
(2019) 05 UK CK 0270
In the Uttarakhand High Court
Case No : Special Appeal No. 504 Of 2019

Sandeep Ghildiyal	Vs	APPELLANT
State Of Uttarakhand And Another		RESPONDENT

Date of Decision : 27-05-2019

Acts Referred:

Uttar Pradesh Industrial Employment Model Standing Orders, 1991 — Section 3(a)
Constitution Of India, 1950 — Article 12, 13(2), 141, 226

Citation : (2019) 05 UK CK 0270

Hon'ble Judges : Ramesh Ranganathan, CJ; N.S. Dhanik, J

Bench : Division Bench

Advocate : Dr. Kartikey Hari Gupta, B.S. Parihar

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. This appeal is preferred against the order passed by the learned Single Judge in Writ Petition (S/S) No. 934 of 2019 dated 25.04.2019.
2. The petitioner (appellant herein), an employee of the second respondent, invoked the jurisdiction of this Court seeking a writ of mandamus directing the second respondent to treat him as a permanent workman under Section 3(a) of the Uttar Pradesh Industrial Employment Model Standing Orders, 1991 and to provide him full pay and allowances of the post of Traffic Manager from the date of successful completion of one year probation period, and from the date of completion of one year probation period, i.e. 01.05.2015 along with interest; and a writ of mandamus directing the second respondent to treat the services of the petitioner as permanent and regular from the date of completion of one year probation period, i.e. 01.05.2015, and to provide full wages along with interest.
3. The second respondent is a company incorporated under the Companies Act, 1956 and, admittedly, the Government of Uttarakhand does not own any shares in the share-capital of the said company. The employees of the second

respondent company are governed by the provisions of the Industrial Employment (Standing Orders) Act, 1946; and the Uttar Pradesh Industrial Model Standing Orders, 1991, made in terms of the Act, are applicable to the second respondent Company. The petitioner invoked the jurisdiction of this Court contending that a writ petition would lie against the second respondent, since it discharges public functions.

4. In the order under appeal, the learned Single Judge observed that the second respondent was a private body, which did not fall within the meaning of the term "State" as defined under Article 12 of the Constitution of India; and, even otherwise, the appellant-writ petitioner was a workman who had a remedy before the Labour Court. On the ground that the appellant-writ petitioner has an alternative remedy, the writ petition was dismissed by the learned Single Judge reserving liberty for him to approach the appropriate forum. Aggrieved thereby, the present appeal.

5. Dr. Kartikey Hari Gupta, learned counsel for the appellant-writ petitioner, would place reliance on the Memorandum and Articles of Association of the second respondent, as also on the provisions of the Industrial Employment (Standing Orders) Act, 1946, to contend that the functions discharged by the second respondent are in the nature of public functions; and a writ petition would lie against a body discharging public functions.

6. The provision, on which the appellant-writ petitioner, places reliance upon, is Paragraph 3(b) of the Memorandum of Association of the second respondent. Paragraph 3 are the objects for which the 2nd respondent was formed and, amongst its objects, are (in Clause 3(b)) to co-operate with Government authorities, and to supplement their efforts in the regulation of traffic, and in providing all possible comforts to the public.

7. The second respondent has, on its own accord, chosen to co-operate with Government authorities, and to supplement their efforts. That, by itself, would not make the second respondent an instrumentality of the State under Article 12 of the Constitution of India, nor can the second respondent be treated as a public body discharging public functions merely because it has on its own stated, in its Memorandum and Articles of Association, that it would co-operate with the Government and would supplement their efforts in regulating traffic.

8. The other provision, which is relied upon by Dr. Kartikey Hari Gupta, learned counsel for the appellant-writ petitioner, is under the Industrial Employment (Standing Orders) Act, 1946. It is no doubt true that the provisions of the said Act have been made applicable to the second respondent also. Even private sector companies, which are industries, are governed by the provisions of the Industrial Employment (Standing Orders) Act, 1946; and, in the absence of any certified Standing Order being made with respect to the said companies, the Model Standing Orders, prescribed under the Act, would apply to employees working in such industries.

9. The mere fact that the provisions of the 1946 Act are made applicable to employees of an industry would not make it an instrumentality of the State under Article 12 of the Constitution of India, or require it to be treated as a public body discharging public functions. The distinction between a body created by a Statute, and a body governed by the provisions of a Statute, must be borne in mind. The second respondent is governed by the provisions of the Companies Act, 1956 and the provisions of the Industrial Employment (Standing Orders) Act, 1946. It is not a body created by any enactment. It is a private limited company carrying on business in terms of its Memorandum and Articles of Association. While its employees would undoubtedly be governed by the provisions of the Industrial Disputes Act and the Industrial Employment (Standing Orders) Act, 1946, the second respondent is not an instrumentality of the State, nor can it be said to be discharging public functions; and, consequently, it would not be amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India.

10. While Dr. Kartikey Hari Gupta, learned counsel for the appellant-writ petitioner, would rely on the dissenting opinion of Justice S.B. Sinha in *Zee Telefilms Ltd. and another vs. Union of India and others* : (2005) 4 SCC 649, the law binding on the High Court, under Article 141 of the Constitution of India, is the majority opinion and not that of the minority.

11. The other judgment, on which Dr. Kartikey Hari Gupta, learned counsel for the appellant-writ petitioner, relies, is *Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology and others* : (2002) 5 SCC 111, wherein a Constitution Bench of the Supreme Court summed up its conclusion as under:

(1) Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of 'other authorities' in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to the public. Further, the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people --their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavour and clear indicia of power -- constitutional or statutory and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that

extent they may overlap. Tests 1, 2 and 4 in *Ajay Hasia* enable determination of Governmental ownership or control. Tests 3, 5 and 6 are 'functional' tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Unfortunately thereafter the tests were considered relevant for testing if an authority is the State and this fallacy has occurred because of difference between 'instrumentality and agency' of the State and an 'authority' having been lost sight of sub-silentio, unconsciously and un-deliberated. In our opinion, and keeping in view the meaning which 'authority' carries, the question whether an entity is an 'authority' cannot be answered by applying *Ajay Hasia* tests.

(2) The tests laid down in *Ajay Hasia's* case are relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in the positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned. When an entity has an independent legal existence, before it is held to be the State, the person alleging it to be so must satisfy the Court of brooding presence of government or deep and pervasive control of the government so as to hold it to be an instrumentality or agency of the State.

12. In terms of the law declared in *Pradeep Kumar Biswas*, for it to be considered an authority within the meaning of 'other authorities' in Article 12, the entity should have been created by a statute or should be functioning with liabilities and obligations to the public; the statute creating the entity should have vested that entity with power to make laws; it should have been entrusted with such functions as are governmental or closely associated therewith; and the person, approaching the Court, must satisfy it of the brooding presence of the government, or of deep and pervasive control of the government, so as to hold it to be an instrumentality or agency of the State.

13. In the present case, the self-proclaimed intent of the second respondent to co-operate with Government authorities, and to supplement governmental efforts in regulating traffic, would not make it an instrumentality of the State amenable to the writ jurisdiction of the High Court.

14. We see no reason, therefore, to differ with the opinion of the learned Single Judge that the second respondent is not an instrumentality of the State under Article 12 of the Constitution of India and is, therefore, not amenable to the writ jurisdiction of this Court.

15. The learned Single Judge has also relegated the appellant-writ petitioner to approach the Labour Court on the ground of existence of an alternative remedy. While the jurisdiction of this Court is not barred, by the mere existence of an alternative remedy, it is one of the factors which this Court would bear in mind

while exercising its discretion whether or not to entertain the writ petition.

16. Interference in an intra-court appeal is justified only if the order under appeal suffers from a patent illegality. We find no such infirmity in the order under appeal. The appeal fails and is, accordingly, dismissed.