
(1993) 02 BOM CK 0042
In the Bombay High Court
Case No : Writ Petition No. 1972 of 1992

Pesi Shroff

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 15-02-1993

Acts Referred:

Bombay Race-courses Licensing Act, 1912 — Section 3, 4(3)
Constitution of India, 1950 — Article 10, 101, 102, 104, 112(A)

Citation : AIR 1993 Bom 384 : (1993) 95 BOMLR 610

Hon'ble Judges : V.A. Mohta, J; S.M. Jhunjhunwala, J

Bench : Division Bench

Advocate : K.S. Cooper, S.K. Cooper, Harish Jagtiani and B.V. Dharia, for the Appellant; R.A. Dada, I.M. Chagla, S.K. Talsania and A.P. Mawani, e/b. M/s. Mulla and Mulla, Cragie Blunt, Caroe and V.R. Manohar, Advocate General and Aspi Chinoy, A.N. Samant, N.D. Pokle, Suraj N. Shah and Miss S.P. Daruwala, for the Respondent

Judgement

V. A. Mohta, J.—Pesi Shroff is a flat racing jockey of repute. The Royal Western India Turf Club ("the Turf Club") denied to him the racing licence for the racing calendar 1992-1993. Aggrieved thereby, he has filed the writ petition under Article 226 of the Constitution, against the Turf Club for restoration of his licence.

2. Preliminary jurisdictional point which we were called upon to decide is, whether this Writ Petition is maintainable.

3. Whether the Turf Club is a "State" within the extended meaning given to the said term under Article 12 of the Constitution?

4. The concept "State" takes within its sweep not only the executive and legislative wings of the Union and the States but also local bodies as well as "other authorities" which would include the instrumentalities or agencies of the State or institutions which discharge public functions of a governmental nature. Great mass of case law has developed in the process of interpreting the expression "other authorities". Starting point of long line of decisions in the case

of Rajasthan State Electricity Board, Rajasthan v. Mohan Lal AIR 1967 SC 1856 , wherein, departing from The earlier views, the Supreme Court ruled that principle of ejusdem generis does not apply in the interpretation of this expression as there is common feature present in the named bodies. Line ends with the last reported judgment of the Supreme Court in the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , in which review of "almost all important decisions dealing with the subject has been taken, and certain propositions laid down.

5. The classic judgment on the subject is the case of Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, , in which six main tests have been formulated. We reproduce below for ready reference the material portion of that decision (at p. 496):

"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 norms with the Government with the sweep of the expression. A wide enlargement of the meaning must be tampered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority's case.

(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 that 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) Exercise 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 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. We may point out that it is immaterial for this purpose whether the Corporation, is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government

and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The Corporation may be a statutory Corporation created by a statute or it may be a Government company or a company formed under the Companies Act, 1956, or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a Corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12."

6. Thus, it will be seen that a non-statutory body not exercising statutory powers is not a State unless it is an agency of the State and in the determination of the question of agency, basic tests to be applied are:

- (a) Whether share capital is held by the State;
- (b) Whether State has conferred monopoly status;
- (c) Whether functions are governmental or closely related thereto;
- (d) Funding by the State;
- (e) Control by the State;
- (f) Imposition of statutory duties by the State;
- (g) Transfer of a Government Department.

7. Mr. Cooper, learned Counsel for the petitioner, had invited our attention to certain observations of Mathew, J. 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, . Detailed reference to the observations is not necessary because the said decision has been considered in Ajay Hasia in laying down the six tests reproduced above. Strong reliance was placed also on certain observations made in the case of M.C. Mehta and another Vs. Union of India and others, . The essence of the matter was whether a limited company carrying on activities which can jeopardise public interest is amenable to writ jurisdiction under Article 226 in the matter of those activities. No doubt, there are certain observations which swing the pendulum of interpretation towards the theory of expansion of the concept but the questions are left undecided. We cannot go merely by those observations in the face of clear ratio laid down in subsequent decisions including the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and

other[OVERRULED], .

8. This takes us to the task of application of ratio of the Supreme Court decisions to the Turf Club. It is a limited liability company - constituted under the Indian Companies Act. Its Memorandum indicates the objects for which the Club is established. In substance, the main objects are;

(a) To take over the assets and liabilities of the present unincorporated Western India Turf Club;

(b) To carry on the business of a Race Course Company in all its branches; ""

(c) To establish any Clubs, Hotels or other conveniences;

(d) To carry on the business of horse-keepers, tavern keepers, licensed victuallers and refreshment purveyors;

(e) To carry on in all its branches the business of breeding and training horses;

(f) To establish, maintain and carry on any school or other establishment for the training of riding boys or jockeys born in India etc.

The Memorandum further provides that if, upon the winding up or dissolution of the Club, there remains after the satisfaction of all debts and liabilities and property whatsoever, the same shall be paid to or distributed among the Members of the Club in equal shares.

9. Now, the material part of the Articles of Association. Article 10 puts a ceiling on the number of Club Members. Article 21(i) and (ii) refers to entrance fees under various heads and annual subscriptions. Management of the Club and the control over its funds and property vests in the Management Committee consisting of 9 elected Members and maximum 2 persons nominated by the State Government (Article 69), Procedure of nomination is provided for under Article 87. Chairman is elected by majority (Article 89). The decisions in the Meeting are by majority of votes. Chairman has a casting vote in case of equality of votes (Article 90). The Committee can delegate its functions to Sub-committees whose decisions are also by majority of votes. The Committee is obliged to elect 5 Club Members to be Stewards of the Club for a specified period (Article 101). The State Government is empowered to nominate persons not exceeding two to act as Stewards of the Club (Article 102). Powers of the ; Stewards are specified in Article 104. Article 104A prohibits a betting by Stewards. Article 112A mandates application of the income and property of the Club towards its objects and prohibits its application in payment of dividends for the Members of the Club.

10. It would be seen that horse-racing is but one of the objects of the Club, though quite an important one. Betting on horserace is illegal under the general law. But this otherwise illegal activity has been permitted by a special enactment viz., the Bombay Race-courses Licensing Act, 1912 ("the Act of 1912"). Section 3 of the said Act provides that:

"No horse-race shall be held save on a racecourse for which a licence for horse-racing granted in accordance with the provisions of this Act is in force."

Section 4(3) of the said Act provides:

"The State Government may by such licence authorise the licensee to grant, subject to such conditions as shall be specified by the State Government in such licence, a licence or permit to any book-maker to carry on his business or vocation or to act as a book-maker or turf commission agent in respect of horse-races held on a race-course, being a race-course which is situated in this State or outside it. The licence may be granted for such period not exceeding the period of the licence granted to the licensee as the licensee may think fit."

Section 4(4) provides for cancellation of the licence, in the event of any breach of the condition subject to which it was granted.

11. The Turf Club obtained a lease of huge land in the midst of the Bombay City from the Municipal Corporation and in Pune city from the Pune Cantonment Board -- and, had applied on that basis, for licence, which, from time to time, has been granted to the Turf Club. Material conditions of the licence are Nos. (1), (2), (3), (10), (11) and (14). Condition No. 1 refers to the yearly licence fee of Rs. 40 lakhs payable to the Government. Condition No. 2 mentions that during the period of licence the licensees shall be permitted to hold races on the Race-courses at Bombay, Pune for a period not exceeding 55 days of the aggregate in the respective racing year, excluding those days the net receipts whereof are to be handed over by the licensees to the Charitable Institutions and/or Funds as provided viz., if the Licensees intend to hold horse-races over and above fifty five days in a racing year, the Licensees shall make an application in writing seeking permission for the same to the Additional Chief Secretary (Home) to the Government of Maharashtra, Home Department, well in advance by giving reasons in support thereof which permission may or may not be granted by the Government, upon such conditions including that of the payment of additional licence fee as the Government may think fit. Condition No. 3 deals with the licences or permits to the maximum 70 book-makers to register bets on the said race-courses which, licences cannot be granted without prior approval of the Government. The licence can be cancelled by the Government without assigning any reason. If a licence granted to any book-maker is suspended or cancelled by the licensee, the licensee shall send a written intimation thereof to the Government within seven days from the date of such suspension or cancellation. If the Government so directs, the Licensee shall, within the time fixed by the Government, revoke any such suspension or cancellation. Under Condition No. 10 Government is granted the right to audit the Club accounts at any time. Condition No. 11 mentions that Articles 10, 21(1) and (II), 69, 87, 102 and 104(a) in the Articles of Association of the Turf Club made at the instance of Government and in force on the date of the grant of the Licence shall not be altered without the prior approval of Government. Condition No. 14, the most important of all the Conditions, is reproduced here for ready reference;--

"14. The Licensees shall duly comply with all the directions that may be given from time to time by the Government to the Licensees either in connection with any of the activities carried on by the Licensees or otherwise howsoever."

12. Races conducted by the Turf Club are governed by the Rules framed by the said Club. The Stewards have high powers in the matter of all aspects of races including ejecting person from places under their control and punishing owners, nominators, trainers, jockeys, riding boys and persons attending on horses with fine and suspension. Rule 22(a) is the power of the Stewards of the Club to grant, withdraw and suspend licences to officials, trainers, jockeys, book-makers and others. Under Rule 93, no person shall ride in any race under these Rules until he shall have obtained a licence or previous permission to do so from the Stewards of the Club. Such licence or permission must be applied for annually. Certain conditions are imposed on the jockey to hold a valid licence. Rule 94-A; contains the power of suspension, imposition of fine or disqualifying of the jockeys by the Stewards of the Club on the grounds specified in sub-clauses (i) to (iv).

13. Keeping in view the above basic facts pertaining to the Turf Club and the Racing conducted by it, it seems to us that the Turf Club cannot come in the sweep of the concept "other Authority" as contemplated under Article 12, for the reasons that follow:

1) The Turf Club is a limited liability Company incorporated under the Indian Companies Act;

2) Its objects are wide and varied and have no nexus with the discharge of regal, statutory or public functions of the State;

3) Racing is only one of the activities of the Club though an important one;

4) But for the provisions of the Act of 1912, some of the activities like betting on horse races conducted by the Turf Club are illegal and prohibited under the general law;

5) Conditions of licence for racing and restrictions imposed thereunder are essentially regulatory in nature and are also to protect the revenue in the form of entertainment duty under the Bombay Entertainment Duty Act and tax on betting under the Bombay Betting Tax Act; 6) The Government neither holds the share capital of the Club nor funds it.

7) The Club and its activities including activity of racing are governed by the Managing Committee of 11 Members by Majority. Maximum 2 Members can be nominated by the Government. Those nominated members have no power to veto and no obligation to report to the Government. Government has no power to issue binding instructions to their nominees. Hence, there is no governmental control -- in the case deep or pervasive --over the functions of the Club;

8) No monopoly is conferred by the statute upon the Club in the matter of

conducting races;

9) The Club is not formed by transfer of any Government Department.

14. It is submitted on behalf of the petitioner that Government control over the Turf Club is all pervasive in view of the stringent conditions of Licence, such as Conditions Nos. 2, 3, 10, 11 and 14. Under these Conditions, the Government has a power to audit the accounts and the balance-sheet. Certain Articles of Association which pertain to Government control and which are introduced at the instance of the Government, are made unalterable. In the first place, these are conditions governing only one of the activity of the Club and the only consequence of non-compliance is cancellation of the Licence. These conditions appear to be regulatory in nature and appear to have been imposed also to protect the Government revenue. Huge public revenue in the form of entertainment duty under Bombay Entertainment Duty Act and betting tax under the Bombay Betting Tax Act is involved. After all, the activity of betting on horses is basically illegal and is permitted under a special legislation. Regulation of such activity was essential. Condition No. 14 is no doubt very widely worded. There was considerable debate over the extent of the power of the Government to issue binding directions. The petitioner contended that it was all pervasive and brooked no restriction of any nature. The respondents contended that it will have to be read down to restrict its areas only to matters having nexus with the purpose of the licence and no other. Even if construed in the widest possible way, the said power does not raise the level of the control of the State over the management and policies of the body to unusual degree. That, even the high degree of control by itself is not determinative of the question is yet another aspect; Even power of nomination of two Members (with no veto power) in an eleven Member body whose decisions are by majority of votes does not make a decisive impact on the question. We repeat that all these powers are essentially regulatory in character.

15. Our pointed attention was drawn to the feature that huge and very costly lands have been made available at cheap rates by the Bombay Municipal Corporation and Pune Cantonment Board to the Turf Club. Such lands are not available for being given to others, no race can be conducted without such parcels of land and hence there is factual monopoly conferred on the Turf Club. Now, such situations often arise in many private enterprises. Such factual monopoly, if any, is not the test contemplated by the Supreme Court. The Supreme Court has spoken only about State conferred monopoly. Hence, though attractive in the first blush, the submission cannot be accepted.

16. We may now turn to the question of the Turf Club being a power centre. Yes, the club certainly has some wide and important powers which include power to grant or refuse licences to the jockeys and others and also to cancel them. But holding important and wide power -- irrespective of its origin and nature -- is not determinative. Source of this power are the Rules of Racing framed by the Club for the races conducted, by it. These Rules can be changed at the Club's volition

and it may choose to stop the system of having licenced jockeys and may provide for any other mode for appointment. This power has no statutory backing at all. None can dispute the importance of the power and the serious impact that it can have on the professional jockey. But this importance is not determinative. Take for example more important power of dismissal of an employee, which a private employer possesses. He cannot be raised to the level of instrumentality of State on the basis of being a power centre in that sense. The right of the jockey in the matter of licence under the Rules framed by the Turf Club appears to be purely personal. Several other powers are also vested in the Turf Club and its bodies in the matter of conducting its affairs including racing. But those powers also stand on the same footing. Possession of such powers, therefore, cannot raise the Turf Club to the status of agency or instrumentality of the State.

17. The character of the body in principle may change with respect to its different functions. In the Turf Club an agency or instrumentality of the State at least in the activity of conducting horse-races? We do not think so far the broad reasons already indicated. Control over races is regulatory in nature. It is not all pervasive. We are unable to notice the brooding presence of the State behind the operation of racing, as contended on behalf of the petitioner. Power even if construed to be wide, has no nexus with the State functions.

18. Activity of racing in which a large number of people are involved is certainly of a public importance, but that again is not decisive of the matter. Every activity of public importance does not become the part of regal functions of the State though in the developing world the State functions are widening and are no more restricted to conventional areas. It is difficult to bring the activity of betting on horse-racing, which is otherwise illegal, within the sweep of regal functions of the State. In this context, our attention was invited to the fact that the Government of Tamilnadu had, by the Madras Race Club Acquisition and Transfer of Undertaking Act, 1956, taken over the Madras Race Club -- a similar limited company. Company was taken over because the Committee of Management of the said Club was not conducting its functions properly and in the interest of the race-going public, resulting, inter alia, into substantial loss of revenue to the Government, and hence the Government took it over. This feature, no doubt, indicates the importance of the race clubs but it does not make the club an agency of the State.

19. Several other decisions were also brought to our notice by both parties. Detailed reference to all of them is unnecessary since in all those cases the same basic tests were applied to the bodies involved.

20. This takes us to the second face of the preliminary objection viz., whether, even though the Turf Club is not a "State", writ would lie against it under Article 226. It is true that Article 226 does not restrict the ambit of writ jurisdiction to the State but extends also to "any person" and that too not only for the enforcement of right conferred by Part III but also for "any other purpose". The

law on the point of writ jurisdiction under Article 226 is crystallised due to judicial pronouncements made from time to time. Writ under Art. 226 can be issued for the enforcement of (i) fundamental rights and so also (ii) general legal rights. The expression "for any other purpose" does not mean any purpose which the High Court pleases. It means the purpose for which any of the writs could, as per the well established principles, issued. As ruled by the Supreme Court, in many decisions, the object of introducing these expressions was to place the High Court in the same position as that of the King's Bench in England and not to supplant the remedy which can be pursued under the general law. "Any other purpose" means enforcement of legal rights and performance of any legal duty. Legal rights mean legally enforceable rights and not purely personal rights and/or personal contract having no statutory force. In our view, the right of the petitioner to get racing licence is of personal character. It stems from the non-statutory Rules of Racing framed by a private body and has no nexus with the public duty. Hence, no writ would lie in the matter against the Turf Club.

21. In this context, our attention was invited to certain observations of the Supreme Court in the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, . That pertains to a registered Public Trust carrying on activity of imparting education, which always has been held to be a part of regal function. The following passage from that decision would indicate the correct legal position and also demonstrate how different the rights involved therein were at p. 1611 of AIR:--

"If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party."

The case of *Nagle v. Feitden* (1966) 2 Q. B. 633 also does not render any

assistance in the present decision making process. It only lays down that policy decision of refusing training licences to women trainees can be examined in a regular civil action and that action cannot be dismissed for want of cause of action in the absence of regular contract. Such questions, no doubt, are of public importance as held in that decision, that every right of public importance is not related to public duty.

22. Under the circumstances, we sustain the preliminary objection and hold that no writ can legally be issued against the Turf Club in the matter.

23. Accordingly, the Rule is discharged. No costs.

24. Certified copy expedited.

25. At this stage, Mr. Cooper orally applied under Article 134A of the Constitution for certificate of fitness to appeal to the Supreme Court of India, of the nature referred to in Article 133(1). Certificate refused, since, our judgment is essentially based on the ratio of the Supreme Court decisions.

Rule discharged.