
(2019) 01 CAL CK 0160

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 15233 (W) Of 2018

Debashis Nandy

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 21-01-2019

Acts Referred:

Citation : (2019) 01 CAL CK 0160

Hon'ble Judges : Protik Prakash Banerjee, J

Bench : Single Bench

Advocate : Arif Ali, Ambar Banerjee, Amrita Panja Moulick, Ashim Kumar Ganguly, Sonal Sinha, Amitesh Banerjee, Tarak Karan, Kaushik Chanda, Rabi Prosad Mookherjee

Final Decision : Dismissed

Judgement

Arijit Banerjee, J

(1) The writ petitioner is an association of the Retired Employees of the second respondent, who were posted at the Head Office of the second respondent. The writ petition is essentially directed against the second respondent i.e. Andrew Yule and Company Limited.

(2) Mr. Majumder, learned counsel for the respondent No. 2 has raised a preliminary objection about the maintainability of the writ petition. He relied on the decision of the Hon'ble Division Bench of this Court in the case of Sri Anupam Ghosh versus Union of India and others, reported in 1991 (2) CHN 451. In that case, the learned Trial Judge had held that Andrew Yule (hereinafter referred to as the said company) was not a 'State' within the meaning of Article 12 of the Constitution of India and hence, a writ petition was not maintainable against the said company. This finding of the learned Single Judge was upheld by the Hon'ble Division Bench.

(3) Mr. Majumder also referred to a decision of a Division Bench of this Court delivered on 23rd July, 2008 in Movewell Griha Nirman Pvt. Ltd. and another

versus The Andrew Yule Co. Ltd. and others (APOT No. 67 of 2008). In the said case, the Division Bench took the same view as was taken by the Division Bench in the case of Anupam Ghosh.

(4) Mr. Bhattacharyya, learned Senior Counsel appearing for the petitioner pointed out with reference to the judgment in the case of Anupam Ghosh that the factors that weighed with the Court in coming to the conclusion that the said company is not an authority within the meaning of Article 12 of the Constitution were as follows:-

(i) The said company is governed by the provisions of the Companies Act and the entire share capital of the company is not owned by the Central Government.

(ii) The other non-governmental share holders are also entitled to exercise rights as share holders in effecting various controls on the functioning of the company.

(iii) The company raises fund by way of loans from financial institutions for the running of the trading activities of the company.

(iv) The Central Government does not have deep and pervasive control on the functioning of the company.

(v) Although the Central Government ensures that the company follows the general policy decisions of the government and guidelines and directions of the Bureau of Public Enterprises, such exercise of control by itself will not constitute deep and pervasive control on the functioning of the company, so as to make it an instrumentality or agency of the government.

(vi) The financial resources of the State are not the chief funding resource of the company nor the activities of the company are Governmental in essence nor the plenary control fully rests with the government.

(5) Mr. Bhattacharyya submitted that subsequent to the passing of the judgment in the case of Anupam Ghosh, the nature and character of the company has undergone a sea change. Hundred per cent of the share holding is now held by the Central Government. He drew my attention to the Master List of Central Public Sector Enterprises as on 31st March, 2017 and pointed out that the said company finds place in the said list. He further drew my attention to the guidelines on Corporate Governance for Central Public Sector Enterprises issued by the Ministry of Heavy Industries and Public Enterprises, Government of India on 22nd June, 2007 and in particular to Clause 1.6 of the said guidelines which reads as follows:-

1.6 Apart from these instructions of DPE, the CPSEs are governed by the Companies Act, 1956 and regulations of various authorities like Comptroller and Auditor General of India (C&AG), Central Vigilance Commission, administrative Ministries, other nodal Ministries, etc. The Right to Information Act 2005 is also applicable to the CPSEs. The CPSEs fall under the definition of 'State' as provided in Article 12 of the Constitution of India. Further, some principles of corporate

governance are already in vogue in public sector because (a) the Chairman, Managing Director and Directors are appointed independently through a prescribed procedure; (b) Statutory auditors are appointed independently by the C&AG; (c) Arbitrary actions, if any, of the Management could be challenged through writ petitions; (d) remuneration of Directors, employees, etc. are determined on the basis of recommendations of Pay Committees constituted for this purpose etc.

(6) Mr. Bhattacharyya further referred to an office memorandum dated 14th May, 2010 issued by the Ministry of Heavy Industries and Public Enterprises, Government of India continuing the guidelines issued on 22nd June, 2007 and directing all Administrative Ministries/Departments to issue suitable directions to all the Central Public Sector Enterprises under their respective administrative jurisdiction to comply with the guidelines on Corporate Governance on a mandatory basis.

(7) Learned Senior Counsel also placed before me the revised guidelines on Corporate Governance for Central Public Sector Enterprises issued in May, 2010, Clause 1.7 whereof reads as follows:-

1.7 Apart from these instructions of DPE, the CPSEs are governed by the Companies Act, 1956 and regulations of various authorities like Comptroller and Auditor General of India (C&AG), Central Vigilance Commission (CVC), Administrative Ministries, other nodal Ministries, etc. The Right to Information Act 2005 is also applicable to the CPSEs. The CPSEs fall under the definition of 'State' as provided in Article 12 of the Constitution of India. Further, some principles of Corporate Governance are already in vogue in public sector because (a) the Chairman, Managing Director and Directors are appointed independently through a prescribed procedure; (b) Statutory auditors are appointed independently by the C&AG; (c) Arbitrary actions, if any, of the Management can be challenged through writ petitions; (d) Remuneration of Directors, employees, etc. are determined on the basis of recommendations of Pay Committees constituted for this purpose; etc.

(8) The said 2010 guidelines also provide for composition of the Board of Director of a Central Public Sector Enterprise.

(9) Mr. Bhattacharyya then submitted that the loans/financial assistance advanced by the Central Government to the said company have substantially been converted into equity held by the Central Government.

(10) Mr. Bhattacharyya submitted that in view of the aforesaid, it is clear that the said company has undergone a complete structural metamorphosis. The Central Government is the only share holder. It has full, deep and pervasive control over the functioning of the company. The Government guidelines themselves recognize that the said company being a Central Public Sector Enterprises is 'State' within the meaning of Article 12 of the Constitution of India and is amenable to the writ jurisdiction of the High Court.

(11) I am impressed with the submission of Mr. Bhattacharyya, learned Senior Counsel appearing for the petitioner. Indeed, it appears that the structure, nature and character of the company have undergone a complete change. I would have accepted Mr. Bhattacharyya's submissions that the company as it is today is an authority within the meaning of Article 12 of the Constitution of India and is amenable to the writ jurisdiction of the High Court but for the fact that the decision in Anupam Ghosh stares at my face. I am bound by the decision and by the subsequent decision of the Division Bench in the case of Movewell Griha Nirman Pvt. Ltd. and another versus The Andrew Yule Co. Ltd. and others which have both held that a writ petition is not maintainable against the company. Only a higher Forum can reconsider whether or not the said company is an authority within the meaning of Article 12 of the Constitution of India and, therefore, an application under Article 226 of the Constitution is maintainable against it.

(12) I have not considered the merits of the petitioner's case. Purely on the ground of maintainability I am compelled to dismiss the writ petition, in view of the earlier Division Bench judgements of this Court referred to above.

(13) W.P. No. 18957 (W) of 2018 is accordingly dismissed.

(14) Urgent Photostat certified copy of this judgment shall be given to the parties, if applied for, upon compliance with requisite formalities.