
(1993) 10 BOM CK 0004

In the Bombay High Court

Case No : Appeal No. 1073 of 1988 in Writ Petition No. 600 of 1988

Scindia Steam Navigation Company Limited

APPELLANT

Vs

Sam Rustomji Lakdawala and Others

RESPONDENT

Date of Decision : 13-10-1993

Acts Referred:

Constitution of India, 1950 — Article 12, 13, 14, 16, 19
MERCHANT SHIPPING ACT, 1958 — Section 14, 15
Oil and Natural Gas Commission (Transfer of Undertaking and Repeal) Act, 1993 —
Section 10, 2
Penal Code, 1860 (IPC) — Section 21
Shipping Development Fund Committee (Abolition) Act, 1986 — Section 10, 11, 12,
14, 16

Citation : (1994) 96 BOMLR 976

Hon'ble Judges : M.K. Mukherjee, J;A.P. Shah, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.K. Mukherjee, C.J.—While working as an Assistant Electrical Superintendent under the Appellant-Company ("Company", for short) the respondent No. 1 was served with a letter dated November 30, 1987 terminating his services with immediate effect. Aggrieved thereby, he filed a writ petition before a learned Judge of this Court contending that consequent upon the enactment of the Shipping Development Fund Committee (Abolition) Act, 1986 ("Act", for short) and its imposition upon the Company with effect from April 3, 1987 it became a "State" within the meaning of Article 12 of the Constitution of India and that the Company's action in terminating his services was violative of Articles 14 and 16 thereof. In repelling the above contentions the Company urged that by no stretch of imagination could it be said that it became a "State" on the enforcement of the Act and submitted that the writ petition was not maintainable nor were the Articles 14 and 16 of Constitution of India available to the respondent No. 1. On the contrary, the Company submitted, the impugned termination was effected strictly in accordance with the conditions of his services, after giving him six

months" pay in lieu of notice. On consideration of the various provisions of the Act and the facts and circumstances of the case, the learned Judge accepted the contention of respondent No. 1, quashed the order of termination and directed his reinstatement. Hence this appeal at the instance of the Company.

2. In the context of the respective cases of the parties, the principal question, therefore, that falls for our determination is as to whether the Company is a "State" within the meaning of Article 12 of the Constitution, which reads as under :-

12. Definition, - In this Part, unless, the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the 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".

3. It is obvious that the Company can become a "State" under the above Article only if it is found to be an "authority" within the territory of India or under the control of the Government of India. What tests should be applied for determination whether or not a Corporate body or institution is an "authority" under Article 12 of the Constitution has been laid down by the Supreme Court in a number of cases. As far back as in 1962, in interpreting the words "other authorities" in Article 12, in the case of *Ujjam Bai v. State of Uttar Pradesh* AIR 1962 SC 1621, Ayyangar J. observed (in paragraph 152) :

...Article 12 winds up the list of authorities falling within the definition by referring to "other authorities" within the territory of India which cannot obviously be read as ejusdem generis with either the Government and the Legislatures or local authorities. The words are of wide amplitude and capable of comprehending every authorities created under a statute and functioning within the territory of India or under the control of the Government of India. There is no characterisation of the nature of the "authority" in this residuary clause and consequently it must include every type of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws.

4. While interpreting Article 12 in the case of *K.S. Ramamurthi Reddiar Vs. The Chief Commissioner, Pondicherry and Another*, , Wanchoo, J. speaking for the Court observed (in paragraph 11):

...From the scheme of Article 12 it is clear that three classes of authorities are meant to be included in the words "the State", there; and the third class is of two kinds and the qualifying words which follow "all local or other authorities" define the two types of such local or other authorities as already indicated above. Further all local or other authorities within the territory of India whether under the control of the Government of India or the Government of various States and even autonomous authorities which may not be under the control of the Government at all....

The question as to whether the Electricity Board of Rajasthan came within the expression "other authorities" under the above Article arose in the case of Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others, . In deciding this question, Bhargava, J., who delivered the main judgment for the Constitution Bench observed :- .

The meaning of the word "authority" given in Webster's Third New International Dictionary, which can be applicable is a public administrative agency or corporation having quasi-governmental powers and authorised to administer a revenue producing public enterprise. This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India, and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Article 12 of the Constitution.

and after considering the fact that the Act constituting the Board gave it ample powers to give directions, the disobedience of which was punishable as a criminal offence, and other related facts, held that the Board was clearly an authority to which the provisions of Part III of the Constitution were applicable.

5. While agreeing with the above finding of Bhargava, J., Shah, J. (as His Lordship then was) however observed (in paragraphs 10 and 11) :

I am unable, however, to agree that every Constitutional or Statutory Authority on whom powers are conferred by law is "other authority" within the meaning of Article 12. The expression "authority" in its etymological sense means a body invested with power to command or give an ultimate decision, or enforce obedience, or having a legal right to command and be obeyed.

The expression "State" is defined in Article 12 for the purpose of Part III of the Constitution. Article 13 prohibits the State from making any legislative or executive direction which takes away or abridges the rights conferred by Part III and declares any law or executive direction in contravention of the injunction void to the extent of such contravention. In determining what the expression "other authority" in Article 12 connotes, regard must be had not only to the sweep of fundamental rights over the power of the authority, but also to the restrictions which may be imposed upon the exercise of certain fundamental rights (e.g., those declared by Article 19) by the authority. Fundamental rights within their allotted fields transcend the legislative and executive power of the Sovereign Authority. But some of the important fundamental rights are liable to be circumscribed by the imposition of reasonable restrictions by the State. The true content of the expression "other authority" in Article 12 must be determined In the light of this dual phase of fundamental rights. In considering whether a statutory or constitutional body is an authority within the meaning of Article 12,

it would be necessary to bear in mind not only whether against the authority, fundamental rights in terms absolute are intended to be enforced, but also whether it was intended by the Constitution - makers that the authority was invested with the sovereign power to impose restrictions on very important and basic fundamental freedoms.

6. In the case of Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, , the question as to whether the Oil and Natural Gas Commission the Life Insurance Corporation and the Industrial Finance Corporation could be described to be "authorities" within the meaning of Article 12 came up for consideration in the background of the provisions of the three Acts by which they were respectively incorporated. The question arose for determining the other two relating questions as to (1) whether an order for removal from service contrary to, regulations would enable an employee to a declaration against the statutory Corporation of continuance in service or would it and up in a claim for damages only and (2) whether an employee of a statutory Corporation was entitled to claim protection under Articles 14 and 16 of the Constitution against such Corporation. After considering the various provisions of the three Acts Chief Justice A. N, Ray, speaking for the majority, held that those three statutory Corporations were "authorities" within the meaning of Article 12. Mathew, J., who delivered a separate judgment first observed (in paragraphs 77 and 78) :

The test propounded by the majority is satisfied so far as the Oil and Natural Gas Commission (hereinafter referred to as the Commission") is concerned as Section 2 of the Oil and Natural Gas Commission Act (hereinafter referred to as "the Act") provides for issuing binding directions to owners of land and premises not to prevent employees of the Commission from entering upon their property if the Commission so directs. In other words, as Section 25 authorises the Commission to issue binding directions to third parties not to prevent the employees of the Commission from entering into their land and as disobedience of such directions is punishable under the relevant provisions of the Indian Penal Code since those employees are deemed to be public servants u/s 21 of the Indian Penal Code by virtue of Section 27 of the Act, the Commission is an "authority" within the meaning of the expression ""other authorities" in Article 12.

Though this would be sufficient to make the Commission a "State according to the decision of this Court in the Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others, , there is a larger question which has a direct bearing so far as the other two Corporations are concerned viz. whether, despite the fact that there are no provisions for issuing binding directions to third parties the disobedience of which would entail penal consequence, the Corporations set up under statutes to carry on business of public importance or which is fundamental to the life of the people can be considered as "State" within the meaning of Article 12. That Article reads :

In this Part, unless context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the 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.

It is relevant to note that the Article does not define the word "State". It only provides that "State" includes the authorities specified therein. The question whether a Corporation set up under a statute to carry on a business of public importance is a "State" despite the fact that it has no power to issue binding directions has to be decided on other considerations."

The learned Judge then referred to various judgments of foreign Court and authorities and concluded (in paragraphs 111 and 112) :

The ultimate question which is relevant for our purpose is whether such a Corporation is an agency or instrumentality of the Government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the Corporation carrying on the business? When it is seen from the provisions of that Act that on liquidation of the Corporation, its assets should be divided among the shareholders, namely, the Central and State Governments and Ors., if any, the implication is clear that the benefit of the accumulated income would go to the Central and State Governments. Nobody will deny that an agent has a legal personality different from that of the principal. The fact that the agent is subject to the direction of the principal does not mean that he has no legal personality of his own. Likewise, merely because a Corporation has legal personality of its own, it does not follow that the Corporation cannot be an agent or instrumentality of the State, if it is subject to control of Government in all important matters of policy. No doubt, there might be some distinction between the nature of control exercised by principal over agent and the control exercised by Government over public Corporation. That, I think is only a distinction in degree. The crux of the matter is that public Corporation is a new type of institution which has sprung from the new social and economic functions of Government and that it therefore does not neatly fit into old legal categories. Instead of forcing it into them, the latter should be adapted to the needs of changing times and conditions.

I do not think there is any basis for the apprehension expressed that by holding that these public Corporations are "State" within the meaning of Article 12, the employees of these corporations would become Government servants. I also wish to make it clear that I express no opinion on the question whether private Corporations or other like organisations, though they exercise power over their employees which might violate their fundamental rights, would be "State" within the meaning of Article 12.

7. We then come to the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . In this case the principal question raised was whether the International Airport Authority of India was a "State" within the

meaning of Article 12 so as to be subjected to enforcement of fundamental rights against it. After considering the earlier cases decided by the Apex Court, besides other Courts, Bhagwati. J. (as His Lordship then was), speaking for the Court, said (in paragraph 14) :

A Corporation may be created in one or two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a Corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a Corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a Corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition, there should be a certain amount of direct control exercised by Government and, if so, what should be the nature of such control ? Should the functions which the Corporation is charged to carry out possess any particular characteristic or feature, or is the nature of the functions immaterial ? Now, one thing is clear that if the entire share capital of the Corporation held by Government, it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government, But, as is quite often the case, a Corporation established by statute may have no shares or share holders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by Government, though this consideration also may not be determinative, because even where the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions. What then are the tests to determine whether a Corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate an all inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula which would provide the correct division of Corporations into those which are instrumentalities or agencies of Government and those which are not.

It was next pointed out (in paragraph 18) :

In fact, it is difficult to distinguish between governmental functions and non-governmental functions. Perhaps the distinction between governmental and non-governmental functions is not valid any more in a social welfare State where the laissez faire is an outmoded concept and Herbert Spencer's social statics has no place. The contrast is rather between governmental activities which are private

and private activities which are governmental. Mathew, J., in *Sukhdev v. Bhagatram* (supra) (1975) 3 S.C.R. 652 : AIR 1975 SC 1355. But the public nature of the function, if impregnated with governmental character or "tied or entwined with Government" or fortified by some other additional factor, may render the Corporation an instrumentality or agency of Government. Specifically, if a department of Government is transferred to a Corporation, it would be a strong factor supportive of this inference.

8. In the light of the above principles, the Court proceeded to answer the question, namely, whether the International Airport Authority of India could be said to be an "authority" within the meaning of State under Article 12. After considering the various provisions of the Act by which the body was constituted, its functions and other details the Court answered the question in the affirmative.

9. Next comes the case of *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, , and *Som Prakash Rekhi v. Union of India* . Though judgments in both these cases were delivered on the same day the former is of a Constitution Bench while the other is of a three Judge Bench. In *Ajay Hasia*'s case the question was whether a Society under the Jammu and Kashmir Registration of Societies Act ,1898 running an Engineering College answered the description of an "authority" within the meaning of Article 12. In deciding the question the Court considered its earlier decisions, particularly the one in the case of *International Airport Authority*, (supra) and summarised position as follows :-

9. The tests for determining as to when a Corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the *International Airport Authority*'s case AIR 1979 SC 162&. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government with the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation.

We may summarise the relevant tests gathered from the decision in the *International Airport Authority*'s case as follows :

(1)One thing is clear that if the entire share capital of the Corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the Corporation being impregnated with governmental character.

(3) It may also be a relevant factor...whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of deep and pervasive State control" may afford an indication that

the corporation is a State agency or instrumentality.

(5) If the functions of the Corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a Corporation, it would be a strong factor supportive of this inference" of the Corporation being an instrumentality or agency of Government.

If on a consideration of these relevant factors it is found that the Corporation Is an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority's case, be an "authority" and, therefore, "State" within the meaning of the expression in Article 12." and further observed {in paragraph 11):

We may point out that it is immaterial for this purpose whether the Corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created.

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

10. That bring us to the case of Som Prakash (supra). Since the learned Counsel appearing for the respondent No. 1 has strongly relied upon this case the facts thereof are required to be stated. Som Prakash, the petitioner therein, was employed as a Clerk in the Burmah Shell Oil Storage Limited ("Burmah Shell", for short) and retired after qualifying for pension on April, 1, 1973. He was also covered by a scheme under the Employees' Provident Funds and Family Pension Fund Act, 1952. Burmah Shell was statutorily taken over by the Central Government by force of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976. Thereafter the Central Government acting under the statute took necessary steps for the vesting of the undertaking in the Bharat Petroleum Corporation Limited ("Corporation", for short) and the Corporation became the statutory successor or Som Prakash's employer, Burmah Shell. His pensionary benefits, as he had, therefore, became claimable from the Corporation. In the

context of the above facts, one of the questions arose as to whether a writ could be issued against the Corporation for alleged deduction in the quantum of the retiral benefits of Som Prakash. In dealing with the petitioner's grievance, the question necessarily arose as to whether the Corporation answered the description of "authority" within the meaning of Article 12.

11. In answering the question, Krishna Iyer, J. speaking for himself and Chinnappa Reddy, J, approved the Court's earlier observations made in the case of International Airport Authority of India (supra), culled out the tests therefrom and further observed that sometimes the test was formulated in an over-simplified fashion, by asking whether the Corporation was formed by a statute or under a statute. According to the learned Judge, the true test was functional; not how the legal person was born but why it was created. (Emphasis supplied)*. The Court then proceeded to consider the various provisions of the Act by which the Corporation came into being and detailed as under :-

30. In the present instance, the source of both, read in the light of Sections 3 and 7, is saturated with State functions. Avowedly, the statutory contemplation, as disclosed by Section 7, is that the Company should step into the shoes of the executive power of the State. The legislative milieu in which the second respondent came to be the successor of Burmah Shell suggests that the former is more than a mere Company registered under the Companies Act. It has a statutory flavour acquired u/s 7. Moreover, everything about the second respondent in the matter of employees, their provident, superannuation and welfare funds, is regulated statutorily unlike in the case of ordinary Companies. Sections 9 and 10 deal with these aspects. These two provisions which regulate the conditions of service and even provide for adjudication of disputes relating to employees indicate that some of the features of a statutory Corporation attach to this Government Company. Sections 9 and 10, in terms, create rights and duties the Government Company itself apart from the Companies Act. An ordinary Company, even a Government Company simpliciter has not the obligations cast on the second respondent by Sections 9 and 10. And Section 11 specifically gives the Act primacy vis-a-vis other laws. Section 12, although it has no bearing on the specific dispute we are concerned in the case, is a clear pointer to the statutory character of the Government Company and the vesting of an authority therein. This provision clothes the Government Company with power to take delivery of the property of Burmah Shell from every person in whose possession, custody or control such property may be. There are other powers akin to this one in Section 12. The provision for penalties if any person meddles with the property of the second respondent emphasises the special character of this Government Company. Equally unique is the protection conferred by Section 16 on the Government Company and its officers and employees "for anything which is, in good faith, done or intended to be done under this Act". Such an immunity does not attach to employees of Companies simpliciter, even if they happen to be Government Companies. In the same strain is the indemnity conferred by Section 18. This review, though skeletal, is sufficient strikingly to bring home the

point that the Corporation we are concerned with is more than a mere Government Company. Whatever its character antecedent to the Act, the provisions we have adverted to have transformed it into an instrumentality of the Central Government with a strong statutory flavour super-added and clear indicia of power to make it an "authority". Although registered as a Company under the Indian Companies Act, the second respondent is clearly a creature of the statute, the undertaking having vested in it by force of Section 7 of the Act. The various provisions to which our attention was drawn, an elaboration of which is not called for, emphasise the fact that the second respondent is not a mere Company but much more than that and has a statutory flavour in its operations and functions, in its powers and duties, and in its personality itself, apart from being functionally and administratively under the thumb of Government. It is a limb of Government, an agency of the State, a vicarious creature of statute working on the wheels of the Acquisition Act. We do not mean to say that for purpose of Article 309 or otherwise this Government Company is State but limit our holding to Article 12 and Part III.

Pathak, J. (as His Lordship then was), however, made the following observations :

72.1 must confess to some hesitation in accepting the proposition that the Bharat Petroleum Corporation Limited is a "State" which the meaning of Article 12 of the Constitution. But in view of the direction taken by the law in this Court since *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*,¹ I find I must lean in favour of that conclusion. I would have welcomed a wider range of debate before us on the fundamental principles involved in the issue and on the implications flowing from the definition in the Companies Act, 1956 of "Government Company", but perhaps a future case may provide that.

73. As regards, the *Burmah Shell (Acquisition of Undertakings in India) Act, 1976*, I am unable to see any support for the proposition in the provisions of the Act. The provisions will apply to any Government Company, and they do not alter the basic nature of that Company. They are provisions which could well have been applied to a private Corporation, if the Act had selected one for vesting the undertaking in it. Would that have made the private Corporation a "State"?

12. Even after its decisions in the two cases, just referred to, the Supreme Court had occasions to consider the question raised before us in a number of cases but to eschew prolixity we will only refer to and deal with the case of *Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other* [OVERRULED], wherein Supreme Court had to decide the question whether the National Council of Educational Research and Training (N.C.E.R.T.) was a "State" as defined in Article 12. After considering the decisions in the cases of *Sukhdev Singh* (supra), *R.D. Shetty* (supra), *Ajay Hasia* (supra), *Som Prakash* (Supra) and in other cases, the Supreme Court observed (in paragraph 3) :

Article 12 should not be stretched so as to bring in every autonomous body

which has come 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 vast and pervasive is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual 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 identifying the body as "State" within the meaning of Article 12 of the Constitution.

13. Now that we have detailed the principles enunciated and tests formulated by the Supreme Court for ascertaining whether or not a Corporate Body or a statutory Corporation is an "authority" under Article 12, let us consider the facts of the instant case in the light thereof to answer the question raised before us. The appellant-Company was incorporated under the Indian Companies Act, 1913 and at all material times it was and still is carrying on business of carriage of goods and passengers by sea. In view of its financial difficulties, the Company borrowed large sums of money from the Shipping Development Fund Committee ("S.D.F.C.", for short), which was constituted by the Government of India u/s 15 of the Merchant Shipping Act, 1958 to administer the Shipping Development Fund formed u/s 14 thereof. The fund was to be utilised for granting loans and extending different types of financial assistance for the purposes of acquisition and maintenance of ships and other purposes as mentioned in Section 16 of the above Act. S.D.F.C. had made the funds available by way of loan and financial assistance not only to the appellant Company but to others also.

14. In 1986, a fall in freight rates and the recession in the international shipping industry had placed considerable financial burden on the S.D.F.C, and affected its ability to finance new ship acquisitions. Although the S.D.F.C. had played its role as a development body satisfactorily, its record in respect of enforcing recovery of loans from the various Shipping Companies had been well below expectations. Under such difficult circumstances the Government of India decided to establish anew financial agency under the Companies Act in place of S.D.F.C. which would be endowed with wider financial responsibilities and greater flexibility of operations. The Central Government, therefore, thought it necessary, through legislation, to abolish the Shipping Development Fund and S.D.F.C. and provide, among other things, for the vesting of the assets and liabilities thereof in the Government, transfer of the employees of the SDFC to the Government, special powers of recovery of outstanding dues of S.D.F.C. including appointment of receiver without intervention of Courts, appointment of Directors and Administrators, recovery of dues as arrears of land revenue and a power to recall

loans before the agreed period to Government and to exercise all these powers either directly or through a designated person. For the aforesaid objects and reasons the Act was brought into the statute book and enforced with effect from April 3, 1987 - "the appointed day" under the Act. From that day, the S.D.F.C. was abolished by virtue of Section 3 of the Act and all its rights, obligations, liabilities, powers privileges, properties, contracts and employees stood transferred to the Central Government.

15. Chapter III of the Act deals with the special powers of the Central Government. u/s 8 the Central Government may, by notice in writing, require a ship owner to whom the Committee (S.D.F.C.) had granted any financial assistance at any time before the appointed date, to discharge forthwith in full his entire dues and also discharge his other liabilities to the Central Government, if -

(a) it appears to the Central Government that false or misleading information in any material particular was given by the shipowner for the purpose of procuring or for continuing to procure the benefit of such financial assistance; or

(b) the ship owner has failed to comply with the terms of his agreement with the Committee; or

(c) there is a reasonable apprehension that the shipowner is unable to pay his debts or, that proceedings for liquidation have been or may be commenced against the shipowner; or

(d) the Central Government has reason to believe that the shipowner has not used or applied the financial assistance granted by the Committee strictly for the purpose for which it was granted or has otherwise misapplied or misappropriated the same for wrongful gain; or

(e) the property assigned, charged, hypothecated, mortgaged or pledged to the Committee as security for financial assistance is not insured or kept insured by the shipowner to the satisfaction of the Central Government, or if such property has depreciated in value to such an extent that, in the opinion of the Central Government, further security to the satisfaction of the Central Government should be given and such security is not given; or

(f) without the permission of the Central Government any ship machinery, plant or other property, whether forming part of the security or otherwise, is removed by such shipowner without being replaced; or

(g) for any other reason, it is necessary so to do to protect the interests of the Central Government.

Section 9(1) provides that if the shipowner fails to comply with a notice issued u/s 8 the Central Government may, without intervention of the Court, appoint a Receiver to detain and take possession of any ship or other assets belonging to the shipowner, whether mortgaged, hypothecated or charged, with power to sell

the same, to demand and recover all the income and to appropriate the same in the discharge of the liabilities of the Central Government; and Sub-section (2) thereof says that the Receiver so appointed shall be deemed to be the agent of the shipowner and the latter shall be liable for the acts or defaults of the former except as provided therein, Other Sections which are relevant for our present purposes are Sections 10, 11, 12, 14 and 16 of the Act, which reads as under :-

10. (1) Where the Central Government requires a shipowner to discharge his duties and liabilities pursuant to a notice issued u/s 8 and the shipowner fails to comply with such notice, the Central Government may, notwithstanding anything contained in any other law for the time being in force, or anything contrary contained in any agreement, deed or other instrument in the nature of any guarantee or counter-guarantee, and without prejudice to anything contained in Section 9, by notified order, appoint as many persons as it thinks fit, -

(a) to be directors of the Company, if the shipowner is a Company, as defined in the Companies Act, 1956, or

(b) in any other case, to be the administrators of the shipping concern.

(2) The power to appoint directors or administrators under this section includes the power to appoint any individual, firm or body corporate to be the directors or, as the case may be, administrators, on such terms and conditions as the Central Government may think fit.

(3) For the removal of doubts, it is hereby declared that the power to appoint directors or administrators include the power to remove or replace the persons so appointed.

(4) Nothing in the Companies Act, 1956, or in any other law for the time being in force or in any instrument relating to the shipowner, if it is a Company, shall, in so far as it makes in relation to a director, any provision for the holding of any share qualification, age limit, restriction on the number of directors or directorships, retirement by rotation or removal from office, apply to any director appointed by the Central Government under this Section.

11. (1) on the issue of a notified order u/s 10 -

(a) if the shipowner is a Company as defined in the Companies Act, 1956 all persons holding office as directors of the shipowner, and in any other case, all persons holding any office having the powers of superintendence, direction and control immediately before the issue of the notified order, shall be deemed to have vacated their offices as such;

(b) any contract of management between the shipowner and any director or person referred to in Clause (a) holding office as such immediately before the issue of the notified order shall be deemed to have been terminated.

(2) The directors or administrators appointed u/s 10 shall take such steps as may be necessary to take into their custody or under their control, the property,

effects and actionable claims to which the shipowner is, or appears to be, entitled, and all the property and effects of the ship-owner shall be deemed to be in the custody of the directors or administrators, as the case may be, as from the date of the notified order.

(3) Subject to the other provisions of this Act, the directors appointed u/s 10, shall, for all purposes, be the directors of such Company duly constituted under the Companies Act, 1956, and such directors shall alone be entitled to exercise all the powers of such directors.

12. Subject to the control of the Central Government, the directors, or as the case maybe, the administrators appointed u/s 10, shall take such steps as may be necessary for the purpose of efficiently managing the business of the shipowner and shall exercise such powers and discharge such duties as may be exercisable by persons in charge of managing the said business.

14. (1) Where directors have been appointed u/s 10 in relation to a Company, then, notwithstanding anything contained in the Companies Act, 1956 or in the memorandum or articles of association of such Company -

(a) it shall not be lawful for the shareholders of such Company or any other person to nominate or appoint any person to be a director of the Company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Central Government;

(c) no proceeding for the winding up of such Company or for the appointment of Receiver in respect thereof shall lie or be continued in any Court, except with the consent of the Central Government.

(2) Subject to the other provisions of this Act and subject to such other exceptions, restrictions and limitations, if any, as the Central Government may, by notification in the Official Gazette, specify in this behalf, the Companies Act, 1956 shall continue to apply to a shipowner which is a Company in the same manner as it applied thereto before the issue of the notified order u/s 10.

16. (1) The Central Government may, by notification in the Official Gazette, and subject to such conditions, restrictions and limitations as may be specified therein or otherwise, delegate all or any of its powers and functions under this Chapter to a designated person.

(2) Where any notification has been issued under Sub-section (1), the provisions of this Act shall apply in relation to the designated person as they apply in/ relation to the Central Government in respect of any matter in relation to which the powers and functions of the Central Government have been delegated to the designated person.

16. In exercise of the powers conferred by Section 16(1) the Central Government has delegated the Shipping Credit and Investment Company of India Limited, respondent No. 4 herein, a Company registered under the Companies Act, 1956

(hereinafter referred to as "the Investment Company"), with all its powers and functions under Chapter III of the Act on and from the appointed day.

17. Relying upon the provisions of the Act particularly those of Sections 10, 11, 12 and 14 it was submitted on behalf of the respondent No. 1 that on and from the appointed day the appellant-Company was transformed into an "authority" under Article 12. It was pointed out that after the Act came into force and notice was issued upon the Company pursuant to Section 8 thereof it was the Central Government, through its delegatee - the Investment Company - which was in absolute and exclusive control of the Company. Indeed the learned Counsel for the appellant submitted that it was the delegatee which was running the Company, and even providing the necessary funds. In making the above submissions, the learned Counsel drew inspiration from the various observations made in the case of *Som Prakash Rekhi*(supra). Having given our anxious consideration to the facts of the instant case, we are unable to accept the contentions raised on behalf of respondent No, 1 and, for that matter, uphold the findings of the learned Single Judge.

18. When the objects and reasons, which prompted the Central Government to bring the Act in the Statute Book, are considered along with the fasciculus of sections appearing in Chapter III, it is manifest that the Act is primarily concerned in spelling out a methodology for the recovery of the Governmental dues from such of the Shipping Companies which were not in a position to repay the loans which they had obtained. The provisions of the Act nowhere expresses any legislative intent to have any shipping Company acquired by the Government or to completely take over the management and control of the affairs of any Shipping Company. On the contrary. Chapter III speaks of only of special power (emphasis supplied)* of the Central Government and Section 8 empowers the Government to require a shipowner to repay his loans and also discharge his other liabilities to the Central Government in any of the situations earlier detailed. The power of the Central Government to appoint Receiver u/s 9 and directors and administrators u/s 10 stem from issuance of a notice u/s 8, which necessarily means that all these empowerments are solely for and limited to the purpose of ensuring repayment of loans and discharge of liabilities by the defaulting shipowners. The other provisions of Chapter III also seek to achieve the same purpose and no other.

19. That the Investment Company has been functioning with that limited object only in transparent from the various statements made in its affidavit-in-reply filed in this Court. It has been stated therein that after it took over charge, it served a notice of demand upon the Company in accordance with Section 8 of the Act, since it found that the financial position of the Company was precarious, inasmuch as besides other outstanding governmental dues, the employees had not been paid salaries for months together. It is under these circumstances that the Investment Company initiated proceedings for recovery of large outstandings to safeguard the interest of the Government regarding the loans given to the

Company. Since the Company was not in a position to immediately pay back large outstanding, it (Investment Company) proceeded to appoint Shri V. M. Parekh, who was one of the Directors of the Company at the relevant time, as Receiver of 19 ships belonging to the Company along with other assets and records of those ships in exercise of its powers u/s 9 of the Act. Shortly thereafter, the Investment Company reconstituted the Board of Directors of the Company pursuant to Section 10 of the Act with effect from August 4, 1987. The Investment Company has specifically averred in its affidavit-in-reply that even in the reconstituted Board several Directors of the previous Board have been retained and the new appointments made were primarily of people from the banking, finance and marine disciplines. The new Board of Directors were thereafter left entirely to find ways and means of running the Company affairs of closing it down with a view to ensure that the large outstanding to the Government were recovered or was secured fully and effectually. According to the Investment Company, it was entirely upon the Board's discretion to sell all or select assets of the Company and appropriate the proceeds towards the Government dues or operate the Company with financial efficiency and over a period to realise the loans outstanding to the Government or to consider ways and means of recovery which would partly be on the basis of the sale of assets and to operate certain ships which can be profitably utilised.

20. It has further been stated that the newly constituted Board of Directors has considered several ways and means of keeping the Company operational and with this intent and purpose has drawn up several schemes with a view to finding pay-back to the creditors - inland and foreign - and large outstanding wage bills of the employees, ashore and afloat. It has also been specifically averred in the affidavit-in-reply that it has not been envisaged that the Investment Company would take over and assume any responsibility in respect of employees/workmen of the Company or any of its other liabilities and that it has no intention to run any Shipping Company as a Government Company. Besides, there is no take over of any existing shares nor participation in the Company's equity. It is the categorical stand of the Investment Company that the arrangement that has been made under the Act is purely transitory towards a well-defined objective which is not for taking over but simply for recovering debts. It has next been stated that the Government does not assume any liability to any losses of the appellants nor is interested in any share in the Company's profit. According to the Investment Company, the Government has already advanced rehabilitation loans to the extent of about Rs. 57 crores with the purpose of ensuring the Company's viability as a going concern and to generate funds from operations to meet its debt obligations. It has lastly been stated that the purpose of the present control over the affairs of the Company has been primarily for the recovery of dues and its control is conterminous with it.

21. From the foregoing discussion, it is patently clear that none of the six tests summarised in the case of *Ajay Hasia* (supra) to conclude that the Company is a "State" stands satisfied in the instant case; firstly, because the entire share

capital of the Company is not held by the Company: secondly because the grant of rehabilitation loans of Rs. 57 crores to the Company is solely for the purpose of ensuring its viability as a going concern so that funds may be raised from operations to meet its debt obligations and not for meeting the entire expenditure of the Company; thirdly, because the Corporation does not enjoy any monopoly status; fourthly, because there is no deep and pervasive State control as it is limited to the extent necessary for getting its dues back; fifthly, because the Company is not closely related to governmental functions and lastly, because no department of Government is transferred to a Corporation. On the contrary, our earlier discussion shows that the Company is maintaining its own status with its own shareholders and employees. It must therefore be said that the reliance placed by the learned Counsel for the respondent No, 1 on the case of *Som Prakash* (supra) to contend that the Company is a "State" under Article 12 is wholly misplaced as the facts thereof and the provisions of the Act applicable thereto stand altogether on a different footing.

22. On the conclusions as above, we are unable to hold that the Company answered the description of "other authority" or, for that matter, "State" within the meaning of Article 12 of the Constitution of India. That necessarily means that the writ petition is not at all maintainable. In view of our above finding, the question as to whether termination of services of respondent No. 1 was in breach of Articles 14 and 16 of the Constitution does not arise.

23. The appeal is therefore, allowed, the impugned judgment of the learned Single Judge is hereby set aside and the writ petition is dismissed. There will be no order as to costs.

24. Oral prayer of the respondent No. 1 for leave to appeal to the Supreme Court is rejected.