

(2005) 07 CAL CK 0021
In the Calcutta High Court
Case No : Writ Petition No. 1255 of 2004

Mr. Sunirmal Kumar Ray

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-07-2005

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : (2005) 3 CALLT 316 : (2006) 110 FLR 374 : (2006) 2 LLJ 60

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Arunava Ghosh and Soumya Mazumdar, for the Appellant; Sundarananda Pal L.K. Pal Sumita Pal and Debasis Pal, for the Respondent

Final Decision : Allowed

Judgement

Jyotirmay Bhattacharya, J.—Challenging the order of suspension, the petitioner has filed this writ petition claiming various service benefits against his employer, the respondent No. 2 herein which is a Company registered under the Indian Companies Act, 1956.

2. A preliminary objection regarding the maintainability of this writ petition was taken by Mr. Pal, learned Advocate, appearing for the respondent No. 2 on the ground that since the respondent No. 2 is a Company registered under the Indian Companies Act, 1956, the said respondent is neither a State nor an instrumentality of the State nor any other local nor other authorities within the meaning of Article 12 of the Constitution of India and as such writ does not lie against the said respondent.

3. Since a preliminary objection regarding the maintainability of the writ petition was raised by Mr. Pal, this Court thought it fit to decide the said objection first before entering into the merit of the said application.

4. By drawing my attention to the unreported decision of this Hon'ble Court in

the case of Sukumar Chakraborty v. Union of India and Ors., Mr. Pal submitted that the issue regarding maintainability of this writ petition against the respondent No. 2 is no longer res integra as the Division Bench of this Hon''ble Court has already held in the said decision that respondent No. 2 is not a State instrumentality and as such writ does not lie against the said respondent.

5. On careful consideration of the said decision, I must say that the said issue was not ultimately decided in the said decision though such an issue was raised in the said case.

6. To substantiate the preliminary objection, Mr. Pal drew the attention of the Court regarding the objects and functions of the respondent No. 2 for which the said Company was incorporated under the Companies Act. 1956. The functions and activities of the said Company, generation of fund to carry out its objectives as well as the modalities of functioning of the said Company, the service conditions of its employees etc. were brought to the notice of this Court to justify that the said Company is neither financially, functionally, administratively dominated by or under the control of the Government.

7. Several guidelines have been laid down by seven Judges'' Bench of the Hon''ble Supreme Court in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, which has also been followed by the subsequent decision of the five Judges'' Bench of the Hon''ble Supreme Court in the case of Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others, . The guidelines laid down in those decisions for becoming a body to be a part of the State under Article 12 of the Constitution of India are as follows:

"(1) Principles laid down in Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, are not a rigid set of principles so that if a body falls within any one of them it must ex hypothesi, be considered to be a State within the meaning of Article 12.

(2) The question in each case will have to be considered on the basis of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.

(3) Such control must be particular to the body in question and must be pervasive.

(4) Mere regulatory control whether under statute or otherwise would not serve to make a body a part of the State."

8. These are the broad guidelines which are to be tested in the facts of the instant case for ascertaining as to whether the respondent No. 2 can be treated as a State instrumentality or other authority within the meaning of Article 12 of the Constitution of India.

9. The following are the points which were formulated, by Mr. Pal to show that

the respondent No. 2 is neither financially, functionally, administratively dominated by or under the control of the Government:

(i) The respondent Company was not created by or under any statute. Rather the respondent No. 2 is a company registered under the Indian Companies Act, 1956.

(ii) The Company does not carry on any monopoly trade. There are as many as 21 Export Councils including the respondent No. 2 which are operating to support, protect, maintain, increase and promote the exports of all chemicals, pharmaceutical and other allied products including minerals and ores etc. in India.

(iii) There is no shareholder in the respondent Company. Only the member who registered himself with this council becomes member of the council on payment of membership fees for the purpose of export of their products. Members are all private individuals or private limited company or public limited company.

(iv) Financial assistance is not given by the Government to meet the whole or entire expenditure of the respondent Company. The Company, however, receives partial fund from the Government in particular project which is approved by the Government. The Government only retains control and/or supervision over the utilization of the fund which is given by the Government to the respondent Company for a particular project for a limited purpose as indicated in Clause 27(1) of the Articles of Association of the Company.

(v) The Government does not retain any control over the appointment of the employees of the respondent Company. The employees of the respondent Company are paid from the Company's own fund. The service conditions of the employees are regulated by the Service Rules of the Company to which the Central Government and the other Government has nothing to do.

(vi) The respondent Company is run and managed by a Committee of administration of 20 members who are all elected representatives by its members. There are however three nominated members from different Government establishments who are also not nominated by the Government but are selected by the other members of the Board of Management of the Company.

10. These are the broad basic structure of the respondent Company which according to Mr. Pal do not satisfy the guidelines laid down in Pradeep Kumar Biswas's case for becoming the said Company a part of the State under Article 12 of the Constitution of India.

11. Mr. Ghosh, learned Advocate, appearing for the petitioner, drew my attention to various documents of the Company annexed to the writ petition to 11 show that the Company is financially, functionally, administratively dominated by or under the control of the Government. By drawing my attention to annexure "P-3" to this writ petition, Mr. Ghosh pointed out that presently there are 12 Export Promotion Councils under the administrative control of the Department of Commerce as given in Appendix-II. The Appendix-II at page 51 to this writ petition also shows that the respondent Company was figured under serial No. 2

therein under the Heading "Export Promotion Councils".

12. Several provisions from the Memorandum of Associations of the respondent company being annexure "P-4" to this writ petition have also been shown to this Court to support the petitioner's claim to the effect that the Company is a State instrumentality and/or other authorities within the meaning of Article 12 of the Constitution of India.

13. Mr. Ghosh pointed out from the said Memorandum that the Company can deposit or invest monies and/or securities in any banks approved in this behalf by the Union Government. Thus, the Company has no choice for selection of its Bank for its transaction. Even no alteration can be made to the Memorandum of Association or to the Articles of Association of the Company unless the alteration had been previously submitted to and approved by the Central Government. Mr. Ghosh submitted that all these provisions in the Memorandum of Association of the Company show that the Government retains full control over the management and functioning of the said Company.

14. Mr. Ghosh further submitted that above all there are three nominated Government officials in the Board of Management of the said Company and the Government also not only gives financial assistance to various projects of the said Company but also retains full control and supervision over the utilization of the fund of the Government through the said Company. Government Auditors are also deputed by the Department of Commerce, Government of India to verify the utilization of Government grant under MDA and MAI schemes by the council which will appear from annexure "P-5" at page 75 to this writ petition. Inspection team are also sent by the Government of India for checking the progress of various export promotion activities under MDA and projects sanctioned under MAI schemes from time to time as Will appear from annexure "P-11" at page 77 to this writ petition.

15. Thus, Mr. Ghosh submitted that the materials on record show that the Company is financially, functionally, administratively dominated by or under the control of the Government and thereby satisfies the test laid down in Pradeep Kumar Biswas's case. Such being the position, Mr. Ghosh submitted that the Company is a State instrumentality and/or authority within the meaning of Article 12 of the Constitution of India and thereby is amenable to the writ jurisdiction of this Hon"ble Court.

16. Let me now consider the context under which the CSIR was declared as State or other authority under Article 12 of the Constitution of India by the seven Judges' Bench of the Hon"ble Supreme Court in Pradeep Kumar Biswas's case. Simultaneously, let me consider as to whether the tests which have been laid down in Pradeep Kumar Biswas's case for becoming a body to be a State and/ or other authority, are satisfied in the case of the respondent No. 2 or not.

Formation of CSIR

17. Board of Scientific and Industrial Research and the Industrial Research Utilization Committee were set up by the Department of Commerce, Government of India, with the broad objective of promoting industrial growth in this country.

18. Subsequently CSIR was created by the Government to carry on in an organised manner what was being done earlier by the Department of Commerce of the Central Government. In fact the two research bodies which were part of the Department of Commerce have since been subsumed in the CSIR which is a society registered under the Registration of Societies Act, 1860. Even the registration was made under the said Act pursuant to the decision of the Government.

Formation of Capexil

19. Capexil is a company registered under the Companies Act, 1956. Nothing is apparent from the materials on record that Capexil was formed by the Government. Government has no share in the Company.

Objects and functions of CSIR

20. CSIR was set up by the Government in the national interest to further the economic welfare of the Society to fostering planned industrial development in the country. Expenditure of CSIR is controlled by the Government. Government of India plays a dominant roll in the Governing Body of CSIR. Members of the Governing Body are mostly Government nominees, nominated by the President of India. Byelaws of the said Society prescribes full control of the Society by the Government.

Objects and functions of Capexil

21. Promotion of export of various chemical and allied products. The Company, no doubt, works in a field of national importance, but its overall activities are not controlled by the Government. Government does not retain any control over the expenditure of the Company, The activities and management of the Company is exclusively controlled by the Board of Management in which there are three Government nominees out of 20 members. But even the Government nominees are not nominated by the Government. Rather the Government nominees are selected by the Board of Management of the Company.

22. The Company does not carry on any monopoly trade.

23. The Company, however, receives some grant from the Government for some specified projects of the Company. The Government, however, retains control over the utilization of such grant and/or for implement of the project by the Company. Retention of control by the Government over Company is restricted only to the above extent.

24. The effect of receiving grant from the State for a particular project as well as the effect of exercise of the control by the Government for verification of the utilization of the said project has also been considered by the Hon"ble Supreme

Court in the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , wherein " it was held as follows:

¶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 connected 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 arrangement with government, public or private organisations or individuals in furtherance of the objectives for implementation of programmes. The funds of the 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 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. The NCERT is thus largely an autonomous body."

Financial Aid of CSIR

25. Major part of the financial aid comes from the Government. The accounts of CSIR is audited by the Comptroller and Auditor General and placed before the table of both the Houses of the Parliament.

Financial Aid of Capexil

26. Apart from some particular specified project, the Company does not receive any grant from the Government. Government retains control over the implementation of such project and/or over the utilization of such grant. The control of the Government is limited to that extent only.

27. The accounts of the Company is not audited in general by the Comptroller and Auditor General. Government audit is restricted only to the utilization of the Government grant in a particular specified scheme approved by the Government.

Dissolution of CSIR

28. In case of dissolution, the surplus assets of the said Society after payment of all debts will pass to the Government.

Dissolution of Capexil

29. In case of dissolution, the surplus assets of the said Company after payment of all debts will be transferred to such other Company having objects similar to the objects of the Company, to be determined by the members of the Company

at or before the date of dissolution or in default thereof, by the High Court of Judicature that has or may acquire jurisdiction in the matter.

Jurisdiction of Administrative Tribunal over CSIR

30. Jurisdiction of Administrative Tribunal was extended over CSIR with effect from 17th November 1986 by the Government notification which provides that the provisions of sub-section (3) of section 14 of the 1985 Act will apply to CSIR being the Society owned and controlled by the Government.

Jurisdiction of Administrative Tribunal over Capexil

31. No notification. Not applicable.

32. To conclude, let me now summarise the aforesaid discussion in the following manner:

33. It is an admitted position that the respondent No. 2 is a Company registered under the Indian Companies Act, 1956. Admittedly the said Company was not created by any statute. Nothing could be shown that any part of the share capital of the Company is held by the Government. Nothing could be shown that any financial assistance is given by the Government to meet the whole or entire expenditure of the Company. It is, however, true that the Company received some grant from the Government in some particular projects which are approved by the Government viz., MDA and MAI schemes. Neither the appointment nor the conditions of service of the employees of the Company are controlled by the Government. The Company retains its full control over the appointment of its employees and to determine the conditions of their service.

34. The provisions which have been made in the Memorandum of Association of the Company as pointed out by Mr. Ghosh are the self-framed provisions by the Company itself. Those provisions were not made by the Government for controlling the activities of the said Company. Even the Government nominees in the Board of Management are not nominated by the Government but they are nominated by the members of the Company which shows that the Government has in fact no control over the management of the Company as such. Even in case of winding up, the surplus assets of the Company will not go to the hands of the Government but that will be transferred to such other Company having object similar to the object of the Company as provided in Clause 10 of the said Memorandum of Association.

35. However, the Company in its Memorandum of Association made some provision, viz., Selection of Bank, change in the Memorandum of Association, appointment of Government nominees in the Board of Management. But those are all self-imposed conditions. Government never put those restrictions for recognising the said Company.

36. The Government no doubt retains some control over the utilization of the fund and the implementation of the said schemes by the Company but that does

not mean that the Company as a whole is financially, functionally, administratively dominated by or under the control of the Government. The control which the Government retains to supervise the implementation of the projects for which the Government extends its grant, is merely regulatory in nature and the Company is not under deep and pervasive control of the Government.

37. All these facts at least give some indication that the respondent No. 2 is not an instrumentality of the State.

38. The above distinctive features of the CSIR and Capexil show that Capexil does not satisfy the tests which were laid down in Pradeep Kumar Biswas's case following which the CSIR was declared as State or other authority within Article 12 of the Constitution of India.

39. The picture which thus ultimately emerges is that the control which the Government exercises over such a body is not deep and pervasive in nature but merely regulatory in nature.

40. If all these factors are taken together, in my view, the respondent No. 2 is neither a State instrumentality nor other authority within the meaning of Article 12 of the Constitution of India. Thus, this Court holds that the said respondent is not amenable to the writ jurisdiction of this Court.

41. Accordingly, this writ petition cannot be entertained, as the same is not maintainable in view of the aforesaid discussions.

The writ petition thus stands rejected. There will be, however, no order as to costs.

Urgent xerox certified copy of this dictated order, if applied for, be given to the parties, as expeditiously as possible.