(1993) 03 PAT CK 0040

In the Patna High Court

Case No : C.W.J.C. No. 3577 of 1989

Prem Shankar Sharma		APPELLANT
	Vs	
The State of Bihar and Others		RESPONDENT

Date of Decision : 19-03-1993

Acts Referred:

Citation : (1993) 03 PAT CK 0040

Final Decision : Dismissed

Judgement

Binod Kumar Roy, J.—The petitioner, Deputy Finishing House Incharge of the Ashok Paper Milk Limited (hereinafter referred to as the Company), through this writ application filed on 30-3-1989, prays to quash a communication made to him by the Works Manager Incharge of the Company (Respondent No. 4) vide letter dated 29-12-1987 (as contained in Annexure 8) to effect that as per the decision of the Board of Directors of the Company, he is being informed that his joining with effect from 4-11-1987 has not been accepted and that it will be considered only after a decision is taken to restart production of the Company. The petitioner also prays for issuance of an appropriate writ or direction of order commanding the Respondents to allow him to join on the post he was working prior to proceeding on leave granted by Respondent No. 4 as also to pay his salary and wages from August, 1985 to March, 1987 (the period during which he was on duty) and from 4-11-1987 to date.

The Facts:

2. The petitioner asserts that the Ashok Paper Mills Limited is a company registered under the Indian Companies Act, 1956, having its registered Office at Calcutta, which was set up as a joint venture of the Governments of Bihar and Assam, that the Company is having two units one at Jogighipa in Assam and the other at Rameshwar Nagar, Darbhanga, in Bihar, that he was appointed in the Darbhanga unit of the Company on 8-8-1975 or an Assistant Incharge, Finishing House, that for various causes the production of the units are suspended since about August, 1982, without any declaration of lock out or closure, that nearly

600 employees including the petitioner are still on the rolls of the Company in its Darbhanga Units although everyday their attendance are being marked but without being paid wages since February, 1983 though the Government of Bihar is making advance and ad hoc payments of meagre amounts to them on the eve of few important festivals once or twice in a year, that due to non-payment of salary and wages it became very difficult for him to stay at the Factory site quarters and at last applied for leave with effect from 1-4-1987 for one month vide his leave application dated 28-3-1987 (as contained in Annexure 2) to Respondent No. 4, which was granted to him without pay, which was extended through his application dated 30-4-1987 (as contained in Annexure 3) sent by registered post to 2-6-1987 and then by another leave application (as contained in Annexure 4) on 25-6-1987 and 31-7-1987 and he further extended his leave up-to 30-10-1987 on account of flood vide Annexure 5 : that on the expiration of his leave, he went to join duty on 4-11-1987, submitted his joining report to Respondent No. 4 on 4-11-1987 and he was allowed to join and to sign the Attendance Register, that Respondent No. 4 wrote a letter dated 18-11-1987 (as contained in Annexure 6) to Respondent No. 3, the Director Incharge, Gauhati, informing him that the petitioner was absent for more than 90 days and recommending for sanction of extra-ordinary leave to regularise his joining through without stating the facts therein, that the Respondent No. 4 also wrote letters dated 14-11-1987 and 29-5-1988 (as contained in Annexure 7 and 7/A) addressed to the Joint Director, Industries (C. and A.), Government of Bihar, Patna, and to the Deputy Collector, Nazarat, Darbhanga, Correctly mentioning therein about he petitioner having proceeded on long leave with effect from 1-4-1987 till 4-11-1987, on which the petitioner was informed of the impugned communication (as contained in Annexure 8), that thereafter the petitioner was stopped from signing the Attendance Register, that the petitioner met the Director Incharge, submitted representations after representations (as contained in Annexures 9, 9/A and 9/B). But has not received any correspondence though he was assured for sympathetic consideration and hence this writ petition.

3. Respondents Nos. 2 and 4, in their preliminary counter-affidavit (dated 3-8-1989 filed on 11-9-1989), assert, inter alia, that they (Respondent Nos. 2 to 4) are not ''authorities'', that no averment has been made by the petitioner to show that the Government exercises plenary control over the affairs of the Company, which is not a Government Company as defined under the Companies Act, 1956, that the subscriber to its share capital is the public at large, in which the Governments of Bihar and Assam are share holders to the extent of 16% and 32% respectively which is not a relevant factor to classify it as an instrumentality or agency of the State, that even otherwise the Company does not discharge functions in the nature of public or closely related to the Governmental function, that the Company was established solely with the object of making profit from the business of manu facturing paper, that the writ application has been filed much after a year from the date of the impugned order without any explanation offered for the delay and, accordingly, the petitioner is guilty of laches and on

this ground alone, the writ application is fit to be dismissed in limine, and that the petitioner was granted leave by the Board of Directors as per the Companies Leave Rules.

4. The petitioner in his reply to the aforementioned affidavit asserts, inter alia, that the Company is a Government Company, in which 16.5% shares are of the Government of Bihar, 11-5% shares are of the Govern ment of Assam and 48% share are of the Industrial Development Bank of India (which is a subsidiary of the Reserve Bank of India), I.F.C.I., I.C.I.C.I. and L.I.C, and only 4% shares are not of the Government/State owned Financed and is a "State" under Article 12 of the Constitution and its instrumentality or agency, that all the Board of Directers of the Company are of the Government of Bihar, Government of Assam and from the Industrial Development Bank of India, that the fact it is well-known that the Mills is of the Government, which has been reported in the Newspaper, the relevant reports and the documents are Annexure 10 to 16 that the last representation of the petitioner was made on 10-10-1988, which is still pending disposal and, thus there was no delay or laches on his past and that on no occasion, the leave application of the petitioner was rejected by the Respondents.

5. The petitioner also filed a supplementary affidavit (wrongly describing it to be a supplementary counter-affidavit) stating, inter alia, that in the meeting of the Board for Industrial and Financial Reconstruction (the proceeding of which is being attached as Annexure 17) held on 15-11-1989, Darbhanga Unit of the Company was declared as a sick unit, that now the Unit of the Company in Assam has been bifurcated from the Government of Bihar with their assets and liabilities and presently the Company is being managed and controlled by the officers of the Bihar Government.

6. This writ application was admitted by order dated 20-11-1990, which runs as follows:

This application will be heard.

The contesting respondents have already entered appearance.

It will be open to the petitioner as well as the respondents to tile a detailed affidavit and a counter-affidavit respectively as to whether M/s. Ashok Paper Mills Ltd. shall be deemed to be a Government Undertaking to meau that it is being managed directly by the State Government or through its agency. We may observe that the matter will be different if only financial assistance has been given to the said paper Mills either under some terms of agreement or statutory provision. If only some financial assistance has been given, details thereof should be given in the counter-affidavit.

We make it clear that the pendency of this writ application shall not be a bar on the part of the management of the respondent M/s Ashok Paper Mills Ltd. to make payment of salary to the petitioner or to take work from him.

Let this application be listed for hearing before any appropriate Division Bench on llth February, 1991, as the rst case subject to part heard, if any.

7. The Respondent No. 1, State of Bihar, in its counter-affidavit states, inter alia, that the Company, which is situated at Rameshwar Nagar, Darbhanga, is not a Government Company, that under the Companies Act, the Government Company as denied u/s 617 of the Companies Act, 1956, means any Company in which less than 51% of paid up capital is held by the Central Government or by or any State Government or Govern ments or partly by one or more State Government and includes a Company which is subsidary of a Company, whereas, the share held by the Govern ment of Bihar and Government of Asssm are to the extent of 48% only, the I.D.B.L. is having shares to the extent of 39%. 1.F.C.I., I.C.I.C.I. and L.I.C. having shows to the extent of 9% and Maharaja-Darbhanga and others to the extent of 4% that its management is not under the control of the State Government nor its employees ate employees of the State Govern ment that the Ashok Paper Mills, Rameshwar Nagar, Darbhanga, was established in the year 1957 by Late Maharaja Darbhanga and Baidyanath Ayurved Bhawan and their Associates in private sector, which was closed in the year 1965 as the private promoters could not run it, that in the year 1968 rehabilitation proposal was initiated by the Governments of Assam and Bihar and all Financial Institutions and a scheme was established but the units became sick for various reasons and were closed in October, 1982, the Government of Bihar tried to rehabitiate the unit and entrusted she work of preparation of rehabilitation package to M/s Parkhe Consultants, Pune, who prepared a rehabilitiation scheme and submitted to the Government of Bihar in 1986, that the matter of rehabilitation was referred to by the Company on 19-7-1987 to the Board for Industrial and Financial Reconstruction contisuted under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, and on 28-6-1989 it was decided that the Darbhanga Unit of the Company should be acquired by the Government of Bihar and the Assam Unit by the Government of Assam, that both the Governments requested the Government of India to make financial assistance, which also granted financial assistance, that for taking over and running the Ashok Paper Mills, Darbhanga, a Draft Ordinance was sent to the President of India, that the Minister of State for Industries, Governmenr of India, vide G.O. letter No. 2094 dated 23rd December, 1991, informed the Chief Minister of Bihar (as contained in Annexure A) that the Union of India unable to make available any financial assistance for the Company, that the Ordinance was returned vide memo No. 2089 dated 12-8-1992 for certain comments, that the Ashok Paper Mills Kamgar Union moved the Supreme Court under Article 32 of the Constitution of India in a representative capacity far issuing a writ of mandamus to the State of Bihar to take appropriate steps for its revial and reconstruction, on which an interim Order dated 20-12-1991 was passed but State Government is not in a position to take over the Company without financial assistance given by the Union of India, that as the Company has not been taken over by the State Government and as such his claim for payment by the State Government is not justified though on humanitarian ground it has been paying

advance wages that in the event of take over, the payment so made will be debited to the account of the Company, that the Union of India has given financial assistance to the Government of Assam, which started production, but in the case of Bihar, it has shown its inability, and that the writ application is not maintainable against the State of Bihar.

8. Through their supplemenlary counter-affidavit Respondents Nos. 2 and 3 bring on record a recent judgment dated 27-10-1992 of a learned Single Judge of the Gauhat High Court in Civil Rule No. 1217 of 1986 (Shri Lahindra Kumar Saikia v. Ashok Paper Mills Limited and Ors.), dismissing a writ application filed against the Company as not maintainable on the ground that it is not a State within Article 12 of the Constitution of India.

9. The petitioner, through an additional supplementary affidavit, reasserts that the Company is still a joint venture of States of Bihar and Assam, all its Directors are the Bihar and Assam Government Officers, which stand supported by the 29th Annual Report-cum-Balance Sheet of the Company (as contained in Annexure-18), and that as per his calculation, the petitioner will superannuate with effect from January, 1993.

The Submissions:

10. Mr. Tara Kisore Prasad, learned Counsel appearing in support of the Rule submitted as follows:

The Company is a ''State'' within the meaning of Article 12 of the Constitution of India, it is manned by the officers of the States of Assam and Bihar, which stands supported by the 29th Anual Report cum Balance Sheet of the Company (as contained in Annexure 18). The stand of the petitioner also stands further supported by the direction of the Hon''ble Supreme Court of India in Writ Petition filed by its employees as also the documents appended as Annexures 10 to 16 to which no answers has been given by the Respondents. The stand taken by the Respondents in their counter-affidavit that the Company is not a State should not be accepted. Even though the petitioner was informed by the order impugned (as contained in Annexure 8) that his prayer in regard to joining will be considered later on, no decision has been taken either to restart the production of the Company or in regard to his joining. The petitioner had validlv joined but his joining was illegally withheld, which has caused serious prejudice to him and the action of the respondents is wholly arbitrary, illegal and mala fide and, thus, they be commanded to accept his joining and pay his salary etc.

Mr. Prasad in support of his submission also placed reliance on two decisions of the Hon''ble Supreme Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , and in Som Prakash Rekhi v. Union of India .

11. Mr. K.D. Chatterjee, learned Counsel appearing on behalf of Respondent Nos. 2, 3 and 4, submitted that the Company is not a State within the meaning of Article 12 of the Constitution of India. He placed reliance on the decision of the

Gauhati High Court. Alternatively he submitted that even if it is State a mandamus will not be issued in respect of contract of Service as mandamus is issued only when a contract of service is terminated in violation of the Statue or Statutory Rule. The service condition of the petitioner was also governed by Article 311 of the Constitution of India or by the provisions of the Industrial Disputes Act.

He placed reliance on the following decisions of the Hon''ble Supreme Court of India, namely, (i) The Praga Tools Corporation Vs. Shri C.A. Imanual and Others, (ii) Vaish Degree College v. Lakshmi Narain AIR 1975 SC 888 and (iii) Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, .

12. We also wanted to know from Mr. Chatterjee, learned Counsel appearing on behalf of Respondent Nos. 2, 3 and 4 as to whether any final decision in regard to the petitioner as stated in the impugned order, has been taken to which he stated that it has not been taken so far.

13. Mr. J.P. Karn, learned Standing Counsel No. 5 appearing on behalf of the State of Bihar, followed up Mr. Chatterjee and strenuously urged to dismiss this writ application as not maintainable.

14. Mr. Prasad, in reply, apart from reiterating his submissions placed reliance on Clause 6 of the appointment letter of the petitioner (as contained in Annexure 1).

My Findings :-

15. I take up first the question of maintainability of this writ application.

16. In Civil Rule No. 1217 of 1986 of the Gauhati High Court an Officer Trainee (Personnel) of the Company, whose service was terminated by the Company on the ground of prolonged unauthorised absence from duty, moved the Gauhati High Court through a writ application praying to issue a writ of mandamus to the Company to reinstate him. A preliminary objection was raised to the maintainability of that writ application on behalf of the company that it is not a State within the meaning of Article 12 of the Constitution of India or for the purpose of Article 226 of the Constitution and a learned Judge upheld it observing as follows:

(4) The question which arises for consideration is whether the Company is "State" within the meaning of Article 12 of the Constitution of India. At this stage, it may be helpful to refer to a decision of the Supreme Court reported as Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], . In that case the Supreme Court has held ;

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, vest and pervasive, is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusal 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 indentifying the body as "State" within the meaning of Article 12 of the Constitution. See: (i) P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, ; (ii) Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, ; and (iii) Tekraj Vasandi alias K.L. Basandhi Vs. Union of India (UOI) and Others, .

The Supreme Court has further observed that : There are only general principles but not exhaustive test to determine whether a body is an instrumentality or agency of the Government. Even in general principles, there is no cut and dried formula which would provide correct division of bodies into those which are instrumentalities or agencies of the Government and those which are not. The powers, functions, finances and control of the Government are some of the indicating factors to answer the question whether a body is "State" or not. Each case should be handled with care and caution. Where the financial assistance from the State is so much as to meet almost entire expenditure of the institution, or the share capital of the corporation is completely held by the Government it would afford some indication of the body being impregnated with governmental character. It may be a relevant factor if the Institution or the corporation enjoys monopoly status which is State conferred or State protected. Existence of deep and pervasive State control may afford an indication. If the functions of the institution are of public importance and related to governmental functions, it would also be a relevant factor. These are merely indicative indicia and are by no means conclusive or clinching in anycase. See (i) 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, , (ii) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , (iii) Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, and (iv) Som Prakash Rekhi v. Union of India (UOI) .

(5) Keeping the above principles in view, let us now examine the case on hand. The Company is a Company incorporated under Indian Companies Act, As already stated, Ms Dutta has produced Memorandum and Articles of Association. The Company has its Memorandum and Articles of Association. The Company is governed by its Memorandum and Articles of Association subscribed by seven (7) persons who arc not Government officials. Clause 85 of Memorandum of Association provides

''Until otherwise determined by a General Meeting, the number of Directors shall not be less than three or more than twenty''.

Under Clause 86 of the Memorandum of Association, the first Directors shall be Pandit Ram Dayal Joshi, Pandit Ram Narayan Vaiday and Shri Banwari Lal Sharma who are three (3) of the subscribers. Clause 86-A provides for nomination or appointment of Directors by financial institutions like Industrial Development Bank of India (IDBI), Industrial Finance Corporation of India (IFCI), Industrial Credit, Investment Corporation of India Limited, Life Insurance Corporation of India etc. Clause 86-B further provides for nomination or appointment not more than two Directors by each of the Governments of Assam and Bihar so long as the State Government of Assam and/or Bihar holds any Equity and/or preference shares or during the currency of any guarantee given by such State Governments to other party/parties on behalf of the Company, etc.

(6) I am of the opinion that, the case on hand having regard to the Memorandum and Articles of Association, does not satisfy the requirement of "State" under Article 12 of the Constitution of India, In that view of the matter, the Company is not "State" within the meaning of Article 12 of the Constitution of India or for the purpose of Article 226 of the Constitution of India. Therefore, the petition is dismissed. No costs.

17. Unfortunately before us the Memorandum and Articles of Association of the Company has not been produced by the petitioner to falsify the stand of the Respondents and I am handicapped to say anything in this regard. No request has been made before us to call for it from the Registrar of Companies.

18. The photo staf copy of the ''29th Report and Accounts for the period ended 31st March, 1989, of the Company (Annexure 18 to the additional supplementary affidavit) shows (1) Shri Prem Saran, IAS, Director Incharge, (2) Shri M.V.N.R.S. Rao, Special Director, (3) Shri V.H. Panday, (4) Shri H.S. Das, IAS (5) Shri N.K. Singh, IAS, (6) Shri N.C. Sen Gupta and (7) Shri A.K. Srivastava as Directors but that does not mean that they are the only Directors of the Company. It merely shows that they had participated in the meeting. In Annexure 18 against the description of all the seven afore said Directors, the words "Assam, Bihar, I.D.B.I., Assam, Bihar, Technical Director and Bihar B.S.I.D.C." have been added in pen subsequently.

19. The statements made in newspapers (as contained in Annexure 13) are not admissible in evidence.

20. Annexure 10 contains a copy of the Order dated 10-2-1983 passed in Appeal No. ED (SB T) No. 237/80-C filed by the Company Unit in Assam against the Collector of Central Excise, Shillong, before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi, which shows that the Assam Unit, of the Company took up a stand that it is a joint venture of the Governments of Assam and Bihar. However, this stand taken in the excise case cannot be itself conclusive of the issue more so when the petitioner has not stated in his

pleadings of this stand.

21. Annexure 11 is a copy of the letter dated 9-8-1983 of Shri G.C. Goswami, I.A.S., Additional Secretary to the Government of Assam and Director-in-charge of Ashok Paper Mills Limited, to the Chief Executive Officer, Ashok Paper Mills Limited, Rameshwarnagar., showing that the Additional Secretary to the Government of Assam as the Director-in-charge of the Company.

22. Annexure 18 is a notification dated 22-11-1988 issued by the Industries Department of the Government of Bihar on the orders of the Government of Bihar, showing that the Rameshwarnagar Unit of the Company is a State Industrial Unit.

23. Annexure 17 contains a copy of the proceeding of the Board for Industrial and financial Reconstruction in regard to case No. 222/87, concern ing the Company also cannot be said to be settler of the issue.

24. No Ordinance/Act has come in existence taking over the Company. In regard to non-giving of financial assistance to this State by the Union we are not called upon to make any comments.

25. The petitioner himself admits that at least 4% shares are being owned by private individuals and that only 48% shares are being owned by our State and the State of Assam.

26. I also find that recently the Hon''ble Supreme Court in Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , considered the decisions relied upon by Mr. Prasad as also the principles once again which would constitute ''State'' within the meaning of Article 12 of the Constitution of India reiterating its principles as quoted by Gauhati High Court in Paragraph 4 of its order and further observ ing and holding as follows :

(5) The object of the NCERT as seen from the above analysis is to assist and advice 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 co-ordination of research extension services and training, dissemination of improved educational techniques, collaboration in the eductional programmes. It also undertakes preparation and publication of books materials, periodicals and and other literature. These activities are not wholly related to governmental functions. The affairs of the NCERT are conducted by the executive Committee comprising of 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 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.

27. For the reasons aforesaid, it is not possible for me to take a view different from what has been taken by Mr. Justice R.K. Manisana of the Gauhati High Court rather agreeing with him 1 too hold that the Company is not ''State'' within the meaning of Article 12 of the Constitution or its ''agency'' or ''instrumentality'' and accordingly, I further hold that this writ application is not maintainable.

28. This writ application is, accordingly, dismissed.

29. Since I have held this application as not maintainable I refrain from recording any finding in regard to other issues pressed before us.

30. In the peculiar facts and circumsrances I make no order as to cost.

Ram Nandan Prasad, J.

31. I agree.

