
(2000) 03 DEL CK 0064
In the Delhi High Court
Case No : CWP No. 122 of 1999

Krishan Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-03-2000

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : (2000) 54 DRJ 675

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : H.S. Dahiya, for the Appellant; R.S. Puri, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The principle question which needs determination in this case is as to whether EAN-INDIA is a "State" or "another authority" within the meaning of Article 12 of Constitution of India amenable to the writ jurisdiction of this Court. This controversy arose in this petition as the petitioner has challenged the termination of his service by order dated 30th November, 1998 and respondents have challenged the maintainability of such petition.

2. Petitioner was appointed by EAN-INDIA vide its letter dated 13th July, 1997 as Accounts Officer which was later redesignated as Office Manager. He was to be on probation for a period of one year. Clause 2 relating to probation is reproduced below: -

"You will be on probation for a period of one year in the first instance which may be extended or curtailed by EAN-INDIA at its discretion. During the initial probation period of one year, your service shall be terminable at any time without assigning any reason and without notice and in the event of the probation period being extended your service shall be liable to be terminated at any time during the extended probation period without assigning any reason but with one month's notice or pay in lieu of notice."

3. By letter dated 26th August, 1998 the probation period was further extended by another year. During this probation period services of the petitioner were terminated by letter dated 30th November, 1998 and it was stated in this letter that one month's pay in lieu of notice period shall be paid to him shortly. The petitioner, in the writ petition, challenged the impugned order on the ground that it is not termination implicate due to unsatisfactory performance of the petitioner but motivated action with malafide intention of the respondent and particularly of Shri Ravi Mathur, Chief Executive Officer in EAN-INDIA. According to him, the termination is punitive in nature and he has made the prayer that respondents be directed to reinstate him in service from 30th November, 1998 with full back wages.

4. In the counter affidavit filed by the respondents, apart from defending the case on merits, a preliminary submission is taken that EAN-INDIA is not amenable to the writ jurisdiction of this Court. Accordingly, arguments were addressed mainly on this aspect.

5. In order to appreciate and decide the status of M/s. EAN-INDIA, it would be appropriate to mention about the structure and status of EAN-INDIA. EAN-INDIA is a Society registered under the Societies Registration Act, 1860. It is affiliated to EAN-International which is a user driven numbering association, based in Belgium, which manages a system of identification and communication for products and services based on internationally accepted and business led standards.

6. As a Society, it is an autonomous body which functions as per memorandum and Article of Association. As per the Memorandum of Association of EAN-INDIA following are the objects for which it is established:-

1. to stimulate consciousness of article numbering;
2. to undertake and promote study, research and development in article numbering on products\\packages and to recommend standards for article numbering and equipment;
3. to ward country and company codes as per EAN Format;
4. to test, evaluate and certify article numbering systems, equipment and processes;
5. to provide consultancy services on article number problems;
6. to study article numbering for export commodity wise and country wise and to suggest measures to authorities concerned for implementation and effecting improvements;
7. to study and article numbering pattern and preferences in foreign markets and undertake research studies for the purpose;
8. to provide training both short term and long term for specified personnel

employed in industry, commerce and Government in Bar Coding and other related technologies;

9. to promote and stimulate action in universities and colleges to provide education in Bar Coding and related technologies;

10. to analyze the implications of article numbering on domestic production, domestic consumption and domestic prices;

11. to study methods and procedures for implementing appropriate article numbering system;

12. to analyze the institutional framework-most conducive to the promotion of article numbering;

13. to study the article numbering requirements with special reference to transport, storage and distribution;

14. to study the impact of bar coding and other numbering systems on marketing;

15. to undertake advertising, publicity and exhibition to promote article numbering;

16. to establish relation and co-operate with any other agency or organisation having similar objectives in India or abroad;

17. to provide and disseminate information relating to article numbering;

18. to prepare, print and publish any papers or periodicals or reports;

19. to establish and maintain libraries and information services to facilitate study of the various objects for which the Society is established;

20. to invite representatives of Government, industry, trade and other institutions and organisations, Indian and Foreign, to deliver lectures on subjects in which the Society is interested;

21. to accept grants of money, securities and property of any kind on such terms as may seem expedient;

22. to acquire by gift, purchase, exchange, lease, hire or otherwise howsoever any property movable or immovable which may be necessary or convenient for the purpose of the Society and to build, construct, improve, alter, demolish and repair such buildings, works and construction as may be necessary for carrying out the objects of the Society;

23. to sell, lease, exchange, hire or otherwise transfer all or any portion of the property movable and immovable of the Society, provided that prior approval in writing of the Central Government and the Board of Management is obtained for the transfer of immovable property;

24. to invest and deal with any moneys and securities of the Society not immediately required for any of its activities in such a manner as may, be provided by the Rules and Regulations of the society, as. may, from time to time, be determined;

25. to draw, make, accept, endorse and discount cheques, notes or other negotiable instruments for the purpose of the Society;

26. to create any Reserve Fund, Sinking Fund, Insurance Fund, Provident Fund or any other Special Fund whether for depreciation or for repairs, improving, extending or maintaining any of the properties or rights of the Society and/or for recoupment of wasting assets and or benefits of the employees and for any other purposes which the Society deems it expedient or proper to create or maintain any such Fund or Funds;

27. to borrow and raise money with or without security or on the security of mortgage, charge of hypothecation or pledge of all or any of the movable or immovable properties belonging to the Society or in any other manner whatsoever provided that prior approval in writing of the Central Government and the Board of Management is obtained in that behalf;

28. to create administrative, technical, and other posts under the Society and to make appointments thereto in accordance with the Rules and Regulations of the Society;

29. to make Rules and Regulations and Byelaws for the conduct of the affairs of the Society and to add to, amend, vary or rescind them from time to time with, the approval of the Central Government and the Board of Management;

30. to do all such other acts and things either alone or in conjunction with . other organisations or persons as the Society may consider necessary. Incidental or conducive to the attainment of the above said objectives.

7. The management of the affairs of the Society is entrusted to the Board of Management. The Board of Management consists of 10 Member Organisations. One of them being Ministry of Commerce and the rest are as under:-

ii. Agricultural and Processed Food Products Export Development Authority through Chairman.

iii. Associated Chambers of Commerce and Industry of India through Secretary General,

iv. Bureau of Indian Standards through Director General.

v. Confederation of Indian Industry through Senior Director.

vi. Federation of Indian Chambers of Commerce and Industry, through Secretary General.

vii. Federation of Indian Export Organisation through Director General.

viii. Spices Board.

ix. Indian Merchants' Chamber.

x. Indian Institute of Packaging through Director.

As per Rule 2 of the Rules and Regulations, EAN-INDIA consists of the following Members: -

a) The President, Vice-President and Members of the Management Board being ex-officio Members; and

b) all persons admitted to membership of the EAN-INDIA under Rule 3.

8. Under Rule 3 Board of Management may admit any apex body of industry and trade such as Chamber of Commerce, Federation of Industry and others interested in the objects of EAN-India as Associate member if any such Membership is prescribed. The President and Vice-President of the Board of Management are elected under Rule 8 and Rule 10 respectively. The Board of Management elects from themselves a Vice-President. The Executive Director of the EAN-India is appointed by the Board of Management. As per Rule 20, EAN-India shall be the supreme authority empowered to take all measures necessary for the attainment of the objectives specified in the Memorandum of Association and under Rule 22 EAN-INDIA had the power to frame, amend or repeal any bye-laws in furtherance of its objectives and for particular to provide for the matters mentioned in the said list.

9. Under Rule 26, funds of the EAN-INDIA consist of the following: -

(i) grants made by or through the Central or any State Government;

(ii) donations and contributions from other sources;

(iii) other income and receipts of the EAN-INDIA.

10. Other relevant rules regarding funds/grant in aid etc. are Rules 26 and 28 which read as follows:-

27. The EAN-INDIA shall, have power to enter into arrangements with the Central and State Government, and other public or private organisations or individuals, for securing and accepting endowments, grant-in-aid donations or gifts to the EAN-INDIA on mutually agreed terms and conditions provided that the conditions of such grants-in-aids; or donations or gifts shall not be inconsistent or in conflict with the nature and objectives of the EAN-INDIA.

The EAN-INDIA shall have power to take over and acquire by purchase, gift or otherwise from the Central or State Governments or other public or private organisations or individuals willing to transfer the same, libraries, laboratories, demonstration equipment, immovable properties, endowments or funds together with any attendant obligations and engagements not inconsistent with the nature and objectives of the BAN-INDIA.

As per the Rule 31 accounts are to be audited annually by qualified auditor(s) appointed for the purpose.

The aforesaid provisions clearly show that there is no control, much less deep and pervasive control of the Government of India. The Ministry of Commerce is only one of the Member Organisation. Most of the Member Organisations are private organisations. However, there is no role of the Government in the appointment/election of President, Vice-President and Members of the Board of Management. President is elected by the Members. Membership consists of President, Vice-President, Members of Management Board as well as other Members who may be admitted. Thus Members could consist of apex body of industry and trade such as Chamber of Commerce, Federation of Industry, etc. and these are private bodies. In the creation, collection and control of funds also Government has no role to play. The Central or the State Government may only give grants and for giving such grants BAN-INDIA has power to enter into arrangements with Central or State Governments. However, such grants is only one of the source of the funds of EAN-INDIA and it can raise funds of donation and contributions from other sources as well as through other income and receipts. The management of the affairs of the EAN-INDIA is also essentially function of the Board of Management which has to be conducted in accordance with Rules and Regulations and for attainment of the objective specified in the Memorandum of Association, Therefore, there is no control of the Government either in its constitution or in the Board of Management or in the functioning of the Society or for that matter in the financial affairs of the Society. Therefore, it cannot be said that EAN-INDIA is a "State" or an "instrumentality of State" under Article 12 of Constitution of India.

11. In *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, , the. Apex Court culled out six criteria as laid down in the judgment of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, to determine whether a concern is an instrumentality or agency of the State. These are the following:-

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 factor..... whether the corporation enjoys monopoly status which is the 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 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 Govt. 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."

12. EAN-INDIA docs not meet any of the aforesaid criteria. One may refer to the judgments of Supreme Court in the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], as well as Tekraj Vasandi alias K.L. Basandhi Vs. Union of India (UOI) and Others, . In the former case, NCERT was held to be not "State" or instrumentality or agency of the State. Following observations of the Court would apply to the is case also.

3. 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 of Article 12 of the Constitution."

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5. The object of the NCERT as seen from the above analysis is to assist and advise the Ministry of Education and Social Welfare in the implementation of the governmental policies and major programmes in the field of education particularly school education. The NCERT undertakes several kinds of programmes and activities connect with the coordination of research extension services and training, dissemination of improved educational techniques, collaboration in the educational programmes. It also undertakes preparation and publication of books, materials, periodicals and other literature. These activities are not wholly related to governmental functions. The affairs of the NCERT are conducted by the Executive Committee comprising 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 NCERT consist of : (i) grants made by the government, (ii) contribution from other sources, and (iii)

income from its own assets. It is free to apply its income and properly towards the promotion of its objectives and implementation of the programmes. The government control is confined only, to the proper utilisation of the grant. The NCERT is thus largely an autonomous body."

6. Almost a similar case was considered by this Court in *Tekraj Vasandi @ K.L. Basandhi v. Union of India*. This Court was required to determine whether the Institute of Constitutional and Parliamentary Studies (ICPS) was State under Article 12. The ICPS was a registered society financed mostly by the Central Government and partly by gifts and donations from Indian and foreign agencies. The first President of the society was the then Speaker of the Lok Sabha. Out of the five Vice Presidents three were the then Central Ministers; the other two were then Chief Justice of India and the Attorney General. The objects of the society were to provide for constitutional and parliamentary studies, promotion of research in constitutional law, setting up of legislative research and reference service for the benefit of legislators, organisation of training programmes in matters of parliamentary interest and importance and publication of a journal. The Court found that ICPS was born as a voluntary organisation. It found further that though the annual financial contribution from the State was substantial, it was entitled to receive aid from the public and in fact, received contributions from other sources. Its objects were not governmental business. As regards the argument that the government exercised pervasive control over ICPS, the Court said:- (SCC p.257, para 20)-

"In a Welfare State governmental control is very pervasive and in fact touches all aspects of social existence A broad picture of the matter has to be taken and a discerning mind has to be applied keeping the realities and human experiences in view so as to reach a reasonable conclusion."

13. One may also usefully refer to the Division Bench judgment of this Court in the case of *J.S. Arneja Vs. National Co-Operative Consumers Federation of India Ltd. and Others*, . This case had more proximity with the present case. In that case the Court held as under:-

"The National Co-operative Consumers Federation of India is neither an instrumentality nor an agency of the state within the meaning of Article 12 of the Constitution. The entire share capital of the Co-operation is not held by Government nor does it receive any financial assistance or subsidy for its commercial operation from Govt. but runs its own business on commercial principles by raising its own funds, resources and obtaining loans from financial institution like banks. It does not enjoy monopoly status. It is an independent body functioning according to its bye-laws. It is neither controlled nor it is department of Govt. According to its bye-laws, the Board of Directors is the authority responsible for the management, administration, business and functioning of the Federation, elected accordingly. It is a society, sponsored by co-operative lenders, interested in the welfare of consumers. Its functions, Therefore, are to ensure availability of consumer goods at reasonable prices to

the masses which is neither controlled nor directly related to the Government."

14. To the same effect is another judgment dated September 18, 1995 of this Court in Civil Writ Petition No. 815 of 1995 entitled *Shri Y.L. Ahuja v. Institute of Applied Manpower and Research and Others*. Following the aforesaid judgments, one can easily come to the conclusion that EAN-INDIA is not a State, agency or instrumentality of the State under Article 12 of the Constitution of India. Infact, it is playing the role of catalyst for managing the system of identification and communication for products and services based on internationally accepted and business led standards. There is no control and supervision of Government of India in the affairs of EAN-INDIA. There is no participation of the Government. Infact in the counter affidavit it is mentioned that even the grant-in-aid is provided by the Government for specific purposes and the same has on an average gradually decreased over a period of time. In the counter affidavit filed on behalf of Union of India also, it is mentioned that EAN-INDIA is not covered by Article 12 of the Constitution and following portion of the sale counter affidavit would be worth quoting: -

"It is denied that Ean-India is funded by the Central Government through the Ministry of Commerce. The Central Government has not contributed any amount i.e. seed money for the said organisation. However other founding members have contributed for the said purpose. The Government of India has only provided some grants-in-aid for the promotional work to be undertaken by the society. It is most respectfully submitted that Ministry of Commerce has the authority and mandate to promote the adoption of new and modern standards and methods for conducting trade by the Indian business. For the said purpose, the Government of India oven in the past has given grants-in-aid to various business organisation like EAN-INDIA. The said grants are not used for meeting any normal administrative expenditures of the organisation. In case of respondent No. 2 also, the entire administrative expenditure and major part of promotional expenditure is met from its own sources."

15. Merely because Ministry of Commerce is one of the Member Organisation would not reflect that the Government has any control in the affairs much less deep and pervasive control since Joint Secretary, Ministry of Commerce is only one of the Members of the Board of Management. Even the pay structure of the employees of EAN-INDIA is different from government structure. Therefore, I hold that EAN-INDIA is not "State" or "instrumentality of State" or "agency of State" under Article 12 of the Constitution of India.

16. Learned counsel for the petitioner however relied upon the judgment of the Supreme Court in the case of *Air India Statutory Corporation, etc. Vs. United Labour Union and others* [overruled], and the Division Bench judgment of this Court in the case of *Kuldip Mehta Vs. Union of India and Others*, . The principles which are laid down in the former judgment to ascertain as to whether a particular body is instrumentality and/or agency of the State or not are the same as laid down in *Ajay Hasia* (supra) and infact it is the ratio of earlier cases which

is adopted in the case of Air India Statutory Corporation (supra). However, on applying the same principles in the present case I hold that EAN-INDIA is not a body covered under Article 12 of the Constitution. Therefore, this case is of no assistance to the petitioner. In so far as Division Bench judgment of this Court in the case of Kuldip Mehta Vs. Union of India and Others, is concerned, the petitioner relied upon this judgment for the proposition that writ under Article 226 can be maintainable even against a body which is not covered by Article 12 of Constitution of India. The petitioner relied specifically on the following observations:-

25. 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 Art. 32. Article 226 confers power on the High Courts to 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 owned 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."

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28. In view of the law which has developed all these years and as propounded by the Supreme Court it may not be necessary to refer to other judgments of the High Courts. But the fact remains that in all these judgments which we have been referred to, the Judges are speaking in one vein, that of the issuance of writs, and said that the person against whom these writs would lie must be performing the public functions. To us, however, it appears that Article 226 while empowering the High Court for issue of orders or directions to any authority or person does not make any such difference between public functions and private functions.

29. We need not go into the question as to what is the nature, scope or amplitude of the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari. They are certainly founded on the English system of jurisprudence. Article 226 also speaks of directions and orders which can be issued to any person or authority, including, in appropriate cases, any Government. We are not unmindful of the fact that trend of various judgments has been that perhaps since Article 226 is based on public law foundations, power under this Article can be exercised when the dispute is in the realm of public law. But that question does not strictly fall for consideration in the present case because of the view which we are taking."

17. His submission was that writ can be issued, under Article 226 of the Constitution, even against "any person or authority". The Court in para 29 of the aforesaid judgment hinted that Article 226 is based on public law foundations and power can be exercised when the dispute is in the realm of public law. However, this question was not decided conclusively as, in para 30 of the judgment of Division Bench, on the facts of that case concluded that the affairs of Swadeshi Polytex Limited were being controlled by Central Government and there was complete control of the State in the affairs of the said Company and on that basis may be for the purpose of issuance of writ but for issuance of direction/order, as the case may be. Therefore, this case is of no help to the petitioner. As far as issuance of order or direction is concerned, in this case one has to keep in mind that the petitioner was only a probationer and during the extended period of probation his services were terminated and Therefore it cannot be said that the action of the respondent was arbitrary. Further as far as issuance of writ is concerned, it can be issued only if such body or person has violated any statutory or constitutional provisions. In the instant, case, no violation of statutory or constitutional provision is even mentioned. There is only a vague reference to the violation of Article 14 of the Constitution and such a contention is otherwise not available to the petitioner as Article 14 which is in part III of the Constitution would be applicable only to those bodies which are agency or instrumentality of State under Article 12 of the Constitution. This is clear from the dicta laid down by Apex Court in the case of *Sabhajit Tewary Vs. Union of India (UOI) and Others*, . Accordingly, I held that this writ petition is not maintainable and Therefore the same is dismissed. Rule stand discharged.

18. No order as to costs.