
(1992) 02 CAL CK 0010

In the Calcutta High Court

Case No : F.M.A.T. No. 2331 arose out of C.R. No. 13063 (W) of 1986

Director, Indian Association for The Cultivation of Science

APPELLANT

Vs

Ashoke Kumar Roy

RESPONDENT

Date of Decision : 21-02-1992

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : 96 CWN 798 : (1992) 1 ILR (Cal) 111

Hon'ble Judges : Bhagabati Prasad Banerjee, J; Amal Kanti Bhattacharji, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Partha Sarathi Sengupta and Surajit Das, for the Appellant; Sundarananda Pal, Mandira Mukherjee and Sadhan Roy Chowdhury, for the Respondent

Final Decision : Allowed

Judgement

Bhagabati Prasad Banerjee, J.—This is an appeal against the judgment dated July 20, 1990, passed by the learned trial Judge in Civil Rule No. 13063(W) of 1986. The Respondent writ Petitioner filed a writ application praying for a mandamus upon the Appellants herein to act and proceed in accordance with the provisions of law and to cancel, withdraw and/or rescind the order contained in Annex. "D" of the writ petition by which the Petitioner was informed that Prof. A.N. Chakraborty, Head, Department of Medical Microbiology and Parasitology, University of Calcutta, has stated that Sri Roy may be advised to approach the I.C.M.R through his last Controlling Officer at I.A.C.S. through the offices of I.A.C.S. (Registrar etc.) giving clear written indications of his acceptance of his retrenchment with effect from September 30, 1985. The writ Petitioner Respondent was appointed to the post of Laboratory Technician attached to the Department of Macromolecules under the I.C.M.R. Project entitled "Natural Transfer of Plasmids with special Biotics as Food Additives" on a temporary basis on Rs. 500 (fixed) per month for a period of one year initially. The said appointment was to be terminated upon withdrawal/termination of the scheme

by the sponsoring authority at any time or upon non-renewal of his services due to unsatisfactory progress. Thereafter, the service of the writ Petitioner was extended under various projects. The writ Petitioner also prayed for an order to allow him to resume his duties and functions as usual in the post of Laboratory Technician and to fix and finalise his scale of pay and to draw and disburse the same including arrears therefore and a declaration that the writ Petitioner is an employee of the Indian Association for the Cultivation of Science from December 6, 1978. The learned trial Judge on consideration of the matter allowed the writ application and made the Rule absolute and the learned trial Judge found that the writ Petitioner was eligible for absorption as a regular staff of the Indian Association for the Cultivation of Science against the post held by him and such absorption should be made within a period of three months from the date of communication of that order.

2. Mr. Saktinath Mukherjee, learned Advocate appearing with Mr. Partha Sarathi Sengupta, learned Advocate, after arguing the case on merits for some time took a preliminary objection as to the maintainability of the writ application relying upon a latest decision of the Supreme Court in the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], The said preliminary objection is whether the Indian Association for the Cultivation of Science is an authority either under Article 12 or under Article 226 of the Constitution of India.

3. Indian Association for the Cultivation of Science is a Society registered under the Societies Registration Act (XXI of 1860), 1860. The objects of the Society are to (i) cultivate science in all its departments both with a view to its advancement by original research and to its varied applications to the arts and comforts of life, (ii) found; equip and maintain scientific laboratories and library or reading room for general use among the members or the students of the Association, (iii) establish and maintain collections of natural history, mechanical, scientific and philosophical inventions, instruments or designs, and (iv) take all proper and necessary steps for diffusion and cultivation of science in all departments. There are four categories of members constituting the said Association, namely, (a) Ordinary members, (b) Life members, (c) Honorary fellows and (d) Ordinary fellows. Under the Articles of the Association the affairs of the said Association are administered, directed and controlled by an Executive Council. The said Council consists of 13 members out of which only four are Government nominees and representatives. Out of four, two members are nominated by the Ministry concerned of the Government of India and the other two by the Secretary to the Government of West Bengal. Out of 13 members 7 members of the Council form quorum for holding meeting. Under bye-law 28 all members of the staff including the Registrar and the Heads of Departments shall be under the administrative control of the Director. Under bye-law 33(ii) it is provided that as long as the Association continues to receive grant-in-aid from the Government, the accounts of the Association shall be audited annually by the Comptroller and Auditor-General of India or by any person authorised by him in this behalf and any

expenditure incurred in connection with such audit shall be payable by the Association to the Comptroller and Auditor-General of India. Bye-law 33(iv) provides that the results of audit shall be communicated by the Auditor to the Council of the Indian Association for the Cultivation of Science, Calcutta, who shall submit a copy of the Audit Report along with observations to the Government of India and to the Association. The Auditor shall also forward a copy of the report direct to the Government of India. Under Bye-law 34 the Council is entitled to borrow money from time to time from any source and under Clause (a) of Bye-law 34 the Council is entitled from time to time to accept loans from the Central or any State Government and/or from the University Grant Commission etc. Under Bye-law 40(b) the Finance Committee shall have the function to prepare an estimate of the income to be accepted during the next financial year from the properties and investments of the Association, and from Government grants and income from other sources.

4. The composition of the Council is dominated by private persons and not by person appointed or nominated by the Central Government or State Government. The money required for running the said Institution is not provided by the Central Government or State Government, but from various other sources and the Council may or may not accept such grants given by the Government. There is no provision that the Society can accept money only with the approval of Central Government and Central Government had no manner of control over the receipts and disbursement of the money by the Society. The accounts of the Society are not to be submitted to the Government for their scrutiny and/or approval. Only in respect of grants received from the Central Government the account has to be audited by the Auditor and Comptroller-General and audit report has to be sent for information of the Government. There is no provision that the Society has to comply with all such directions as may be issued by the Central Government in this behalf. Reliance was placed to the decision of the Supreme Court in the case of *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, wherein the Supreme Court observed that:

Where a Corporation is an instrumentality or agency of the Government it must be held to be an authority within the meaning of Article 12 and hence subject to the same basic obligation to obey the Fundamental Rights as the Government. It is immaterial for determining whether a Corporation is an authority whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The enquiry has to be not as to how the juristic person is born but why it has been brought into existence. The Corporation may be a statutory corporation created by a statute or it may be Government company or a company formed under the Companies Act or it may be a society registered under the Societies Registration Act of any other similar statute. Whatever be its genetically origin, it would be an authority within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or

agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12. A juristic entity which may be "State" for the purpose of parts III and IV would not be so for the purpose of part XIV or any other provision of the Constitution.

Reliance was placed to the latest decision of the Supreme Court in the case of *Chander Mohan Khanna v. The National Council of Educational Research and Training and Ors.* (Supra) wherein the Supreme Court observed that:

There are only general principles but not exhaustive test to determine whether a body is an instrumentality or agency of the Government. Even in general principles, there is no cut and dried formula which provide correct division of bodies into those which are instrumentalities or agencies of the Government and those which are not. The powers, functions, finances and control of the Government are some of the indicating factors to answer the question whether a body is "State" or not. Each case should be handled with care and caution. Where the financial assistance from the State is so much as to meet almost entire expenditure of the institution, or the share capital of the corporation is completely held by the Government, it would afford some indication of the body being impregnated with governmental character. It may be a relevant factor if the institution or the corporation enjoys monopoly status which is State conferred or State protected. Existence of deep and pervasive State control may afford an indication. If the functions of the institution are of public importance and related to governmental functions, it would also be a relevant factor. These are merely indicative indicia and are by means conclusive or clinching in any case.

Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression "State". A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State control. The State control does not render such bodies as "State" under Article 12. The State control, however vast and pervasive, is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "State". If the Government operates behind a corporate veil, carrying out governmental activity and governmental functions of vital public importance, there may be little difficulty in identifying the body as "State" within the meaning of Article 12 of the Constitution: See (i) *P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others*, ; (ii) *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, ; and (iii) *Tekraj Vasandi alias K.L.*

In that case it was further held that the National Council of Educational Research and Training (referred to as NCERT) was a society registered under the Societies Registration Act. Like all societies, it has a Memorandum of Association. It has Rules for internal management. The Supreme Court considered the object of the NCERT and held that the affairs of the NCERT are conducted by the Executive Committee comprising of Government servants and educationists. The Executive Committee would enter into arrangements with Government, public or private organisations or individuals in furtherance of the objectives for implementation of programmes. The funds of the said society consisted of (i) grants made by the Government, (ii) contribution from other sources, and (iii) income from its own assets. It was free to apply its income and property towards the promotion of its objectives" and implementation of the programmes. The Government control is confined only to the proper utilisation of the grant. It was held that the said society thus was largely an autonomous body.

5. In *Ajay Hasia's* case (Supra) it was held that the Regional Engineering College was an "authority" under Article 12 because of the composition of the Society was dominated by the representatives appointed by the Central Government and the Governments of Jammu and Kashmir, Punjab, Rajasthan and Uttar Pradesh with the approval of the Central Government. The monies required for running the college were provided entirely by the Central Government and the Government of Jammu Kashmir and even if any other monies were to be received by the Society it could only be done with the approval of the State and the Central Government. The Rules to be made by the Society were also required to have the prior approval of the State and the Central Governments and the accounts of the Society had also to be submitted to both the Governments for their scrutiny and satisfaction. The Society was also to comply with all such directions as might be issued by the State Government with the approval of the Central Government in respect of any matters dealt with in the report of the Reviewing Committee. The control of the State and the Central Governments was indeed so deep and pervasive that no immovable property of the Society could be disposed of in any manner without the approval of both the Governments. The State and the Central Governments had even the power to appoint any other person or persons to be members of the Society and any members of the Society other than a member representing the State or the Central Government could be removed from the membership of the Society by the State Government with the approval of the Central Government. The Board of Governors, which was in charge of general superintendence, direction and control of the affairs of Society and of its income and property is also largely controlled by nominees of the State and the Central Governments.

6. In the instant case the Indian Association for the Cultivation of Science, Jadavpur, is an association registered under the Societies Registration Act and is dominated by private persons. It was free to accept grants from the

Governments and is only answerable to the Governments in respect of the grants received from the Governments and that so long the Association continues to receive grants from the Government the accounts were required to be audited by the Comptroller and Auditor-General of India. It is also free to apply its income and property towards the promotion of its objectives and implementation of its programmes. It was pointed out by the learned Advocate appearing for the Respondents relying on various documents that the Society received much grants from the Central Government. But receiving of grants is not the sole test for determining whether it is an "authority" under Article 12 or not. There is no provision that the Society has to comply with all directions as may be issued by the Central Government in this behalf. It is true that the Association is free to dispose of its moveable and immovable properties and within loans but from this it is clear that there was an absolute control of the Central Government over the affairs of the Society. It cannot be said by any stretch of imagination that it is the Central Government who is functioning through the said Society and that, if the veil is lifted, it could not be accepted that though it is a body registered under the Societies Registration Act really the Central Government is running its affairs through a society. It is not controlled by the Government in any manner whatsoever. The word "State" or instrumentality of the State means that the Government is functioning though it is in the form of a society or a co-operative society or a company and this is a decisive factor for the purpose of determining whether it is an authority under Article 12 of the Constitution or not.

7. In our view, the test laid down by the Supreme Court in the case of *Ajay Hasia v. Khalid Mujib* (Supra) it is clear that the Indian Council of Cultivation and Research is not an "authority" within the meaning of Article 12, but it is an autonomous body and it is independent to carry out its affairs, as it likes.

8. In the case of *Francis John Vs. Director of Education and Others*, the Supreme Court took a view that

where disciplinary proceedings were started against the teacher of a school which is recipient of grant-in-aid and where the grant-in-aid made requires approval of the disciplinary action by the Director of Education of the Government and where such approval for termination by the management of the school was given, writ petition against such termination was maintainable.

In this case in the decision making process the Government approval of termination is the mandatory requirement and only on that ground it was held that in such cases the writ petition was maintainable against the Managing Committee of a school.

9. In another case, that is in *re. Manmohan Singh Jaitla Vs. Commissioner, Union Territory of Chandigarh and Others*, the Supreme Court observed that a Managing Committee of school receiving Government aid is amenable to writ jurisdiction. The Supreme Court in the case of *Vidya Dhar Pande Vs. Vidyut Grih Siksha Samiti and Others*, held that a school run by private trust receiving 100%

grant from the Government is amenable to writ jurisdiction.

10. In those cases Managing Committees of the schools were constituted under the Rules of the Management and admittedly those schools discharged public functions and duties and the same within the scope of public law. But, in the instant case, the situation is just otherwise.

11. The next question is whether the Association is an "authority" within the meaning of Article 226 of the Constitution of India. In this connection, reference was made by the learned Advocate appearing for the Respondents to the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, In that case, the Supreme Court considered the scope of "authority" under Article 226 of the Constitution of India and at para. 19 the Supreme Court observed that

the term "authority" used in Article 226 in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers powers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.

In this case the Supreme Court referred to the observations of Professor De Smith that

To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract. *Judicial Review of Administrative Act*, 4th Ed., p. 540.

The ratio of the judgment is that whatever may be the form of the body concerned, what is relevant is the nature of the duty imposed. If the duty imposed upon such authority is of public nature or in other words a mandamus would lie for the purpose of fulfilling public duties and/or responsibilities. It is a firmly established principle that a mandamus would not lie to enforce private duties and/or private obligations.

12. There is another aspect of the matter that mandamus is a public law remedy and not, therefore, be in respect of duties of a private nature, even if the body in question is created by statute and could in respect of other of its functions be compelled by mandamus, as for example, where the Industrial Court was acting as private Arbitrator. In the instant case, the sole question that was raised in the

writ application was whether there was master and servant relationship by and between the writ Petitioner and the Society.

13. The English authorities are more or less of the view that contractual activities in the field of master and servant is generally outside the scope of public law excepting in case where one is a holder of office, when principles of natural justice should apply and those are included in the ambit of public law: See *Mallock v. Aberdeen Corporation* (1971) 1 W.L.R. 1578 H.L. In *R. v. Civil Service Appeal Board, Ex. Bruce* (1988) 1 C.R. 649 (Q.B.D.) had highlighted the significance of the contractual element to the employment relationship in the context of judicial review and had extended its importance.

14. In Indian law master and servant relationship has been considered in number of cases, namely, *S.B. Dutt Vs. University of Delhi, Ex. Committee of Vaish Degree College and Ors. v. Lakshmi Narain* (1976) 2 S.C.R. 1006 : 1957 A.C. 488. In *Vine National Dock Labour Board* the House of Lords considered the question whether the Court would be justifying in granting a declaration about the invalidity of the action of National Dock Labour Board, a statutory body where the employment of dock workers were regulated under a scheme set up under the Dock Workers (Regulation of Employment) Order, 1947. In this case the Local Board delegated its disciplinary function to the disciplinary committee, which terminated the same. House of Lords was of the view that the said dismissal was a nullity, since the Local Board had no power to delegate its disciplinary functions. Prima facie, jurisdiction of the Court in an appropriate case to declare an order passed by a statutory body, even if the order relates to termination of the employment of a servant of the body, may not be denied.

15. In the instant case, admittedly, the service of the Respondent is not controlled or regulated by any statute or rule having the force of law. It was a purely contractual and outside the domain of public law. Only in case where there are some statutory protection to the service condition of an employee, in that event it would be open for judicial review by the Court. In the absence of any statutory protection or Rules and Regulations having statutory flavour, judicial review by a writ of mandamus is not available. In this connection, reference was made by the Supreme Court to the decision in the case of *Executive Committee of Vaish Degree College, Shamli v. Lakshmi Narain* (1976) 2 S.C.R. 1006 : 1957 A.C. 488. In that case a dismissed lecturer of a private college was, seeking reinstatement in service. The Court refused to grant the relief although it was found that the dismissal was wrongful. The Supreme Court instead granted substantial monetary benefits to the lecturer. This appears to be the preponderant judicial opinion because of the common law principle that a service contract cannot be specifically enforced.

16. Accordingly, we are of the view that in the instant case it cannot be said that the Society had any public duties and/or responsibilities in so far as the writ Petitioners are concerned. As mandamus is a public law remedy and for enforcement of mandamus public duty must exist. In the instant case, in the

absence of any public duty and/or public responsibility on the said Society we are unable to hold that this is an authority under Article 226 of the Constitution of India.

17. In the result, we uphold the preliminary objection raised on behalf of the Appellant that the Indian Association for the Cultivation of Science, Jadavpur, is not an "authority" within the meaning of Articles 12 and 226 of the Constitution and, as such, no writ lies against the Appellant Association. In view of our determination with regard to the preliminary point it is not necessary on our part to go into the merits of the case. Accordingly, the order of the learned trial Judge dated July 20, 1990, passed in C.R. 13063 (W) of 1986 is set aside. Even though we have held that no writ lies against the Appellant Association we arc of the view that, considering the facts and circumstances of the case, the Appellants will consider the case of the Respondents to provide with any alternative job either as regular staff or jobs under other research projects as he was performing as, in our view, it is very difficult to get job at this age and, accordingly, this Court desires the case of the Respondents for its sympathetic consideration considering the fact that they were rendering service for a long time under various projects under the umbrella of the Indian Association for the Cultivation of Science, Jadavpur.

18. The appeal is allowed without any order as to costs. Let a xerox copy be given to the parties on the usually undertaking.

A.K. Bhattacharji, J.

19. I agree.