

(2011) 08 DEL CK 0388

In the Delhi High Court

Case No : Writ Petition (C) 3335-37 and 19755 of 2005 and CM 2537 and 12748 of 2005

M.P. Singh and Others

APPELLANT

Vs

Videsh Sanchar Nigam Ltd. and Others
Vs Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-08-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 21, 226, 32
Contract Act, 1872 — Section 23

Citation : (2011) 08 DEL CK 0388

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : K.S. Chauhan, Tej Singh Varun, Ajit Kumar Ekka, Chand Kiran and Gyan Mitra, for the Appellant; Chetan Sharma Rishi Agarwala, Shikha Sarin for VSNL., Ravinder Agarwal, CGSC and Nitish Gupta, for UOI, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—These writ petitions by former employees of the Videsh Sanchar Nigam Ltd. ("VSNL"), which is Respondent No. 1 in some of the writ petitions, raise an interesting question of law as to the maintainability of the very petitions. The plea of VSNL, which is now renamed as "Tata Communications Ltd." ("TCL"), is that after disinvestment the shareholding of the central government in VSNL came down to 26.12%, and since it No. longer performs a public function or discharges a public duty a writ petition under Article 226 of the Constitution is not maintainable against it.

2. This Court has heard the submissions of Mr. T.N. Razdan and Dr. K.S. Chauhan, learned Counsel for the Petitioners, Mr. Chetan Sharma, learned Senior counsel for the TCL and Mr. Ravinder Agarwal, learned Counsel appearing on behalf of the Union of India.

3. Each of the Petitioners, appointed in VSNL prior to disinvestment, was sought

to be terminated more than two years after the disinvestment had taken place. As a representative sample, the facts in W.P. (C) 3335 of 2005 (M.P. Singh v. VSNL) may be noticed. There are three Petitioners in this writ petition. Petitioner No. 1 M.P. Singh was initially appointed as a Junior Technical Assistant with effect from June 1980 and worked till 3rd June 1983, and again from July 1983 to January 1990. He was absorbed in regular service as Technical Assistant with effect from 1st January 1990. He was then promoted to the post of a Deputy General Manager ("DGM") in VSNL on 27th December 2001. He is aggrieved by the letter dated 28th September 2004 issued by the VSNL rating his performance as "unsatisfactory" for the period from 2002-03 and 2003-04. Petitioner No. 2 was also appointed as a Junior Technical Assistant with effect from 2nd September 1974. He was promoted as Senior Manager (Engineering) with effect from 23rd January 2002. He too is aggrieved by a letter dated 28th September 2004 in which his performance for the period 2002-03 and 2003-04 has been rated as "unsatisfactory". Petitioner No. 3 was appointed in January 1981 as a Junior Technical Assistant and promoted to the post of Senior Manager in February 2002. He is aggrieved by a letter dated 28th September 2004 rating his performance for 2002-03 and 2003-04 as "unsatisfactory".

4. The central government took a policy decision to offload its shares in VSNL by way of disinvestment. With effect from 13th February 2002 VSNL ceased to be a public sector undertaking. A shareholders' agreement of that date was entered into between the President of India and Panatone Finvest Ltd. ("PFL"), Tata Sons Ltd. ("TSNL"), Tata Power Company Ltd. ("TPCL"), Tata Industries Ltd. ("TIL") and Tata Iron and Steel Company Ltd. ("TISCO") whereby the shareholding of the central government in VSNL was reduced to 26.12%. The share of PFL was 25%, of foreign companies (shares held by the Bank of New York as being depository for ADRs), 21%, of the several foreign financial institutions 10.86%, of the Indian public financial institutions and mutual funds 7.9%, the general public 4.92%, Indian body corporates 3.09%, the shares allotted against employees stock option 1.85% and the balance small quantities of less than 1% were of non-resident Indians and Indian national banks.

5. The Petitioners contend that at the time of their appointments they were in the Overseas Communications Service ("OCS"), a department of the Government of India ("GoI") and thereafter absorbed in the VSNL in terms of the Office Memorandum ("OM") dated 11th December 1989. According to them, para 4 of the said OM which deals with dismissal/removal from service implies that the same terms and conditions as were applicable to central government servants would apply to the Petitioners as well. A reference is made to an understanding between VSNL and the GoI as expressed in the letter dated 16th March 2001 during negotiations for disinvestment to the effect that the service conditions of the employees must be formulated in consultation with the employees' unions and all service conditions including Conduct, Discipline and Appeal Rules, 1992 should be continued. Reference is also made to a clause in the shareholders' agreement which requires the strategic partner to use its best efforts "to cause

the Company to continue to provide adequate job opportunities" for the benefit of the members of SC/ST, physically handicapped persons and other socially disadvantaged categories of the society. It is contended that inasmuch as the GoI continues to hold 26.92% of the share capital, VSNL continues to perform a public function.

6. Relying on the observations of the judgment of the Supreme Court in Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others, , it is contended that even if VSNL is No. longer State under Article 12 of the Constitution, a writ petition under Article 226 would nevertheless be maintainable against it. Reliance is placed on the decisions in Binny Ltd. and Another Vs. V. Sadasivan and Others, ; State of Assam Vs. Barak Upatyaka D.U. Karmachari Sanstha, L.M.L. Ltd. Vs. State of U.P. and Others, Bharat Sanchar Nigam Ltd. and Another Vs. BPL Mobile Cellular Ltd. and Others, ; Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, and Federal Bank Ltd. Vs. Sagar Thomas and Others, In addition, counsel has relied upon the licences issued for the conduct of telecom activities under the Indian Telegraph Act, 1885 and the Rules made thereunder to submit that they underscore the nature of functions performed by VSNL (now TCL) which has to provide mobile connectivity to a large section of the Indian population. It is submitted that by its very nature, the function should be treated as a public function as it was an essential service.

7. Resisting the above submissions, it is submitted on behalf of the VSNL (now TCL) that the mere fact that the VSNL has been issued licence under the Indian Telegraph Act will not automatically make it a statutory authority discharging a public function. It is submitted that by that yardstick all private cellular operators functioning in terms of a licence issued by the central government have to be then treated as entities amenable to the writ jurisdiction of this Court. A reference is made to a short order dated 7th September 2009 passed by the Division Bench of the Bombay High Court in Writ Petition No. 2139 of 2007 (Mahant Pal Singh v. Union of India), holding that VSNL is not amenable to writ jurisdiction.

8. On the other hand, the Petitioners have relied upon a decision dated 6th August 2002 passed by a Division Bench of this Court in W.P. (C) 3761 of 2002 (Forum for Justice and Peace v. VSNL) in which it was held that by reason of disinvestment, the VSNL does not lose its corporate entity nor does it lose its licenced right to carry on the business. The point being made is that the writ petition against VSNL although dismissed on merits was nevertheless entertained.

9. One of the points urged by the learned Counsel for the Petitioners is that a licence agreement was entered into on 5th February 2004 which gave exclusive rights to the VSNL in respect of international long distance services ("ILDS"). This was an indication of the fact that the earlier manifestation of VSNL was the OCS and therefore, this gave some exclusivity to the VSNL as compared to other telecom companies. This has been countered by VSNL (TCL) by pointing out that

it No. longer holds exclusive licence even for ILDS. The Petitioners have placed reliance on *Air India Statutory Corporation, etc. Vs. United Labour Union and others* [overruled], in which the correctness of the decision in *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, was doubted. However, the fact remains that the above judgment in *Air India Statutory Corporation v. United Labour Union* has itself been overruled in *the Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc.*, and therefore, the judgment in *Air India* would No. longer be good law. Learned Counsel for the Petitioners then sought to distinguish the judgment in *SAIL* by referring to the clauses in the shareholders' agreement which permitted the Government to again takeover in the event of a threat to the security of the State.

10. The question is whether these types of clauses could themselves result in the *VSNL* discharging public functions and performing public duty so as to make it amenable to the writ jurisdiction of this Court under Article 226 of the Constitution?

11. This Court is of the considered view that the answer to the above question should be in the negative. The decision of the Supreme Court in *Zee Telefilms* is instructive. There, although the majority held that the Board of Control for Cricket in India ("BCCI") was not a "State" within the meaning of Article 12 of the Constitution, it was held to nevertheless discharge a public function and thus amenable to the writ jurisdiction. In para 31 of the judgment, it was held that the duties like the selection of the Indian cricket team, controlling the activities of the players and Ors. involved in the game of cricket can be said to be "akin to public duties or State functions". It was stated that "though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32". The Supreme Court in *Zee Telefilms* also referred to the observations made in *Anadi Mukta Sadguru* where (SCC @ pp 692-93) it was stated that 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 a 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. Its duty must be judged in the light of a 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."

12. In the case of institutions involved in educational activities, it has been consistently recognized they are in fact performing a public duty and owe an obligation to the society and to individuals who may either be students or employees of such institutions. But whether such a relationship vis-?-vis the entity exists in a given case or not has to be determined with reference to the context in which a dispute is raised against such an entity.

13.1 In *Binny Ltd. v. V. Sadasivan*, this core question has been further explained. In that case, the Respondents in the appeal filed by Binny Ltd., which was engaged in the manufacture of cloth, were a part of the management staff. On account of incessant rain in June 1996 the mill premises had to be shut down. There was extensive damage to the plant and machinery. The management invoked Clause (8) of an agreement dated 12th March 1991 in terms of which the management had a right to terminate the services of the employees without assigning any reason but by giving one month's notice or salary in lieu thereof. A writ petition was filed by the Respondents for a declaration that the said Clause (8) read with the order of the termination dated 31st July 1996, was illegal and violative of Section 23 of the Contract Act, 1872 as well as Article 21 of the Constitution. The Respondents prayed for reinstatement with continuity of service. The writ petition was resisted by Binny Ltd. as not being maintainable since it was a private company and not a public authority, and the termination of services did not involve any public law element. The Division Bench of the Madras High Court did not agree with the contentions of Binny Ltd. It declared Clause (8) of the agreement to be opposed to public policy in terms of Section 23 of the Contract Act. However, the consequential relief of reinstatement and back wages was not granted. Reversing the said judgment of the High Court, the Supreme Court observed:

if the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but nevertheless, there must be the public law element in such action.

13.2 The Supreme Court held in *Binny Ltd.* that the decision of the employer to terminate the services of their employees could not be said to have any element of public policy and the remedy available to the Respondents was to seek redressal of their grievance in civil law or under the labour law enactments, especially in view of the disputed questions involved as regards the status of employees and other matters. Their cases were purely governed by the contract of employment entered into between the employees and the employer. It was not appropriate to construe those contracts as being opposed to the principles of public policy and thus as void and illegal u/s 23 of the Contract Act, 1872. It was emphasized that "if a term of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226". The Court further observed that "we are unable to perceive any public element in the termination of the employees by the Appellant" and the remedy available to the Respondents is to seek redressal of their grievance in civil law or under the labour law enactments especially in view of the disputed questions involved as regards the status of employees and other matters. Referring to the judgment in *Federal Bank v. Sagar Thomas*, it was observed that "a private company carrying on business as a scheduled bank cannot be termed as carrying on statutory or public duty and it was therefore held that any business or commercial activity, whether it may be banking,

manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money which do not have an impact on the economy of the country in general cannot be classified as one falling in the category of those discharging duties or functions of a public nature". Specific to the case of Binny Ltd. the Supreme Court held (SCC, p.673): "We are unable to perceive any public element in the termination of the employees by the Appellant in Civil Appeal No. 1976 of 1998 and the remedy available to the Respondents is to seek redressal of their grievance in civil law or under the labour law enactments especially in view of the disputed questions involved as regards the status of employees and other matters."

14. In *State of Assam v. Barak Upatyaka D.U. Karamchari Sanstha*, it was held that mere provision of financial assistance to a registered co-operative society for several years neither makes the State Government responsible for paying the salaries of its employees nor creates any right to demand such assistance.

15. While in the present cases the reduction of the percentage of shareholding of the Government of India in TCL to 26.92% may take it out of the ambit of "state" within the meaning of Article 12 of the Constitution, that may not be the determinative factor in deciding whether TCL is amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution. In the context of Article 226 of the Constitution and in the light of the law as explained by the Supreme Court in the above decisions, the key question to be addressed is this: Whether after disinvestment of VSNL, the reconstituted entity, TCL, can be said to be discharging a public function of performing a public duty? Does the nature of that duty translate into a positive obligation owed to the Petitioners which can then be enforced by a writ of mandamus? This Court is unable to be persuaded to answer either question in the affirmative.

16. TCL (erstwhile VSNL) cannot be said to be discharging a public function only because it is rendering telecom services in the country. TCL is not a statutory corporation. The fact that it is incorporated under the Companies Act does not by itself make it an entity performing a public duty or discharging a public function. Also, the fact that there may be a large number of subscribers to the mobile telephone services offered by TCL cannot by itself render it an entity performing a public duty or discharging a public function. If these were the parameters to make an entity amenable to the writ jurisdiction, then every private cellular operator, who may cater to several millions of subscribers, or for that matter even a television channel offering viewership to millions of viewers, would become amenable to the writ jurisdiction. The mere number of people availing of the services of a private company would not render its function as a public function, or its activities as public duties.

17. The monopoly function or the test of dominance which is perhaps what weighed with the Supreme Court when in *Zee Telefilms* it held BCCI to be amenable to the writ jurisdiction of the High Courts. TCL No. longer holds the monopoly even for ILDS. and there may be several cellular operators, some with

a greater market share than the other, but none can be said to have a monopoly. The other aspect is the nature of the dispute in these petitions. They arise in the context of the employment of the Petitioners with the TCL (erstwhile VSNL) and concern the legality of the actions of TCL as an employer. Going by the law explained by the Supreme Court in Binny Ltd. the disputes arising out of the employment of the Petitioners with the erstwhile VSNL cannot be adjudicated in the writ jurisdiction since they do not involve "any public element". The Petitioners have to seek remedies in civil law.

18. Accordingly, it is held that the present writ petitions are not maintainable against TCL, the reconstituted entity of VSNL after disinvestment. The writ petitions are dismissed with liberty to the Petitioners to avail of any other remedies that may be available to them in accordance with law.