
(2007) 10 DEL CK 0163
In the Delhi High Court
Case No : LPA No. 511 of 2000

S.C. Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-10-2007

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19(1), 21, 226
Contract Act, 1872 — Section 23

Citation : (2007) 99 DRJ 664

Hon'ble Judges : Dr. M.K. Sharma, C.J.; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Viplav Sharma and J.P. Sah, for the Appellant; Mahinder Singh, for respondent No. 5-LIC and Lalit Bhasin, Ratna Dwivedi and Shruti M. Khattar for respondent Nos. 8-12, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—The present appeal has been filed by Mr. S.C. Sharma, an erstwhile employee of Modi Rubber Limited, the respondent No. 8 herein. It is the case of the appellant that on 12th September, 1972 he was appointed as Stenographer with the respondent No. 8. On 26th August, 1996 his services were terminated by giving one month salary in lieu of notice. Aggrieved, the appellant filed Writ Petition No. 3654/1996 on 23rd September, 1996 challenging his termination from service on the ground that it is in violation of principles of natural justice, Articles 14, 19(1)(g) and 21 of the Constitution of India.

2. Before the Learned Single Judge, preliminary objection was taken by the respondent No. 8 that the writ petition was not maintainable as the said company is not a "State" or an "instrumentality" or an "agency" of the Government within the meaning of Article 12 of the Constitution of India. By the impugned judgment dated 11th August, 2000, Learned Single Judge has held that the writ petition was not maintainable as the respondent No. 8 is an incorporated company and, Therefore, does not come within the sweep of Article

12 of the Constitution of India. It was also held that the Government does not exercise direct, deep and pervasive control over the respondent No. 8 merely because some of the financial institutions of the Government were shareholders or had given loans to the respondent No. 8 and their nominees were on the Board of the respondent No. 8. The terms "any person" and "for any purpose" in Article 226 of the Constitution of India were also examined with reference to various judgments of the Supreme Court and the propositions as elucidated by H.M. Seervai in Constitutional Law of India, Fourth Edition. It was held that Article 226 cannot be construed to replace ordinary remedies available by way of a suit to a litigant or a citizen under general law of the land. The Learned Single Judge observed that once the history of the Prerogative Writs is kept in mind, there is no difficulty in understanding that the expression "any person" cannot include private persons who are not performing public functions. Learned Single Judge noticed the distinction between "public function" and "private functions". The contention that the respondent No. 8 was performing public function, was also rejected. The Court also noticed that the dispute between the appellant herein and the respondent No. 8 is based upon contract of personal service and the said contract it was held cannot be made subject matter of a writ petition. The expressions "any person" and "for any purpose" by itself would not entitle a citizen to file a writ petition against an incorporated company.

3. Learned Counsel for the appellant, in addition to his oral submissions, has submitted before us written submissions going into 16 pages along with two voluminous compendiums of judgments. The arguments of the appellant can be condensed in the following words:

(i) Though the respondent No. 8 is a company incorporated under the Companies Act, 1956, several Government Companies Corporations like Industrial Financial Corporation of India, Unit Trust of India, Life Insurance Corporation of India, Industrial Development Bank of India and General Insurance Corporation of India hold shares in respondent No. 8 to the extent of 52.4% of its paid up equity share capital. They had nominated Directors on the Board of the respondent No. 8. Reference in this matter was made to the provisions of the Companies Act, 1956. Therefore, the respondent No. 8 is a state under Article 12 of the Constitution.

(ii) Respondent No. 8 had taken loan from public financial institutions and, Therefore, the said respondent was performing public functions. Activities carried out by the respondent No. 8 were for public good, of vital and high public and national importance. It was the third largest tyre manufacturer company in the country. Some of the objects of the Memorandum of Association of the respondent No. 8, entrust it with important public duties. Thus, respondent No. 8 performed public functions.

(iii) Writ petition under Article 226 is maintainable against any person and it is not necessary that the said person should be exercising sovereign public functions or should be a governmental authority. Writ petition under Article 226

of the Constitution of India is maintainable for any purpose without any limitation or restriction. Distinction between the private law and public law are not relevant.

(iv) Fundamental rights of the appellant have been violated because his service has been terminated by giving one month notice. Action of the respondent No. 8 violates Articles 14, 19(1)(g) and 21 of the Constitution of India. Contract of personal service though not enforceable under the Specific Relief Act, but, Law does not permit arbitrary and illegal termination without reasons in violation of principles of natural justice.

4. Learned Counsel for the respondent on the other hand, has also filed written submissions pointing out that respondent No. 8 does not perform "State" or "public function" and is a purely private body. No public interest as such is involved as the dispute pertains to the appellant and the respondent which is a purely private dispute between employer and employee.

5. We, may mention here that other terminated employees of respondent No. 8 had also filed Writ petitions, which were dismissed. Letter Patent Appeals filed were also dismissed. The Special Leave Petitions were granted but the Civil Appeals were disposed of vide order dated 23rd January, 2003, inter alia, holding that it was not necessary to examine the correctness or otherwise of the order passed by the High Court dismissing the Writ Petition on the ground of maintainability as it was not denied by the appellants therein that alternative remedies were available to them under the general law. In these circumstances, the appellants were asked to avail of alternative remedies to shorten the litigation as suggested by the Court. The Civil Appeals were disposed of by, the Supreme Court without examining the issue of maintainability of the writ petition on merit on the ground of availability of alternate remedy. The present appeal is liable to dismissed following the decision of the division bench in the case of V. Mahendru v. Union of India (LPA No. 171/1998), dismissing the appeal filed by the other erstwhile employees of the respondent No. 8.

6. There is no dispute that the appellant herein was initially employed as Stenographer and was, Therefore, a workman within the meaning of the Industrial Disputes Act, however, the appellant was later on promoted to the position of Assistant Manager (Insurance) in 1988 and subsequently his services were terminated in 1996.

7. We need not refer to various judgments cited by both parties as we feel the entire controversy has been settled by the decisions of the Supreme Court in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, VST Industries Limited v. VST Industries Workers' Union and Anr. reported in (2001) 1 SCC 298, G. Basi Reddy Vs. International Crops Research Instt. and Another, and Binny Ltd. and Another Vs. V. Sadasivan and Others,

8. In Pradeep Kumar bids was (supra), the Supreme Court interpreted Article 12 of the Constitution of India, which reads:

in this part, unless the context otherwise requires, "the State" includes the Government and the Parliament of India and the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India

9. The majority judgment held that the term "State" for the purpose of Article 12 would mean Central Government, State Government, local authorities and statutory corporations and would also include non-statutory bodies, which meet the test as prescribed in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , as reformulated in the case of *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, These tests are as under:

- i) Whether the entire share capital is held by the Government.
- ii) Whether the corporation enjoys monopoly status conferred by the state.
- iii) Whether the functions of the corporation are governmental functions or functions clearly related thereto.
- iv) If a department of the government has been transferred to the corporation.
- v) Volume of financial assistance received from the state.
- vi) Quantum of state control.
- vii) Whether any statutory duties are imposed upon the corporation.
- viii) Character of corporation may change with respect to its different functions.

10. Analysing the tests formulated in *Ajay Hasia's* case (supra), it was explained in *Pradeep Kumar bids* was (supra) that these are not rigid principles and mere fact that a body satisfies one of the tests, it does not, as a ex- hypothesis ,follow that said body is a "State" within the meaning of Article 12. For deciding the said status, cumulative effect of the facts have to be examined so as to find out whether the said body is financially, functionally and administratively dominated by or under the control of the Government. The control of the Government should be particular to that body and must be deep and pervasive. A control, which is merely regulatory whether under the statue or otherwise, would not make the said body a "State".

11. When we apply the aforesaid test laid down in *Ajay Hasia's* case (supra) and also keep in mind the ratio of *Pradeep Kumar Biswas's* case (supra), we do not think that the respondent No. 8 can be regarded as a "State" within the meaning of Article 12 of the Constitution. Mere fact that statutory corporations have entered into commercial contracts and granted loans to the respondent No. 8, have nominated Directors on the Board of respondent No. 8 or hold shares in the respondent No. 8, is not sufficient. The fact that the State controlled Financial Institutions pursuant to contracts or due to purchases from the share market cumulatively hold more than 50% shares in the respondent No. 8, is also not sufficient to hold that the respondent No. 8 is a "State". The test is functional,

administrative and financial control of the Government which should be deep and pervasive. It is admitted that the respondent No. 8 is a company incorporated under the provisions of the Companies Act, 1956. It is a listed company and its shares are traded. The respondent No. 8 is a commercial business venture for the purpose of making profits in which the promoters and the public could have made investments to get returns and reap profits. It is not an extended arm of the State. The said company has entered into purely commercial contracts for securing loans and finance for the commercial venture with the statutory corporations and institutions of the Government of India. In the said era private lending hardly existed. The relationship between the respondent No. 8 and these statutory corporations/banks is that of a borrower and a lender. It is a commercial business transaction between the respondent No. 8 and the financial institutions. By becoming shareholders of the respondent No. 8, the said institutions/banks have also become investors with the underlining purpose and objective to ensure that the investment made and loans given are protected, not pilfered or misused. Nomination of Directors by these statutory institutions/banks is not for the purpose of controlling and managing the affairs of the respondent No. 8, and to take over the said Company, rather, for the purpose of ensuring that the investments made and the loans taken are not misutilised. Nominated Directors normally do not oust and control the management of the company. The company works under the control and supervision of the promoters and private directors, who are in overall charge of the affairs and functioning of the company. Nominated Directors may also ensure that there is compliance with the contractual requirements and the terms on which the loans have been granted. The role and conduct of the financial institutions is not the subject matter of the Writ Petitions. The Company i.e., the respondent No. 8 has a distinct personality and legal identity. It is not a body constituted by the State Government or Central Government. It is a Company incorporated under the General law i.e., the Companies Act, 1956 and its affairs and functioning is regulated as per provisions of the said Act. Whether the State has deep and pervasive control over the respondent No. 8 could be established when the body is financially, functionally and administratively dominated by or under the Control of the Government. Mere regulatory control under a statute or a contract is not sufficient. Doctrine of lifting of the corporate veil is applied by Courts when circumstances justify and require the same to be resorted to. In the present case the said doctrine is not applicable. Even if we apply the said doctrine, there is no evidence and material to establish and it cannot be said that the financial institutions controlled the affairs of the respondent No. 8 and said control was pervasive. The objective and purpose of applying the various tests is to decipher whether the body is really an agency of the Government. If a body is not an agency of the Government, it is not an "Authority" within the meaning of Article 12 of the Constitution of India. By applying the said tests, it cannot be held that the respondent No. 8 is a "State" as it is an "instrumentality" or an "agency" of the Government. Thus, the respondent No. 8 is not a State within Article 12 of the Constitution.

12. Article 226 of the Constitution of India is plenary in nature and confers powers on the High Courts of the country to issue writs. The said Article reads as under:

1. Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

13. The said Article states that every High Court has jurisdiction to issue appropriate writs against any authority for enforcement of rights conferred by Part III or for "any other purpose". The said Article also states that writs can be issued to "any person". The expressions "any person" and "for any other purpose" have been explained and elucidated upon by the Supreme Court.

14. In G. Bassi Reddy's case (supra), these two terms were examined and it was held as under:

27. It is true that a writ under Article 226 also lies against a "person" for "any other purpose". The power of the High Court to issue such a writ to "any person" can only mean the power to issue such a writ to any person to whom, according to the well-established principles, a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words "and for any other purpose" must mean "for any other purpose for which any of the writs mentioned would, according to well-established principles issue".¹

28. A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty (Praga Tool Corporation v. C.A. Imanuel, Shri Anadi Mukta Sadguru Trust v. V.R. Rudani 3 SCC 698 and VST Industries Ltd. v. Workers' Union).... In Praga Tool Corporation v. C.A. Imanuel this Court construed Article 226 to hold that the High Court could issue a writ of mandamus "to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest". The Court also held that : (SCC p.589, para 6)

An application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. (See, Sohan Lal v. Union of India).

15. It may be noted that in Praga Tool Corporation (supra) referred to above by the Supreme Court the appellant company therein at the material time was to the extent of 88%, owned by the Union Government and the Government of Andhra Pradesh, who held 56% and 32% shares respectively. However, the writ

petition filed by the workers was dismissed on the ground that the incorporated company, the appellant therein, was not a statutory corporation and was also not performing public duties.

16. In the case of *Binni Limited* (supra), employees of the company had filed a writ petition challenging right of the management to terminate their services without assigning any reason by giving one month notice or salary in lieu thereof. The employees were not entitled to protection under the Industrial Disputes Act, 1947 and had prayed that they should be reinstated in service with back wages, as the termination clause was illegal and violative of Article 23 of the Contract Act, 1872. The Supreme Court noticed the difference between the public duties and contractual duties, which are a matter of private law. Public duties are enforceable by Mandamus and issue of Writs and can be made subject matter of a writ petition under Article 226 of the Constitution. Under the said Article, a Writ of Mandamus can be issued even against a private authority in respect of the public functions being discharged by the said authority. A writ court can by its decision direct a private authority to correct or enforce discharge of public functions. The term "public function" was defined as one, which seeks to achieve collective benefit for public or a section of public and is accepted by the public or that section of the public as having authority to do so. Bodies, exercise public function when they intervene or participate in social or economic affairs of public interest. Contractual rights, on the other hand, are private rights, which can be enforced through ordinary contractual remedies by filing a suit for damages, injunction, specific performance and declaration. High Courts while exercising jurisdiction under Article 226 of the Constitution of India do not issue a Writ of Mandamus in matters of private law because Writs are discretionary remedies normally issued to enforce public duties and secondly, not usually granted where alternative remedies are available. On the question whether the employees should be allowed to invoke jurisdiction of the High Court under Article 226 on the basis of a contract, the Supreme Court noticed that the courts should be reluctant to exercise writ jurisdiction solely based upon private law element. It was accordingly observed as under:

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public

law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England , 3rd Edn., Vol. 30, p. 682, " 1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit." There cannot be any general definition of public authority or public action. The facts of each case decide the point.

30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless it may be noticed that the Government or government authorities at all levels are increasingly employing contractual techniques to achieve their regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably.

31. The decision of the employer in these two cases to terminate the services of their employees cannot be said to have any element of public policy. Their cases were purely governed by the contract of employment entered into between the employees and the employer. It is not appropriate to construe those contracts as opposed to the principles of public policy and thus void and illegal u/s 23 of the Contract Act. In contractual matters even in respect of public bodies, the principles of judicial review have got limited application. This was expressly stated by this Court in *State of U.P. v. Bridge and Roof Co. (India) Ltd.* and also in *Kerala SEB v. Kurien E. Kalathil*. In the latter case, this Court reiterated that the interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226.

32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not "State" within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties.

17. In the case of *Binni Limited* (supra), earlier decision in the case of *VST Industries Limited* (supra) was also relied upon. In this case again there was a dispute between the incorporated company and workers union, who had filed a

writ petition seeking a Writ of Mandamus. The following proposition summarised by D. Smith, Woolf and Jowell's Judicial Review of Administrative Action was quoted with approval:

(1) The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a "public" or a "private" body.

(2) The principles of judicial review *prima facie* govern the activities of bodies performing public functions.

(3) However, not all decisions taken by bodies in the course of their public functions are the subject-matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function:

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and

(b) where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English Law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute.

18. Following *General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrugan Nishad and Others*, , in *Federal Bank Ltd. Vs. Sagar Thomas and Others*, , it has been held that the High Court should not entertain a writ petition against a private limited company for issue of mandamus on disputes relating to private contracts of employment. In *Federal Bank Limited (supra)*, the Supreme Court rejected the contention that a private company, which carries on business of banking and had an element of statutory or public duty and, Therefore, writ jurisdiction under Article 226 should have been exercised. It was held that the mere fact that the commercial activity undertaken by the company because of nature of business had impact on the economy of the country in general, does not by itself justify the conclusion that the company was discharging duties or functions of a public nature. This judgment in fact takes care of the argument of the appellant that the respondent No. 8 is performing public function, as it is a scheduled industry under the Industries (Development and Regulation) Act, 1951 or is otherwise performing public functions because it is engaged in commercial venture or manufacturing tubes and tyres and was the third largest company of the country at the time, when services of the appellant was terminated. In view of the ratio of these judgments, it cannot be said that the respondent No. 8 is performing public functions and it is amenable to writ jurisdiction as the subject

matter is a private contract between the appellant and the respondent No. 8. The contentions of the appellant are Therefore rejected.

19. Learned Counsel for the appellant had also relied upon two decisions of the Supreme Court in the cases of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, . These two decisions were also relied upon before the Supreme Court in the case of Binni Limited (supra). The Supreme Court explained that these were Public Sector Undertakings and public policy and principles were applied, but the same cannot be applied to private bodies as they stand on different footing. In both cases, the authorities were "State" within the meaning of Article 12 of the Constitution of India.

20. Learned Counsel for the appellant has also made reference to a decision of Division Bench of this Court in Kuldip Mehta v. Union of India reported in 1993 (2) Del Law 196. This decision was also relied upon before the learned Single Judge, but was rightly distinguished for the reasons stated. In the said case, the petitioner therein was appointed to a public limited company in which 50.91% shares were held by private investors. However, the Court noticed that in spite of the shareholding pattern, the affairs of the said company were managed and controlled by National Textile Corporation. After the decision of the Supreme Court in Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors,) , three successive CMDs were appointed by the National Textile Corporation and all of them belonged to Indian Administrative Service. The Court also found as a matter of fact that the petitioner therein was appointed after being selected by a panel of experts, which included Textile Secretary to the Government of India. Accordingly, the Court came to the conclusion that the Central Government exercised deep and pervasive control over the said company and accordingly it was a "State" within the meaning of Article 12 of the Constitution. The Division Bench concluded that the respondent company therein no doubt wearing the mask of a public limited company, but in fact it was dancing to the tune of the Central Government. Its affairs were completely controlled by the Central Government and was working as an extended arm of National Textile Corporation, a Government undertaking. The control was deep and pervasive and, Therefore, it was a "State" within the meaning of Article 12 of the Constitution of India. The said decision does not, in view of the facts found above, support the appellant herein. The respondent No. 8 is not a State as held above.

21. In view of the above, we do not any merit in the present appeal and the same is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.