., (hereinafter referred to as "the Irrigation Corporation"), the main objects for which it is established, are;

"(i) to survey, investigate, construct, execute and carry out schemes and works of all kinds for the exploitation of irrigation potential of the State and for maximum utilisation of available water resources of the State;

(ii) to survey, investigate, construct, execute and carry out integrated schemes for the development of water resources for irrigation and also for development of industries and for purposes of public health;

(iii) to purchase or otherwise acquire, lease, develop, administer, manage or control in the State of Andhra Pradesh any schemes for the development of irrigation potential and integrated schemes for the development of irrigation potential and for industrial purposes and for public health purposes.

(iv) to act as Agent for Government of Andhra Pradesh or Government of India or other authorities, local bodies, statutory or otherwise, on execution of works entrusted to it;

(v) to maintain and improve works mentioned in sub-clauses (i), (ii), (iii) and (iv) above, relating to development of irrigation potential and integrated works for the development of irrigation potential, Industrial purposes and for purposes of public health; and

(vi) to recover such sums as may be determined by the Corporation from any person or authority, local or otherwise and statutory or corporate bodies, for the supply of water or inconnection with any other activity in consonance with the objects of the Corporation."

The authorised share capital of the Company is Rs. 10,000,0000 divided into 10,00,000 equity shares of Rs. 100 each. According to the articles of Association, the Company is to be a "Private Company" within the meaning of clause (iii) of sub-s. (1) of S. 3 of the Companies Act, 1956. Its entire paid-up share capital has been contributed by the Government. The first Directors and all the subsequent Directors are to be, and are appointed by the Government from time to time, which is also entitled to remove them from office and to fill up the resultant vacancies. The remuneration of the Chairman, Managing Director and Directors is determined by the Government. The appointment of the Managing Director is by the Government. The Corporation has to obtain the approval of the Government of undertaking any work of capital nature, involving a capital expenditure exceeding Rs. 10,00,000. The Chairman and Vice-Chairman of the Board of Directors are also to be appointed and removed by the Government, as also the Financial Adviser. The Chairman is obliged to reserve for the approval of the Government any proposals or decisions of the Directors in respect of works of capital value exceeding Rs. 10,00,000 increasing or reducing the issue capital of the company, granting by the company of a loan or the giving of a guarantee or any other financial assistance to any one particular concern of an amount exceeding Rs. 5 lakhs; winding up of the company and any other matter which, in the opinion of the Chairman, is of such importance as to be reserved for the approval of the Government. In such matters, the Directors cannot take any action. Until the Government's approval is obtained. Clause 90 of the Articles of Association expressly reserves to the Government the power to "issue such directives or instructions as they may think fit in regard to the finances and the conduct of the business and affairs of the company". The Directors are bound to comply with, and give effect to such directives and instructions. This power is expressed to be unrestricted by anything contained in any of the Articles of Association. Under clause 106 of the Articles of Association, the Comptroller and

Auditor-General of India is vested with the right to arrange for external audit by an authority appointed by him, and the Corporation and its officials are bound to render all assistance to him. On winding up, the assets are to be distributed to the members, which means the Government.

25. From the counter-affidavit it appears that Vegeswarapuram and Kumaradevam Pumping Schemes which were being executed by the Government, were transferred to the Corporation under G.O. Ms. No. 432, P.W.D., dated 11th April, 1975. After the transfer, the Corporation has completed those schemes and is supplying water to the ryots concerned. It appears further from the counter-affidavit filed by the Corporation that, before supplying the water, an agreement is obtained from the concerned ryot, and water is supplied in terms of such agreement. Indeed, it appears that soon after the aforesaid works were transferred to the Corporation, a meeting was held whereat a majority of the farmers of the area entered into agreements with the Corporation to pay the economy rates and also advanced a sum of Rs. 9,460 lakhs by way of deposits at the rate of Rs. 500 per acre. It is also stated, that by virtue of S. 52-A of the A.P. Revenue Recovery Act, the amount due to the Corporation can be recovered as arrears of land revenue.

26. It would thus appear that this Corporation satisfies all the tests mentioned hereinbefore. Its capital is contributed by the State; its functioning is totally subject to the control of the Government, which is empowered to issue such directives and instructions as it thinks fit, with respect to the finances and conduct of the business and affairs of the company, and the activity of the Corporation is of a public nature. In other words, the activity it is carrying on is for the benefit of the public, According to the 3rd respondent's counter-affidavit, the Corporation is a non-profit making organisation, established for the benefit of developing the irrigation potential of the State in the interest of the agricultural development of the State. Some of the works which were being carried on by the Government have been transferred to this Corporation. The duties it is now asked to perform were formerly being performed by the state Government. There can, therefore, be little doubt that this Corporation is an instrumentality of the State Government and, therefore, falls within the definition of "State" in Art. 12 of the Constitution of India.

27. Now, coming to the Leather Industries Development Corporation - which is the Corporation concerned in W.P. No. 854/1979 - it was directed to be created by the Government in G.O. Ms. No. 835, dated 7th September, 1973. The creation of such a Corporation was found necessary with a view to revive the leather industry in its various sectors, viz., Cottage, Small Scale and Medium Industries. According to the Memorandum of Association, the primary objects for which it was incorporated, are :

"(1) to promote, establish, improve, develop, own and run Flaying and Curing Centres, Hides Exchanges. Tanneries, etc;

to manufacture, buy, import, export, sell and generally deal in all kinds of leather goods;

(3) to manufacture, buy, import, export, sell and generally deal in all varieties of vegetable tan-stuffs, tanning chemicals, acids, solutions and compounds, utilised for tanning and all types of grindaries, eye-lets, toeplates, horse-shoes, and nails, panel pins, shoe polishes, wax balls, buckles, etc., for manufacture of all types of foot-wear and leather goods; and

(4) to aid, counsel, assist, finance and protect and promote the interests of leather industries in the State of Andhra Pradesh, whether owned by the Government, a statutory body, company, firm, or individuals and to provide them with capital, credit means, resources, technical and managerial assistance for the prosecution of their work and business, to enable them to develop and improve their methods of manufacture, management and marketing and their technique of production,"

Among its incidental or ancillary objects, reference may be made to objects Nos. 6, 7, 8, 9, 16 and 35, which read as follows :

"(6) to grant or guarantee or recommend the grant of loans to leather industries, to which such sub-contracts are given or orders are issued as aforesaid, in order to enable them, in carrying out the sub-contracts or orders, to finance plant construction, conversion or expansion, including the acquisition of land, or to finance the acquisition of equipments facilities, machinery supplies or materials, or to supply such concerns with working capital to be used in the manufacture of articles, equipment, supplies or materials under contract to Government, or to this company, to provide them with such financial technical, managerial and other assistance as may be deemed necessary for the purpose of enabling them to execute and carry out the sub-contracts and orders satisfactorily and to organise production and manufacture for meeting such contracts and sub-contracts and orders adequately and according to specification, and to ensure satisfactory production by all necessary instructions, assistance, inspection and supervision :

(7) to effect co-ordination between large scale leather industries and small scale leather industries by suitable methods similar to those aforesaid enabling small industries to manufacture satisfactorily such parts, accessories, ancillaries and components and other articles as may be required by large scale industries;

(8) to promote and operate schemes for development of leather industries in the country and for that purpose to prepare and get prepared reports, blue prints, statistics and other information;

(9) to promote and establish such companies, associations, advisory boards and other suitable bodies as may be deemed necessary in order to carry out the aforesaid objects effectively;

* * * (16) to establish, promote, subsidise, and otherwise assist any company or

companies, syndicate or other concern for the purpose of setting up any industry for the production of leather or leather articles or running any leather undertaking, acquiring any property of furthering any of the objects of this company;

(35) to undertake such other activities, industrial, commercial or financial, which will create conditions conducive to the growth of Leather Industries in the State of Andhra Pradesh ..."

28. According to the Articles of Association, its initial paid-up capital is contributed by the Government; any invitation to the public to subscribe for any shares or debentures of the company is prohibited; its Directors, including its Managing Director, are to be appointed and removed by the Government; their salaries are fixed by the Government; and the Chairman of the Board of Directors is also appointed by the Government. We may observe that the Articles of Association of this Corporation are substantially on par with the Articles of Association of the Irrigation Corporation. In particular, the State Government is empowered to issue such directives and instructions as it may consider necessary in regard to the conduct of the business and affairs of the Corporation, and the Corporation is bound to give effect to such directives and instructions.

29. Now, the object No. 4 and the ancillary objects set out above, clearly go to show that this Corporation is not a pure commercial venture on the part of the State. In other words, its functions are of a public nature and meant for the benefit of the public. The Corporation is created for the purpose of financing and developing the leather industry in the State, in all the sectors of economy and to put it on a sound footing. For that purpose, the Corporation is to aid, advise, assist and finance the individuals and other persons by providing them with capital, credit, means resources, and technical and managerial assistance. The several incidental or ancillary objects, referred to hereinbefore, elaborate and elucidate the main object No. 4. This activity is certainly not a purely commercial one. It is clear that the Government, instead of undertaking the said activity through a department of the Government, has created the Corporation. Its capital is provided by the State, the control of its affairs and business is vested in the State, and the nature of its activity is a public. Promoting and developing the leather industry in the State does not merely benefit the producers. It ultimately benefits the consumers as well. In this context, we may also refer to the fact that the officers of this Corporation would be "public servant within the meaning of S. 21 of the Indian Penal Code. The Corporation is, therefore, an instrumentality of the State, and amenable to the writ jurisdiction of this Court.

30. We may mention that the question whether "LIDCAP" is an instrumentality of the State and, therefore, amenable to the writ jurisdiction of this Court, had come up earlier before this Court. W.P. No. 3103 of 1975 raising this question came up before me, sitting singly, in December, 1977. By order dated 17th January, 1978, I referred the matter to a Bench, while recording my views on the subject, pointing out the desirability of accepting the argument that this

Corporation is an instrumentality of the State. The matter came up before a Bench of this Court in April, 1978. The Bench, however, following the decisions of the Supreme Court in *Sabhajit Tewary Vs. Union of India (UOI) and Others*, and *Shridhar Mahadeo Dhamorikar Vs. State of Maharashtra*, held that it being a Company incorporated under the Companies Act, cannot be treated as an instrumentality of the State. Accordingly it was held that it is not amenable to the right jurisdiction. By that date - it may be noted - the decisions of the Supreme Court in *Ramana's case (supra)* or the subsequent cases, were not available. The mainstay of the petitioners' contention therein was the opinion of Mathew, J, in *Sukhdev's case, (supra)*. The Bench was, however, of the opinion that, having regard to the decision of the Supreme Court in *Tewary's case (supra)*, rendered on the same day, and also having regard to the earlier decisions in *Praga Tools Corporation's case (supra)* etc., the petitioners' contention cannot be accepted. But, since then the Supreme Court has, in more than one decision, explained those earlier cases, including the one in *Sabhajit Tewary v. Union of India, (supra)* which aspect has been dealt with by us hereinbefore. Following the principles affirmed in the subsequent decisions of the Supreme Court, we hold that the decision of the Bench in W.P. No. 3103 1975, dated 17th April, 1978, was not correctly decided and is no longer good law.

31. So far as the decision of another Bench in W.P. No. 5904 of 78 dated 8th December, 1979, is concerned, it is not necessary for us to express any opinion about the correctness of that decision, because it does not directly arise in this batch of writ petitions. We have affirmed and clarified the tests for determining whether a Corporations an instrumentality or agency of the State, and also the aspect, in which cases this scrutiny is relevant and in which cases, not. The matter has been referred to the Full Bench, not for determining the correctness of the said decision but for an authoritative opinion on the question, whether a writ lies against a non-statutory Corporation, and that question we have answered. For the purpose of these writ petitions, it is not necessary to examine the "anatomy" of NCERT or to determine whether it is an instrumentality or agency of the State. It is however, clear that any observation in the said judgment regarding the effect and purport of the Supreme Court judgments referred to above, in so far as they are inconsistent with this judgment, must be held to be no longer good law.

32. We answer the question referred to us accordingly, and remit the matters back to the Bench of decision on merits. W.P. No. 854 of 1979 shall, however, go bank to the single Judge.

33. Per Jayachandra Reddy, J. - While I agree with my learned brother Jeevan Reddy, J., that the Andhra Pradesh State Irrigation, Development Corporation Limited is "State" with the meaning of Art. 12 of the Constitution, I am unable to agree that the Leather Industries Development Corporation of Andhra Pradesh Ltd. (LIDCAP) also is a "State" within the meaning of Art. 12. To substantiate this view of mine, it may not be necessary to refer to all the decisions. Suffice if I

refer to three leading decisions, viz., Sukhdev Singh v. Bhagatram, (supra), Ramana v. I. A. Authority of India, (supra) (hereinafter referred to as "Airport Authority's case"), and Som Prakash Rekhi v. Union of India, (hereinafter referred to as "Bharat Petroleum's case"). Mathew, J., in a separate but concurring judgment in Sukhdev Singh's case (supra) examined the question from a different angle and evolved certain tests to be adopted in considering whether a corporation is an "authority" within the meaning of Art. 12 of the Constitution. Bhagwati, J., in Airport Authority case, (supra) adopted those tests and held that the Airport Authority is a "State" within the meaning of Art. 12. In both these cases the Corporations involved were created by statutes. Therefore, there has been scope to contend that Corporations created by statutes only come within the meaning of Art. 12. In Bharat Petroleum case, (supra) Krishna Iyer, J., after a consideration of the various decisions of the Supreme Court including Sukhdev Singh's case, (supra) and Airport Authority's case (supra) held that Bharat Petroleum, though a Government Company, is a "State" within the enlarged meaning of Art. 12. The learned Judge has also observed that "sometimes the test is formulated, in over-simplified fashion, by asking whether the Corporation is formed by a statute or under a statute. The true test is functional. Not how the legal person is born but why it is created. Nay more, apart from discharging functions or doing business as the proxy of the State, wearing the corporate mask there must be an element of ability to affect legal relations by virtue of power vested in it by law". A perusal of these three judgments would show that the following factors are relevant in deciding the question :

- (1) Whether the entire share capital of the Corporation is held by the Government ? If so, it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government.
- (2) Whether there is deep, pervasive and unusual State control over the Corporation ?
- (3) Whether the Corporation enjoys monopoly status which is State conferred or State protected.
- (4) Whether the functions of the Corporation are of public importance and closely related to Governmental functions ?
- (5) Whether a department of Government is transferred to a Corporation.
- (6) Whether a legal person is a Corporation created "by a statute" as distinguished from "under a statute" ? However, this by itself is not an important criterion although it may also indicate that a Corporation is an instrumentality of agency or of Government.

34. These are some of the factors emphasised by Krishna Iyer, J., which would establish that the Corporation is an instrumentality or agency of the Government. The learned Judge at the same time has also observed that these factors are not

clinching. It was also observed that a cumulative effect of all these factors has to be taken into consideration.

35. A perusal of these three judgments would also show that the learned Judges while laying down these tests have also indicated certain guidelines which have to be borne in mind, particularly while considering whether a Government company is an instrumentality or agency of the Government. In Sukhdev Singh's case (supra) Mathew, J., observed thus (at p. 422, para 23).

"Does any amount of State help, however inconsequential, make an act something more than an individual act ? Suppose, a privately owned and managed operation receives direct financial aid from the State, is an act of such an agency an act of State ? It would be difficult to give a categorical answer to this question. Any operation or purpose of value to the public may be encouraged by appropriation of public money and the resulting publicly supported operation can be characterized as a State operation. But such a rule would seem to go to the extreme. There seems to be no formula which would provide the correct division of cases of this type into neat categories of State action and private action. Some clue, however, to the considerations which might impel the Court in one direction or the other may be obtained from an examination of the cases in this area."

Having thus observed, the learned Judge referred to several American cases and held that these Corporations are instrumentalities or agencies of the Government for carrying on business which otherwise would have been done by the State departmentally. In Airport Authority's case, [1979-II L.L.J. 217]. Bhagwati, J., observed as follows :

"It is not possible to formulate an allinclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula which would provide the correct division of Corporations into those which are instrumentalities or agencies of Government and those which are not."

The learned Judge, while considering various tests, held that "specifically if a department of Government is transferred to a Corporation, it would be a strong factor in support of this inference." The learned Judge has enumerated the various factors to be taken into consideration in this regard in the following manner :

"It will thus be seen that there are several factors which may have to be considered in determining whether a Corporation is an agency or instrumentality of Government. We have referred to some of these factors and they may be summarised as under : whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance whether there is any other form of assistance, given by the State and if so whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the Corporation by the State and what is the nature and extent of such control, whether the Corporation enjoys State conferred or State protected

monopoly status and whether the functions carried out by Corporation are public functions closely related to Governmental functions. This particularisation of relevant factors is, however, not exhaustive and by its very nature it cannot be because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the Corporation and Government calling for flexibility, adaptability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a Corporation is Governmental instrumentality or agency. Moreover, even amongst these actors which we have described, no one single factor will yield a satisfactory answer to the question and the Court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of a particularised inquiry into the facts and circumstances of each case."

36. In *Bharat Petroleum's case*, (supra), Krishna Iyer, J., after considering the ratio in the *Airport Authority's case*, observed thus :

"..... A careful study of the features of Airport Authority and a Government company covered by Ss. 7, 9, 10 and 12 of the Act before us discloses a close parallel except that the Airport Authority is created by a statute while Bharat Petroleum notified under S. 7 of the Act is recognised by and clothed with rights and duties by the State"

37. In arriving at such a conclusion the learned Judge has also referred to the provisions of *Burmah Shell (Acquisition of undertakings in India) Act, 1976*. After considering these provisions it is observed thus :

"..... This review, though skeletal, is sufficiently striking to bring home the point that the Corporation we are concerned with is more than a mere Government company. Whatever its character antecedent to the Act, the provisions we have adverted to have transformed it into an instrumentality of the Central Government with a strong statutory flavour super-added and clear indicia of power to make it an "authority". Although registered as a company under the *Indian Companies Act*, the second respondent is clearly a creature of the statute, the undertaking having vested in it by force of S. 7 of the Act. The various provisions to which our attention was drawn, an elaboration of which is not called for emphasize the fact that the second respondent is not a mere company but much more than that and has a statutory flavour in its operations and functions, in its powers and duties, and in its personality itself, apart from being functionally and administratively under the thumb of Government. It is a limb of Government, an agency of the State, a vicarious creature of statute working on the wheels of the Acquisition Act. We do not mean to say that for purposes of Art. 309 or otherwise this Government company is State but limit our holding to Art. 12 and Part-III."

8. As already mentioned above, the difficulty arises while deciding the question

whether a particular Government company comes within the meaning of Art. 12. As a matter of fact Krishna Iyer, J., while considering the submission about the scope of the ratio in Sukhdev Singh's case, and Airport Authority's case, observed as follows :

"We are free to confess that the proposition have not been neatly chiselled and presented in any of the rulings and further, some measure of incongruity may be noticed if we search for the same;"

In this context it is useful to refer to the following observations made in Bharat Petroleum's case. (supra)

"The characteristics of Corporations, their rights and liabilities, functional autonomy and juristic status, are jurisprudentially recognised as of a distinct entity even where such Corporations are but State agencies or instrumentalities. For purposes of the Companies Act, 1956, a Government company has a distinct personality which cannot be confused with the State".

No doubt, Bharat Petroleum Corporation was a Government company registered under the Companies Act, but their Lordships applied several tests to which I have already referred and virtually placed the company in the same position as a statutory corporation by holding that "Bharat Petroleum notified under S. 7 of the Act is recognised by and clothed with rights and duties by the State". This again shows that apart from other "functional tests", the "statutory flavour" which the corporation enjoys is also an important factor. I may mention here that during the course of the arguments before us a question arose whether the fact that the corporation is created "by a statute" itself is sufficient to attract Art. 12, or other tests also should be satisfied. I am unable to envisage a case where in spite of a corporation being created by a statute it still fails to be an agency or instrumentality of the Government. As a matter of fact in Bharat Petroleum's case (supra) after referring to S. 3 of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976, Their Lordships observed as follows".

"This provision lays bare the central object of making the Central Government the proprietor of the undertaking. It hardly needs argument to convince a court that by virtue of S. 3, the Central Government is the transferee of the undertaking. Had a writ proceeding been commenced during the period of vesting in the Central Government, it could not have been resisted on the score that the employer is not "the State". The appointed day did arrive and the right, title and interest in Burmah Shell did vest in the Central Government."

However, it may not be necessary consider this aspect in view of the further principles laid down by the Supreme Court in Airport Authority's case (supra) and Bharat Petroleum's case (supra). Suffice if we say that the Supreme Court has also laid down that the fact that the corporation is created by a statute is also an important criterion.

39. Now, being these tests and guidelines in mind, I shall proceed to examine

whether LIDCAP can be called an instrumentality or agency of the State Government. Let me first refer to certain factors which are not in controversy. The LIDCAP is not created by any statute. It is only a company registered under the Companies Act LIDCAP does not enjoy a monopoly status conferred or protected by the State. No departmental activity hitherto carried on by the State is transferred to LIDCAP. With this background let us examine the Memorandum of ground let us examine the Memorandum of Association and Articles of Association of LIDCAP.

40. The Memorandum of Association discloses that the main object of the Corporation is to promote, establish, improve, develop, own and run Flaying and Curing, Centers, Hides-Exchanges, Tanneries, etc., and to manufacture, buy, import, export sell and generally deal in all varieties of vegetables tan-stuffs, tanning chemicals, etc. The various clauses in the Memorandum of Association only deal with activities of the LIDCAP in promoting the business.

41. I shall now consider the Articles of Association, on the basis of which my learned brother Jeevan Reddy, J., has concluded that the LIDCAP is an instrumentality or agency of the Government. It is true that the LIDCAP was directed to be created by the Government in G.O. Ms. No. 835, Industries and Commerce Department, dated 7th September, 1978. Para 2 of the G.O. shows that LIDCAP was establishment as a Government company under the Companies Act. It is also mentioned in the G.O. that the Government would be sanction Rs. 6.5 lakhs towards the share capital contribution, The Articles of Association show that the share capital of the company is Rs. 2 cores divided into lakhs equity shares of Rs. 100 each. Article 6 shows that the shares shall be under the control of the Board of Directors who may allot or otherwise dispose of the shares to such persons on such terms and conditions as they think fit. Article 8 shows that every person whose name is entered as a member in the register shall without payment of any fee or be entitled to a certificate under the seal of the company specifying the share or shares held by him and the amount paid thereon. Article 11 lays down that the company shall have a lien on every share, not being a fully paid share. Article 14 is to the effect that the board may from time to time make calls upon the members in respect of any moneys unpaid on their shares and specify the time or times of payment and each member shall pay to the company at the time or times so specified the amount called on each share. Article 19 is to the effect that if a member fails to pay any call or instalment of a call on the day appointed for payment thereof the Board may at any thereafter during such time as any part of the call or instalment remains unpaid serve a notice on him requiring payment of so much of the call or instalment remains unpaid serve a notice on him requiring payment of so much of the call or instalment as is unpaid together with any interest which may have accrued Article 23 is to the effect that a share may be transferred by a member or other person entitled to transfer only to a person approved be the Government. Articles 26 to 28 provide for the transfer of shares by the members. From these articles I am unable to come to the conclusion that the entire share capital is to be invested by the Government -

as a matter of fact G.O. Ms. No. 835 itself shows that the Government paid only Rs. 6.5 lakhs as its contribution towards shares capital and as per the above mentioned articles and as per the above mentioned articles the shares can be allotted to any person. No doubt the Articles of Association of the A.P. State Irrigation Development Corporation Ltd., (hereinafter referred to as "the Irrigation Development Corporation") are more or less to the same effect, but it must be remembered that the Memorandum itself shows that the Irrigation Development Corporation has to act as an agent for Government of Andhra Pradesh or Government of India or other authorities in execution of works entrusted to it. That apart, it is not in dispute that the works hitherto being carried on by the Government were transferred to that Corporation. This makes all the difference. The functions of the Irrigation Development Corporation are of public importance and are closely related to governmental functions. This is yet another important distinguishing feature. So far as LIDCAP is concerned, it cannot be said that the functions it carries on are closely related to government functions. The object of the company is only to promote leather industry and to receive cottage, small-scale and medium industries. This was not previously a government function and at any rate it cannot be said that the functions of the LIDCAP can be identified as that of the Government.

42. The only test which is perhaps relevant is the control that the Government exercises over the corporation, but here again is we have to see whether it is "so deep, pervasive and unusual". In the Memorandum of Association of the LIDCAP there are no clauses providing for the control of the Government. In the Articles of Association. Articles 1 and 2 deal with definitions, Article 3 lays down that the company has to be governed by the Regulations. Articles 4 lays down that it is a private company registered under the Companies Act. Articles 5 to 41, as already mentioned, deal with the allotment of shares, etc. Articles 42 to 47 deal with holding of meetings, Article 48 lays down that the government so long as they are shareholders of the company, may from time to times appoint one or one more persons to represent them at all or any meetings of the Company. Article 49 empowers the Chairman of the Board to take the chair at every general meeting. Articles 50 to 69 again deal only with meetings. Article 70 lays down that total number of Directors both ex officio Directors and Director other than ex officio Director of the Company, shall neither be less than two nor more than fifteen at the any time. Under Art. 71 the first Directors and all subsequent Directors shall be appointed by the Government by nomination; and the Government also shall have the power to remove any Director including the Chairman and the Managing Director under the same article. Under Art. 72 the Government may appoint from time to time one of the Directors to be chairman of Board of Directors. Article 75 deals with the terms of office of the Directors. Article 76 deals with the remuneration of the Directors. Articles 78 to 80 deal with the powers of the Board of Directors. Under Art. 81 the Government may appoint one of the Directors to be Managing Director of the company; and Art. 82 enumerates the powers of the Managing Director and lays down that the

Managing Director shall have such powers and authority to conduct the affairs of the company as may be vested in him or delegated to him by the Board. Under Art. 83 the Government may confer upon the Managing Director such powers for such objects and purposes as they may think expedient. Articles 86 and 87 deal with the disqualifications of the Directors. Articles 88 to 98 deals with the proceedings of the Directors. The rest of the articles are not very much relevant, except Art. 142 which lays down that notwithstanding anything contained in any of the articles, the Government may, from time to time, issue such directives as they may consider necessary in regard to the conduct of the business and affairs of the Company or Directors thereof and in like manner may vary and amend any such directive. So, Articles 71 and 73 make it clear that the Directors of the Board are appointed by the Government. Article 80 deals with their powers. There are 19 clauses in Art. 80. They all deal with the business activities, like purchasing, leasing out, meeting demands, declaring dividends, etc., None of these activities are governmental in nature. It is true that the Managing Director is appointed by the Government under Art. 82, but he again has such powers to conduct the affairs of the Company as may be vested in him or delegated to him by the Board. So, his powers also do not go beyond the powers that can be exercised by the Board. Therefore, two things are clear, viz, that the Directors, are appointed by the Government and the Managing Director also is appointed by the Government, and the Government also has power to remove any Director including the Chairman and the Managing Director. But this by itself does not mean that the Government has such a deep, pervasive and unusual control. The Board of Directors and the Managing Director have only such powers which are necessary to conduct the affairs of the Company and under Art. 142 the Government can give directives only when they are necessary in regard to the conduct of the business and affairs of the Company. We also come across such article in the Articles of Association of the order Government companies including that of the Irrigation Development Corporation. But, on other basis of this kind of article, it cannot be concluded that the Government wholly controls the company not only in its policy but also in carrying on every function. In other words, from this article it cannot be said that the LIDCAP functions only as an instrumentality or agency of Government. This kind of control by the Government in the matter of appointment and removal and in the matter of vesting some special powers in the Managing Director, or giving some directives only when it is necessary for carrying on the activities of the company, is common to every Government company. In Airport Authority's case, (supra) Bhagwati, J., observed that "where a Corporation is wholly controlled by Government not only in its policy-making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government". In the case of LIDCAP it cannot be said that carrying out the functions entrusted to it are also wholly and for all times and for all purposes controlled by the Government. Even the fact that the employees of the Government company come within the meaning of "public servants" as defined under S. 21 of the Indian Penal Code, also does not make

any difference because that is common to every Government company. Unless it is shown that in a particular Government company the control of the Government is such that it is deep, pervasive and unusual, it must be held that one of the important tests laid down by the Supreme Court remains unsatisfied. When we examine the Memorandum and Articles of Association of the Irrigation Development Corporation, we find there is such deep and unusual control. For instance, Art. 89 of the Articles of Association of the Integration Development Corporation makes it imperative that the Chairman shall reserve for the approval of the Government any proposals or decisions of the Directors in respect of works capital, increasing or reducing the issue capital of the company granting by the company a loan, winding up of the company, or any other matter which in the opinion of the Chairman is of such importance as to be reserved for the approval of the Government, and unless the Government gives the approval no action can be taken by the Board. This definitely reveals that the Government has pervasive control. Yet another important article which shows that the Government has deep and unusual control over the Irrigation Development Corporation is Art. 106, which lays down that in addition to the audit to be carried out in accordance with the Act, the Comptroller and Auditor General of India shall have the right to arrange for external audit by an authority appointed by him, and the authority so appointed by the Comptroller and Auditor-General of India and all the members of the staff working under that authority shall, at all reasonable times, have access to all accounts, account books, vouchers. Documents and other papers of the company and all reports of Auditors appointed under the Act; and on a report submitted by the said authority the Comptroller and Auditor-General of India may make suitable action. This also shows that the Government has deep and unusual control over the Irrigation Development Corporation which is a Government company. We do not find such articles in the case of LIDCAP.

43. Even assuming for argument's sake that there is such control by the Government in the case of LIDCAP, that by it self is not sufficient to hold that it comes within the meaning of "State", if no other factor pointed out by the Supreme Court is present. We notice no other factors which satisfy the tests as we find in the case of Irrigation Development Corporation and Bharat Petroleum. In the case of Irrigation Development Corporation, as already mentioned, in a the memorandum itself it is stated that it is an agent of the Government and that the activities hitherto carried on by the department of the Government have been transferred to the Irrigation Development Corporation, as already mentioned, in the memorandum itself it is stated that it is an agent of the Government and that the activities hitherto carried on by the department of the Government have been transferred to the Irrigation Development Corporation, and apart from the financial assistance the Government has also a deep and pervasive control. In addition to these, the other tests, viz., that the functions of the Irrigation Development Corporation are of public importance and closely related to government functions, are also satisfied. Some of these important factors are absent in the case of LIDCAP. In the case of Bharat Petroleum, as

observed by the Supreme Court, the Company stepped in the shoes of the executive power of the State. Further on an examination of the provisions of the Burmah Shell (Acquisition of Undertaking in India) Act Supreme Court also reached the conclusion that the Bharat Petroleum is more than a mere Government company and that those provisions of the Act do show that the same has been transformed into an instrumentality of the Central Government, and it has a statutory flavour in its operation and functions, in its personality itself, apart from being functionally and administratively under the thumb of the Government.

44. Thus, we can notice a marked difference in the operations and functions of the LIDCAP and its personality itself as compared to the other two Corporations, viz., Irrigation Development Corporation and Bharat Petroleum Corporation.

45. To sum up, LIDCAP is not created by a statute. The entire share capital of the Corporation is not held by the Government. The LIDCAP does not enjoy a monopoly status which is State-conferred or State-protected. On the other hand, there are any number of private industries and companies carrying on the same activities. The functions of the Corporation are not closely related to government functions and they are only purely business activities. The activities that have to be carried on by the LIDCAP were not formerly of any department of the Government. At any rate, no department of the Government as such is transferred to the company. The control that the Government exercises over the company is not deep, pervasive and unusual. The control exercised by the Government is in no way different from the one exercised by the Government over any other ordinary Government company. It is true, one of the objects of the LIDCAP is promote and operate schemes for the development of leather industry in the country, etc. From that it may be said that the functions of the LIDCAP are of public importance, but that is not sufficient. In that larger sense, the functions of every company ultimately turn out to be for the public good. The instrumentality or agency of Government comes in only when such functions are closely related to the governmental functions. This is clearly absent in the case of LIDCAP.

46. For the aforesaid reasons, a writ can be issued against the Andhra Pradesh State Irrigation Development Corporation. So far as W.P. No. 854 of 1979 is concerned a writ cannot be issued against LIDCAP, the second respondent therein.