

(1999) 09 MP CK 0059

In the Madhya Pradesh High Court

Case No : L.P.A. No"s. 49, 51 and 75 of 1998

Rajendra Rathor and Another

APPELLANT

Vs

Madhya Pradesh Stock Exchange and Others

RESPONDENT

Date of Decision : 14-09-1999

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (2000) 102 CompCas 300 : (1999) 2 J LJ 346 : (2000) 3 MPLJ 207

Hon'ble Judges : Shambhoo Singh, J; B.K. Khan, J

Bench : Division Bench

Advocate : A.M. Mathur, A.S. Garg and G.S. Yadav, for the Appellant; V.M. Rege, for the Respondent

Final Decision : Partly Allowed

Judgement

B.A. Khan, J.

The principal question that arises for consideration and determination in these appeals is whether the M. P. Stock Exchange was "State" within the meaning of Article 12 and if not whether it could still be made amenable to the writ jurisdiction under Article 226 of the Constitution of India.

Four writ petitions (W. P. No. 1454 of 1993, 1928 of 1993, 1410 of 1995 and 493 of 1997) were filed by the writ petitioners claiming different reliefs against the respondent "exchange". A preliminary objection questioning their maintainability was taken on the plea that the respondent exchange was not "State" under Article 12 and thus, not amenable to the writ jurisdiction. The writ court formulated a question whether the stock exchange was a "State" under Article 12 and whether it was amenable to the writ jurisdiction under Article 226 and upon a detailed discussion and analysis found that it was neither a "State" because the Central Government had no effective control or involvement in it nor was it otherwise amenable to the writ jurisdiction under Article 226, because it did not discharge any public duty. The court consequently dismissed all the writ petitions

as not maintainable.

The writ petitioners are up in appeal against this. Their case expectedly is that the stock exchange was a "State" under Article 12 and alternatively otherwise amenable to writ jurisdiction under Article 226, engaged as it was in discharge of public duty, responsibility and functions imposed on it under the relevant statute, and the rules/bye-laws.

The appellants' counsel Mr. Mathur contended that the stock exchange had all the trappings of "State" and was an "authority" of the State and inasmuch as its entire functioning was governed and regulated by the Securities Contracts (Regulation) Act, 1956, and the rules, conferring power on the Central Government to direct and regulate its functioning every inch. Under the Act it was to be recognised by the Government which could also impose conditions on it related to qualification of its members and the manner of execution of its contracts. The Government was also to nominate three of its representatives on its board and to also audit its accounts and to call for periodical reports about its functioning. All this indicated that the Government exercised effective and pervasive control over it making it an "authority" to bring it within the meaning "State" under Article 12. He alternatively argued that even if it was not regarded so, it could as well be amenable to the writ jurisdiction under Article 226 as it was discharging public duties and functions under the statute and the rules. He cited Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., ; Rakesh Gupta and others Vs. Hyderabad Stock Exchange Ltd. and others, and Mrs. Sejal Rikeen Dalal and others Vs. The Stock Exchange, Bombay and another, in support.

Mr. Rege, learned counsel for the respondent exchange on the other end made a very fine distinction between Government control and regulation from within and outside. According to him the test to be applied was whether the Government exercised deep and effective control over the management and internal working of the body to make it an instrumentality/agency/authority of the "State". If it exercised only outside regulatory control under the provisions of the statute, as in the present case, the body could not be labelled an "authority" or instrumentality" of the "State" under Article 12. He submitted that the exchange was only an association of brokers engaged in buying and selling of securities and was not performing any public duty as such. It may be that its functioning was related to the public interest but that was not enough unless it was further shown that it performed a public duty and then alone, it could be brought within the fold of the writ jurisdiction. He sought support from *Madhubhai Amathalal Gandhi Vs. The Union of India (UOI)*, , *R. Jagadeesh Kumar v. P. Srinivasan*, [1995] 83 Comp Cas 794 ; AIR 1995 ker 420 and *Satish Nayak Vs. Cochin Stock Exchange Ltd., Ernakulam and Others*, .

Arguments advanced on both sides appear attractive on the face. So does the judgment of the writ court which surveys the legal scene on the subject-matter to conclude that the stock exchange was neither "State" under Article 12 nor

amenable to writ jurisdiction under Article 226. We would have accepted this position and gone with the tide but for some conceptual reservations, which persuade us to take a partially contrary view in the matter.

It requires to be clarified at the very outset that a body or association, a society or a corporation may not strictly fall within the definition of "State" under Article 12 and yet may be amenable to writ jurisdiction under Article 226, if it satisfied the newly evolved tests of being engaged in discharge of public duty/functioning and responsibility and disclosing an element of public interest in its functioning. Gone are days when the writ was believed to run only up to the "State" under Article 12. The concept has undergone a sea change and made spectacular advance over the years widening the frontiers and horizons of the writ jurisdiction. Now it is available even against private persons, bodies, associations and corporations if it is found that a statutory public duty was cast on these and an element of public interest was present in their functioning. This is so because of the liberal interpretation placed by the Supreme Court on the provisions of Article 226 conferring writ jurisdiction on the High Court and distinguishing it from the ambit and contours of Article 12 occurring in Chapter III of the Constitution dealing with fundamental rights. It was accordingly propounded that Article 226 was so much wider in scope as the amplitude of the language used in it indicated and conferred expansive and extraordinary power on the High Court to affect any person including a private individual and was available for any purpose. It was also affirmed that Article 12 was relevant only for enforcement of fundamental rights under Article 32 whereas Article 226 empowered High Courts to issue writs both for fundamental and non-fundamental rights and to "any person or authority" which was not confined to statutory authorities and instrumentalities of the "State" only and which could cover any other person or body performing a public duty. Even though it was noticed that no limitation was imposed on the powers of the High Courts for exercise of extraordinary writ jurisdiction, yet it was hinted that the court was to observe some well established restraints and was not expected to cross the self imposed limits laid down unless the exceptional situation so demanded to reach injustice. This position was all along affirmed in various judgments by the Supreme Court, be that in *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, *Rohtas Industries Ltd. and Another Vs. Rohtas Industries Staff Union and Others*, and *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, . The court in this case brought out a marked distinction in the scope of Articles 12 and 226 in the following terms (headnote of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, :

"The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as

well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty."

The concept received a new dimension in Praga Tools" case [1969] 39 Comp Cas 889 (SC) wherein the court observed as under AIR 1989 SC 1613 : .

"The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation 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. ...

Mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states : "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract". (Judicial Review of Administrative Act, 4th edition, page 540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartments. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found. Technicalities should not come in the way of granting that relief under Article 226."

(emphasis" supplied)

The focus on the nature of duty as a determinative factor was again underscored in the celebrated case of Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., , by the court thus :

"The emphasis in this case is as to the nature of duty imposed on the body. It requires to be observed that the meaning of authority under Article 226 came to be laid down distinguishing the same term from Article 12. In spite of it, if the emphasis is on the nature of duty, on the same principle, it has to be held that these educational institutions discharge public duties."

The court later recorded caution and struck balance in Air India Statutory Corporation, etc. Vs. United Labour Union and others [overruled], holding as under :

"In Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , this court had pointed out that the difficulty will lie in demarcating the frontier between the public law domain and the private law field. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the question and the host of other relevant

circumstances."

The net position that emerges is that no shackles could be put on the writ power of High Court on technicalities which is wide and unlimited to strike at injustice. But this power is not exercisable like a bull in the china shop, as observed by the Supreme Court and is subject to well settled self-imposed restraints and limitations.

The tests laid down by the Supreme Court, though not exhaustive, in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ; *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, , cases were relevant for determining whether the body/society/company was "State" within the meaning of Article 12 and whether a writ could issue to it for enforcement of fundamental or legal rights. But what required to be noted was that even though such body may fail to come up to these tests, it may yet be amenable to writ jurisdiction under Article 226 for reasons of being engaged in discharge of public duty/responsibility/functions cast on it by the statute and the rules or by any charter, contract or common law and because of existence of an element of public interest in its functioning. The form of the body would not constitute a decisive factor in such determination. But a demarcation was required to be made between public law domain and the private law field. Where the body was wholly and purely a private body with no public duty cast on it and no element of public interest involved in its operations and if the rights claimed against such body were also private in nature and character, then it would not be surely attracting the writ jurisdiction. The question is therefore, to be decided with reference to the nature of action complained of, the activity in which the body is engaged and other circumstances.

Summarising it, a body may not partake of the character and status of "State" under Article 12 but may still be amenable to writ jurisdiction under Article 226 in case of breach of public duty cast on it, by the statute, rules and bye-laws. But even then, a distinction was to be drawn between a private law action and a public law one. The writ jurisdiction would not be available where the claimed right and the action complained of were wholly private in nature and character. Viewed in this backdrop, all that remains to be examined is whether the respondent stock exchange is amenable to the writ jurisdiction. For this it becomes necessary to know the nature of the functioning" of the stock exchange and the extent of control and regulation exercised by the statute and rules over it and through it by the Central Government and whether it performed any public duty cast on it by the statute and whether any element of public interest was present in its functioning.

A stock exchange, as commonly known, is a body of individuals engaged in the business of selling, buying or dealing in securities. It provides facilities to liquefy capital to enable a person to convert his/her investment made in a company into cash by disposing of the shares held to some one else. It thus, gives mobility to

the capital in the absence of which the capital invested in the form of shares would be locked up.

The stocks and shares in the exchange are dealt with in three ways: (i) spot delivery contract; (ii) ready delivery contract; and (iii) forward contracts. These contracts sometimes also carry the risk of degenerating into speculative transactions amounting to pure gambling which could subvert the main object of the stock exchange. That is why the Securities Contracts (Regulation) Act, 1956, was enacted to prevent undesirable transactions in securities by prohibiting certain business action and by providing for some other connected matters.

The Act provides for general control over trading methods and practice of the stock exchange exercisable through Central Government. So much so that no stock exchange can be set up without the permission of the Government and its recognition by it in terms of Sections 4 and 19. The Central Government is also empowered to lay down conditions related to membership, rules and bye-laws, etc., while granting such recognition which be withdrawn by it in the interests of trade and public interest u/s 5. The Government is also empowered to call for periodical returns of the exchange and to direct inquiry into its affairs u/s 6 and correspondingly the exchange is duty bound to furnish annual reports to the Government u/s 7.

A recognised stock exchange can make rules to provide for certain matters contained in Section 7(a) but these are enforceable only with the approval of the Central Government which can also direct the making of such rules in respect of the constitution of the Stock Exchange, powers of management and its office bearers, the manner in which the business is to be transacted by it, the qualification for its membership and the procedure for registration of the members and above all the suspension, exclusion and the readmission of members. The exchange is also allowed to make bye-laws but only with the approval of the Securities and Exchange Board of India (SEBI) which could also make such bye-laws on its own regarding the host of matters specified in Section 9.

What is significant to note is that the Central Government is empowered to supersede the governing body of a recognised stock exchange and even to suspend its business in case of emergency and it could also prohibit contracts in certain areas to prevent undesirable speculation in terms of Sections 11 12 and 13. It is also competent to make rules for giving effect to the objections of the Act u/s 30, pursuant where to such rules stand already framed and are in force.

These rules called "the Securities Contracts (Regulations) Rules, 1957" prescribe the mode and method for a host of matters, including the form of application for recognition, fees to be paid, documents to be filed, qualifications for membership, the manner in which contracts are to be confirmed and inquiry in the affairs of the exchange conducted, the books of account and other documents to be maintained and securities to be listed in the exchange and so

on.

All this shows that though the stock exchange satisfies most of the well established tests to qualify for a "State", yet it falls short of requirement in certain respects. It possesses all the trappings so much so that it owes its existence to the Central Government because it could not be set up without its permission and recognition. It could be also superseded by it and its business suspended in the interest of trade and public. Its rules and bye-laws are also subject to the approval of the Government or SEBI. Three of its members of the governing body are also nominated by the Government. Its accounts and affairs are subject to Government audit and scrutiny and so on. What is, however, missing is that the Central Government has no hand in its internal functioning and management, nor any financial involvement nor any domination in its management. Therefore, even if its eligibility for qualifying for the "State" is a border line case, it requires to be still examined whether it could still attract the writ jurisdiction under Article 226 because of being engaged in discharge of public duty and presence of element of public interest in its functioning.

There are conflicting Division Bench judgments by the Kerala and Andhra Pradesh High Courts on this aspect of the matter. While the Kerala High Court in *Satish Nayak Vs. Cochin Stock Exchange Ltd., Ernakulam and Others*, had ruled that the stock exchange was not discharging any public duty the Andhra Pradesh High Court had held to the contrary. However, it is surprising that a careful analysis of the provisions of the Act, the rules and the subject-matter of bye-laws to be made by the exchange should have escaped notice in these judgments. That perhaps explains the conflict of opinion by the two courts unsupported by any detailed reasoning on whether the exchange was discharging any public duty which in turn was liable to give rise to rights and obligations.

The superficial understanding of the nature of the stock exchange operations would suggest that it is not engaged in discharge of any public duty as such, so long as it deals with dealing and buying and selling of company shares. But there is more to it than meets the eye.

It goes undisputed that the existence and functioning of the stock exchange is provided for and regulated by the Act and the rules made thereunder which have the consequence of making it a public authority if not statutory body in the strict sense of that term. It could qualify to be statutory body also even though it does not owe its birth to the statute because all its ins and cuts are regulated by the statute and the rules and also bye-laws to be made under such statute.

It cannot also be overlooked that the Act and the rules made thereunder provided for do's and don't's for its operations. For instance the Act prohibits contracts in certain cases and declares contracts in notified areas illegal in certain circumstances. It requires the exchange to submit annual reports and periodical returns regarding its affairs and also casts a duty on it to frame rules and bye-laws with the approval of the Central Government or the SEBI as the

case may be. Similarly, the rules prescribe the qualifications of membership of the exchange, the manner of inquiry into the affairs of the exchange and the requirements for listing of security on the exchange. Likewise, the bye-laws required to be made by stock exchange provide for the manner and method for a host of matters including regulation of blank transfers and of budlas, determination and declaration of market rates, the terms, conditions and incidents of contracts, the levy and recovery of fees, fines and penalties, fixing the scale of brokerage, making, comparing and closing of bargains, etc.

All this enables the stock exchange to perform duties which are public in nature and wherein the element of public interest is present. If it is required not to enter into a contract of a particular type or to enlist security of a specified category or to enlist members of a particular qualification, it is discharging a public duty imposed on it and if this gives rise in turn to any rights and obligations the same are surely enforceable in the writ jurisdiction. It cannot be wished away that the exchange under the statute, rules and the bye-laws owes obligations in a number of areas of its operation. Therefore, if any breach is alleged of such obligations by the aggrieved person invoking any of the rights created in the process, writ jurisdiction would always be available to such person in such circumstances.

We accordingly hold that even if stock exchange were not regarded as "State" under Article 12 it could still be amenable to writ jurisdiction under Article 226 in certain cases where it was shown that it was performing/statutory/public duty cast on it under the statute, rules and bye-laws giving rise to an obligation which it owed to the aggrieved party and which was breached in some manner. It would, therefore, all depend upon the facts and circumstances of each case. There may be cases where the writ would certainly issue and cases where the writ jurisdiction would not be available. A dealing or a transaction within the exchange may be private in nature but where its manner and method is covered by statutory rules and bye-laws and a breach alleged thereof, even that would attract the writ jurisdiction on account of breach of statutory duty. As such the stock exchange could be subject to the writ jurisdiction depending upon the nature of the action complained of and the obligation arising out of it, having its genesis in the Act, rules and bye-laws framed thereunder.

Therefore, while agreeing with the reasoning of the writ court partly these appeals are allowed to the limited extent indicated above. The dismissed writ petitions shall accordingly revive and be posted before appropriate Bench for examination of the nature of issues involved and for their determination in the light of the legal position enunciated.