
(1989) 02 CAL CK 0007
In the Calcutta High Court
Case No : F.M.A.T. No. 4002 of 1988

Guest Keen Williams Ltd.

APPELLANT

Vs

Guest Keen Williams Junior Management Staff Association
and Others

RESPONDENT

Date of Decision : 17-02-1989

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (1989) 1 CALLT 214 : (1989) 1 CHN 185 : 93 CWN 462 : (1990) 60 FLR 458 : (1990) 2 LLJ 522

Hon'ble Judges : S.K. Guin, J; M.K. Mukherjee, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Monoj Kumar Mukherjee. J.

1. This appeal under Clause 15 of the Letters Patent is directed against the order dated December 6, 1988 passed by a learned Judge of this Court issuing a Rule Nisi and an interim injunction on a petition under Article 226 of the Constitution of India filed by Guest Keen Williams Junior Management Staff Association ("Association" for short) and its five members. Facts relevant for the purpose of disposal of the appeal are as under.

2. Guest Keen Williams Ltd. ("Company" for short) is a Company incorporated under the Indian Companies Act, 1913, with the liability of its members limited by shares, having its registered office at 3-A Shakespeare Sarani, Calcutta and carries on business at, amongst other places, Andul Road, Howrah where it has one of its factories. The Company is engaged in the business of, amongst others, manufacture of iron and steel materials. The Company is managed and controlled by a Board of Directors, which include two nominee Directors, one nominated by the Industrial Credit and Investment Corporation of India and the other by the Life Insurance Corporation of India. The work-force of the Company in its factory at Howrah includes a category of staff called Junior Management Staff whose

duties are primarily supervisory in nature. They have an Association of their own called Guest Keen Williams Junior Management Staff Association.

3. On October 28, 1987 the Company declared a lock-out of the factory at Howrah on the ground, inter alia, that workmen employed in its various divisions had resorted to illegal strike. Though the Junior Management Staff were kept outside the purview of the lock-out, the Company did not pay their salaries from November, 1987 onwards, on the plea that there was acute shortage of funds, though earlier assurances were given that salaries would be paid soon.

4. The Association and its six members (hereinafter collectively referred to as the "Writ Petitioners") thereupon filed the writ petition on September 23, 1988, wherein they have contended, inter alia, that the Company has a sound financial base and sufficient funds to pay its employees. In spite thereof, the Company taking advantage of the prolonged lock-out and the financial strait of the members of the Junior Management Staff, is luring them to a Voluntary Retirement Scheme. The writ petitioners have further alleged that the Company's management has been coercing the members of the Association individually to voluntarily retire or face termination of service. Accordingly, they have sought for various reliefs, as detailed in the petition, through issuance of appropriate Writs against the Company.

5. When the writ petition was presented before the learned Trial Judge on September 23, 1988, directions were issued for filing affidavits. Thereafter, when the petition came up for hearing preliminary objections as to its maintainability were raised on behalf of the Company on the grounds, that no writ lay against the Company and even if such writ lay the reliefs sought for in the petition could not be granted as they were for enforcement of a contract of employment. After hearing the parties, the learned Trial Judge issued a Rule Nisi as prayed for and passed an interim order. Aggrieved thereby, the Company has filed the appeal.

6. Before us also, the threshold questions about the maintainability of the writ petition and the reliefs sought for therein were raised and argued at length. First, it was contended on behalf of the appellant that by no stretch of imagination could it be said that the Company answered to the definition of "State" within the meaning of Article 12 of the Constitution of India so as to make it amenable to the writ jurisdiction of a High Court. The other contention was that a contract of employment, which the writ petitioners were seeking to enforce, could not be executed through issuance of Writs.

7. In elaborating the first contention, it was submitted on behalf of the Company that the Supreme Court, through its various decisions, had laid down the tests for ascertaining whether a Corporation was an instrumentality or agency of the Government so as to answer to the description of "other authorities", and for that matter "State" within the meaning of the Article 12 of the Constitution of India and if the status of the Company was scrutinised in the light of the above tests it would be found, that none of them stood satisfied. Consequently, it was

argued that no writ would lie against the Company. Though a number of cases of the Supreme Court dealing with the above question were cited at the Bar during the hearing of the appeal, we would, to avoid restatements and prolixity, refer to a few of them. The first of the cases which requires to be considered in this respect is that of *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, which was decided by its Constitution Bench. In that case, the question -arose whether an Engineering College, which was a society registered under the Jammu & Kashmir Registration of Societies Act, 1898 was an authority within the meaning of Article 12 of the Constitution of India. In answering the question," the Court observed (pp. 112-113):

"The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the *International Airport Authority's* case as follows:

- (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) "Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character."
- (3) "It may also be a relevant factorwhether the corporation enjoys monopoly status which is State conferred or State protected."
- (4) "Existence of deep and pervasive State Control may afford an indication that the corporation is a State agency or instrumentality".
- (5) "If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."
- (6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of the inference of the corporation being an instrumentality or agency of Government."

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the *International Airport Authority's* case, be an "authority" and, therefore, "State" within the meaning of the expression in Article 12."

Applying the above tests in the facts of that case, the Court found that the Society which managed the Regional Engineering College at Srinagar was a "State" under Article 12. The above quoted tests have been quoted with approval and followed by the Supreme Court in the latest cases of *Tek Raj v. Union of India* (1988 I LLJ 3) and *All India Sainik Schools Employees' Association Vs. Defence Minister-cum-Chairman Board of Governors and Others*,

8. In the earlier case of *Somprakash Rekhi v. Union of India* the above tests were quoted with approval. It was pointed out by the Supreme Court that the finale was reached when their cumulative effect was assessed and once the body was found to be an instrumentality or agency of the Government, the further conclusion emerged that it was "State" and subject to the same constitutional limitations as Government. In *Tek Raj's* case (*supra*), it was similarly observed that it was not necessary that all the tests should be satisfied for reaching the conclusion either for or against holding an institution to be "State" and in a given case, some of the features might emerge so boldly and prominently that a second view might not be possible, but there might be other cases where the matter would be on the border line and it might be difficult to take one view or the other outright. When judged in the light of the above tests, keeping in view the observation made by the Supreme Court in the case of *Ajay Hasia* (*supra*) in the passage quoted earlier that "the tests were neither clinching nor conclusive but they were merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which had some nexus with the Government within the sweep of the expression" (emphasis supplied), the conclusion is inevitable that the appellant-Company cannot be brought within the meaning of "State" under Article 12 of the Constitution.

9. Admittedly, the Company is incorporated under the Indian Companies Act, 1913 and 73.23 % of its equity share capital are held by individuals and other limited Companies, including some foreign Companies and the balance 26.77% shares are held by financial institutions. It is common knowledge that in the normal course of their business, financial institutions advance money to entrepreneurs and established undertakings, some of them on the condition that a portion of such loans might be converted into equity capital. Besides, the financial institutions make purchase of shares in the market as business investments. The acquisition and holding of only 26.77% shares of the Company by the financial institutions through such routine business transactions cannot certainly satisfy the first two tests laid down by the Supreme Court. Mr. Mitra, appearing for the writ petitioners, in his usual fairness, conceded that not only the above two tests, but the fifth and sixth tests were also not satisfied in the facts of the instant case. He, however, asserted that the third and fourth tests stood satisfied in respect of the appellant Company. According to Mr. Mitra, as the Company was engaged in a core industry like steel and iron and was one of the largest undertakings in that field, it could certainly be said to be holding a

monopoly status. Even if we, for our present purposes, accept the fact that the Company enjoys a monopoly status, still then the third test would not stand satisfied as such status has to be "State conferred or State protected". As there is no material on record to even indicate far less prove, the above ingredient, the contention of Mr. Mitra in this regard must be negated.

10. To bring home his contention that the fourth test stood conclusively satisfied, in the instant case, Mr. Mitra strongly relied upon the determination of the Supreme Court in the case of M.C. Mehta and another Vs. Union of India and others, It will be necessary, therefore, to refer to and deal with the case of MC. Mehta (*supra*) at length.

11. On December 4, 1985, a major leakage of oleum gas took place from one of the units of Shriram Foods and Fertiliser Industries in Delhi. This leakage affected a large number of persons, both amongst the workmen and the public, and an Advocate practising in the Tis Hazari Courts of Delhi died on account of inhalation of oleum gas. Hardly had the people got out of the shock of this disaster when, within two days, another leakage, though this time a minor one, took place as a result of escape of oleum gas from the joints of a pipe. Applications were, thereafter filed by the Delhi Legal Aid and Advice Board and the Delhi Bar Association in the Supreme Court for award of compensation to the persons who had suffered harm on account of escape of oleum gas. As those applications for compensation raised a number of issues" of great Constitutional importance, the Bench of the three Judges which was hearing the applications forwarded them to a larger Bench of five Judges. One of the questions which arose for consideration at the time of hearing was whether Article 21 of the Constitution was available against Shriram declared industrial policies, was ultimately intended to be carried out by shares and which was engaged in an industry vital to public interest and with potential to affect the life and health of the people. On behalf of the applicants, it was contended that Article 21 was available as Shriram was carrying on an industry which, according to the Government's own declared industrial policies, was ultimately intended to be carried out by itself, but instead of the Government immediately embarking on that industry, Shriram was permitted to carry it on under the active control and regulation of the Government. Special emphasis was laid on behalf of the applicants on the regulatory mechanism provided under the Industries (Development and Regulation) Act, 1951, where industries are included in the schedule if they vitally affect public interest. It was pointed out that regulatory measures were also to be found under the Environment Act, 1986 and other allied legislations. Reliance was also placed upon the fact that sizeable aid in loans, lend and other facilities were granted by the Government to Shriram in carrying on the industry. Taking aid of the American State Action doctrine, it was also argued on behalf of the applicants that private activity, if supported, controlled or regulated by the State might get so entwined with Governmental activity as to be termed State action and it would then be subject to the same constitutional restraints on the exercise of power as the State.

12. In controverting the above contentions, it was submitted on behalf of Shriram that control or regulation of a private corporation's functions by the State under general statutory Law, such as the Industries (Development and Regulation) Act, 1951 was only in exercise of police power of regulation by the State and such regulation did not convert the activity of the private corporation into that of the State. It was contended that control which deemed a Corporation an agency of the State, must be of the type where the State controlled the management policies of the Corporation, whether by sizeable representation on the board of management or by necessity of prior approval of the Government before any new policy of management was adopted, or by any other mechanism.

13. In order to deal with the rival contentions, the Supreme Court traced that part of the development of Article 12 where it embarked on the path of evolving criteria by which a Corporation could be termed "other authority" under Article 12. In doing so, the Court considered its earlier decisions and quoted with approval the tests laid down in International Airport Authority's case (supra) as applied in Ajoy Hasia's case (supra) and the observations made in the latter. The Court then pointed out that the controversy as to whether the manner in which a Corporation was brought into existence had any relevance to the question whether it was State instrumentality or agency was set at rest in the case of Ajay Hasia (supra). The Court further pointed out that a Corporation might be a Statutory Corporation created by a statute or it might be a society registered under the Societies Registration Act or a Company formed under the Companies Act: any such Corporation would come within the ambit of Article 12, if it was found to be an instrumentality or agency of the State on proper assessment of the relevant factors.

14. In the light of the above principles of law, the Court proceeded to examine whether a Private Corporation such as Shriram, which was engaged in the manufacture of chemicals and fertilisers, came within the ambit of Article 12 so as to be amenable to the discipline of Article 21. For that purpose, the Court first examined the Central Government's Industrial Policy Resolutions of 1948 and 1956 and then the Industries (Development and Regulation) Act, 1951 enacted to carry out the objectives of the policy, resolutions. On such examination, the Court found that the industry of "Chemicals and Fertilisers" was specified in the First Schedule of the above Act as it was deemed by the State to be an industry of vital public interest, whose public import necessitated that the activity should be ultimately carried out by the State itself, though in the interim period with State support and under the State control, Private Corporations might also be permitted to supplement the State effort. The Court next took notice of fact that the Industries (Development and Regulation) Act, 1951 made the activities of an undertaking engaged in an industry scheduled therein subject to extensive and detailed control and supervision by the Government and even empowered the Government to take over and manage such undertaking if after investigation held under the Act it was found that its affairs were being managed in a manner detrimental to public interest. The Court also took notice of the fact that Shriram

was required to obtain licences, under the Factories Act and Delhi Municipal Act and was subject to extensive environment regulation under the Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981, that is, all such activities which could jeopardise public interest. The Court next observed that such functional control was of special significance as it was the potentiality of the fertiliser Industry to adversely affect the health and safety of the community and its being impregnated with public interest which perhaps dictated the policy decision of the Government to ultimately operate this industry exclusively and invited functional control. The Court next took note of the fact that, along with the extensive functional control, Shriram received sizeable assistance in the shape of loans and overdrafts running into several crores of rupees through various agencies. It was men said by the Court, "Moreover, Shriram is engaged in the manufacture of Caustic soda, Chlorine etc. Its various units are set up in a single complex surrounded by thickly populated colonies. Chlorine gas is admittedly dangerous to human life and health. If the gas escapes either from the storage tank or from the filled cylinders or from any other point in the course of production, the health and well-being of the people living in the vicinity can be affected. Thus, Shriram is engaged in an activity which has the potential to invade the right to life of large sections of people."

15. The Court then posed the question whether those factors were cumulatively sufficient to bring Shriram within the ambit of Article 12 and observed "Prima, facie it is arguable that when the State's power as economic agent, economic entrepreneur and allocator of economic benefits was subject to the limitations of fundamental rights vide *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, ; *Rashbihari Panda etc. Vs. State of Orissa*, ; *Travancore Tea Estates Co. Ltd. and Others Vs. State of Kerala and Others*, , why should a private corporation under the functional control of the State which is hazardous to the health and safety of the community and it is imbued with public interest and which the State ultimately proposes to exclusively run under its industrial policy, not be subjected to the same limitations. But we do not propose to decide this question and make any definite pronouncement upon it for reasons which we shall point out later in the course of this judgment". That the Court did not propose to decide the questions has been reiterated in paragraph 30 of the judgement with the following words:

"But we do not propose to decide finally at the present stage whether a private corporation, like Shriram, would fall within the scope and ambit of Article 12 because we have not had sufficient time to consider and reflect on the question in depth."

16. The Court then proceeded to deal with the other question raised in the case and after answering the same, observed in paragraph 33 that since it was not deciding the question as to whether Shriram was an authority within the meaning of Article 12 so as to be subjected to the I discipline of the fundamental right

under Article 21, it did not think it would be justified in setting up a special machinery for investigation of the claims for compensation made by those who alleged that they had been victims of oleum gas escape.

17. A detailed and careful reading of the above case clearly indicates that the Supreme Court, in no uncertain terms, stated that it was not deciding the question as to whether a private corporation could be made amenable to the discipline of fundamental rights. In other words, even though the Court mooted the question whether a Corporation, like Shriram, could be included within the ambit of Article 12, it did not answer the same. It cannot, therefore, be said that the Supreme Court has expressed any opinion on the subject as to be binding upon us either as obiter or ratio decidendi.

18. Mr. Mitra, however, submitted that even if it was held that the Supreme Court did not make any decision on the point, still then the observations made by it would have a persuasive effect. Accordingly, Mr. Mitra submitted that from the observations made therein, he could successfully argue that the appellant-company was an instrumentality or agency of the State. We are unable to persuade ourselves to rely upon the observations of the Supreme Court referred to earlier for, in making the same, it was largely influenced by the fact that Shriram was engaged in an activity which was dangerous to life and health and had the potential to invade the right of large sections of people.

19. It is of course true that the appellant-Company, like Shriram, is engaged in an industry which comes under the purview of the first schedule to the Industries (Development and Regulation) Act, 1951 and as such, the Government has powers to assume management and control of the Company if it is found that its affairs are being managed in a manner detrimental to public interest. In other words, the Government has the regulatory control over the affairs of the Company through various legislations. But in our view, such control cannot be said to be "deep and pervasive State control" so as to satisfy the fourth test. In the case of Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, Justice Mathews pointed out that a mere finding of the State control was also not determinative of the question whether a Corporation was an instrumentality or agency of the State, since a State had considerable measures of control under its police power over all types of business operations and it was not possible to assume that panoply of law and authority of a State under which people carry on ordinary business or their private affairs or own property, each enjoying equality in terms of legal capacity, would be extraordinary assistance. The learned judge next observed that 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. While on this point, we may, even at the risk of repetition, remind ourselves of the observation made in the case of Ajay Hasia (supra) that the six tests were to be used with care and caution,

because while stressing the necessity of a wide meaning to be placed on the expression "other authorities" it must be realised that it could not be stressed so far as to bring other autonomous body which has some nexus with the Government within the sweep of the expression; a wide enlargement of the meaning must be tempered by a wise limitation.

20. If merely on the basis of the facts that a Company incorporated under the Companies Act is running a business in any of the industries appearing in the first schedule of the Industries (Development and Regulation) Act, 1951 and that for running its business it has obtained loans from financial institution for which such institution has placed a Director in the Board of Management, an inference that it is an instrumentality or agency of the Government has to be drawn, then in that case a private limited company carrying on business in cigarettes, which also finds place in the first Schedule of the above Act, with Bank loan would have to be called an instrumentality or agency of the State. Widening of the scope of Article 12 to such an extent will not only be unwise but unjustified also.

21. In view of our above discussion, we must hold that by no stretch of imagination can the appellant-Company be said to be an instrumentality or agency of the State so as to bring it within the ambit of Article 12 of the Constitution of India. The first point raised on behalf of the appellant must, therefore, succeed. In view of that success, the other point raised on behalf of the appellant in support of the appeal need not be gone into.

22. In the result, the appeal succeeds and the same is hereby allowed. The impugned order is hereby set aside and the Rule issued on the writ application is discharged. There will be no order as to costs.