(2014) 04 OHC CK 0043

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1617 of 2001

Sri Nagendra Nath Mohapatra APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 22-04-2014

Acts Referred:

Constitution of India, 1950 — Article 12, 13(2), 14
Industrial Disputes Act, 1947 — Section 25F, 25G

Citation : (2014) 118 CLT 550 : (2014) 1 ILR 992 : (2014) LabIC 3209 : (2014) 2 OLR 927 Suppl. : (2014) 2 OLR 927

Hon'ble Judges : B.R. Sarangi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Dr. B.R. Sarangi, J.—The petitioner has filed this application seeking to quash the order of termination dated 4.2.2001 passed by the Honorary Secretary, Utkal Gomangal Samiti, Orissa, Cuttack and to direct to allow him to continue in service till he attains the age of superannuation on 30.9.2002 and to pay reasonable compensation for the loss and damage caused to him due to mental agony. The factual matrix of the case at hand is that Utkal Gomangal Samiti, hereinafter to be referred to as ''Samiti'', in short, is a Society registered under the Societies Registration Act, 1860. The aims and objectives of the Society are to bring about all round development of livestock of the State. The petitioner initially appointed as a Typist vide office order No. 2538 dated 13.12.1965 and pursuant to such appointment order, he joined on 14.12.1965. He continued in the said post till 18.10.1966. Thereafter, he became Grade -II Assistant on 19.10.1966 and continued upto 30.12.1977. On getting promotion to Grade I Assistant on 31.12.1977, he continued in the said post till 04.05.1987. He was promoted to the post of Level-II S.O. on 5.5.1987 and continued as such till 24.03.1998 and finally promoted to the post of Level-I S.O. on 25.3.1998 and continued up to 25.03.1999. Though he was entitled to be considered for promotion to the next higher post, i.e. Personal Asst./Establishment Officer, but he was reverted back to Level-II S.O. by withdrawing the order of promotion dated 25.3.1998 vide order No. 3217 dated 20.03.1999, basing upon which he was continued as Level-II S.O. from 26.3.1999 to 05.03.2001. It is stated that the Rules and Regulations applicable to the State Govt. employees have also been applied in the case of the staff of the Samiti read with Rule 10 of the Rules and Regulations of the Samiti. The said Rule of the Samiti states that the services of the employees of the Samiti shall be up to completion of 60 years of age and no pensionary benefits shall be allowed. Therefore, the petitioner is to retire from service on attaining the age of superannuation on 30.9.2002. Therefore, it is stated that the impugned order passed by the authorities terminating his services with effect from 5.3.2001 is absolutely a misconceived one and therefore, he seeks for interference of this Court.

2. Opposite parties 2 and 3 have filed their counter affidavit raising preliminary question with regard to the maintainability of the writ application and have stated that due to closure of certain units, there is abolition of the post, consequence thereof, the petitioner''s services have been terminated as the financial position of the Samiti could not permit to allow continuance of the petitioner in service. It is further stated that the Samiti is a registered Society under the Societies Registration Act and the aims and objectives of the Society are to develop livestock through upgradation of local indigenous funds by providing improved Bulls, Cows and Buffaloes and preparation of different kinds of feeder and cattle feeds and also to do relief works. It is covered by the Rules and Regulations framed by the Board of Directors in the general body meeting and the entire administration, control and management and all policy discussions are vested with the Board of Directors consisting of 13 members out of which three are from Government by way of their designation. The Director of Animal Husbandry and Veterinary Services is the ex-officio Honorary Secretary, the Technical Officer of Veterinary Department is the Joint Honorary Secretary and the Secretary to Govt. of Orissa in-charge of Animal Husbandry Department is the member. Except the above three Govt. officials, the other ten Directors representing the Board of Directors are private/non-Govt. members. Therefore, the Samiti is neither controlled by the Government nor discharging any governmental function. It is further stated that the Samiti is neither a Corporation nor their exists deep and pervasive State control. The financial structure of the Samiti is from donation, memberships and grant-in-aid from the Government. More so, the State Government has got no share capital so that it could have control over the administration of the Samiti. The Samiti had different projects, but due to the financial scarcity, there was continuous heavy loss in those projects, which were closed in due course of time. Therefore, the employees were sitting idle and there was irregularity in payment of salary of the employees since December, 1994 as there was continuous deficit budget. Therefore, the Board of Directors decided for retrenchment of the employees and the process of retrenchment has been initiated by following the procedure as laid down u/s 25F and 25G of the Industrial Disputes Act. It is submitted that the

impugned order of termination has been issued in terms of the provision of Section 25F of the Industrial Disputes Act and therefore, this Court has no jurisdiction to entertain the same. The service particulars given by the petitioner that he was appointed as Typist on 14.12.1965 and continued till 19.10.1966. While he was continuing as Grade-I Assistant in the year 1974, he was entrusted with the duly of livestock, budget, type works, cattle feed store, schemes, fodder, dead stock and meetings. On 13.2.1976, the petitioner submitted a representation stating that he was unable to do the duties assigned to him except maintenance bills of bull centers which is the work of a Junior Assistant and again in another representation dated 2.3.1976, he expressed that he was incapable to do the assigned works and requested for his reversion. Considering such representation, he was reverted to the post of Grade-II Assistant on 11.3.1976 and continued in the said post till 31.12.1977 and again promoted to the post of Grade I Assistant on 1.1.1978 and continued till 4.5.1987 and thereafter he was promoted to the post of S.O. on 5.5.1987 and continued as such till the order of termination was passed.

3. Mr. R.K. Nayak, learned counsel for the petitioner states that the petitioner is entitled to the benefit of continuance in service till he attains the age of retirement i.e., 60 years and such benefit should be extended to him. It is further stated that the Samiti even though was registered under the Societies Registration Act, is a ''State'' within the meaning of Article 12 of the Constitution of India and as such, the writ application is maintainable. In support of his contention, he has placed reliance on the judgments of the apex Court in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, and Virendra Kumar Srivastava Vs. U.P. Rajya Karmachari Kalyan Nigam and Another, .

4. Mr. B.K. Sahoo, learned counsel appearing for the opposite parties 2 and 3 has raised a preliminary objection with regard to the maintainability of the writ application stating that as against the Samiti, the writ application is not maintainable as it is neither a ''State'' nor "other authorities" within the meaning of Article 12 of the Constitution of India. To substantiate his contention, he has relied upon Pradeep Kumar Biswas (supra) and General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrughan Nishad and Others, and also the constitution of the Samiti, which he has already raised in the counter affidavit.

5. In view of the aforesaid facts and circumstances, before going into the merits of the case, the moot question that arises for consideration is whether the writ application as against Utkal Gomangal Samiti is maintainable or not?

6. The admitted fact is that the Samiti is a Society registered under the Societies Registration Act, 1860 and it was having perpetual succession and a common seal and with power to hold, acquire, and dispose of property, and to contract and may by the said name sue and be sued. The aims and objects of the Samiti are to bring about all round development of Livestock of Orissa through upgradation of local indigenous stock by providing improved bulls, bucks, cows,

calves, and buffaloes, rams, boars through scientific means, introduction, cultivation and propagation of different kinds of fodder and cattle feed and encouraging the public for the same on scientific lines to supplement the improved breeding programme, to undertake and encourage milk supply to the public with ancillary functions. Under clause (viii), it is stated that the Samiti is purely a charitable Society and is a non-profit making organization. Rule 5 of the Rules and Regulations of the Samiti states about different types of membership of the Samiti whereas Rule 6 states about funds and Rule 7 deals with General Body of the Samiti, its function and powers. Further, Rule 10 of the said Rules deals with service rules of the Samiti. Clause (b) of Rule 10 deals with C.P.F. of employees of the Samiti, clause (c) deals with the scale of pay, D.A., A.D.A. and other allowances of the employees of the Samiti, clause (d) deals with T.A., leave and service benefits and conditions of service of the employees of the Society, clause (e) deals with advances such as festival, cycle allowances etc., and clause (g) deals with gratuity to the employees of the Society. Under clause (g) it is stated that the Gratuity to the employees of the Samiti may be given as per rules, conditions and regulations as laid by Government in respect of their employees providing funds are available with the Samiti and such gratuity, however, shall not be granted to such employees, who leave the service of the Samiti either by way of resignation, dismissal or removal for unsatisfactory work or misconduct. Rule 11 states about financial matters and Rule 12 states about Banking and Bankers and operation of accounts whereas Rule 13 deals with powers and functions of the Chairman with ancillary conditions stipulated in the said Rules and Regulations. Taking into account such Rules and Regulations of the Samiti and its function, it is to be adjudged whether it satisfies to become a ''State'' or an "instrumentality of the State" or "other authorities" within the meaning of Article 12 of the Constitution of India. In the written note of argument filed by the petitioner, it is stated that on perusal of the Rules and Regulations of the Samiti, Rules 11, 12, 13 and 15(f), the financial control lies with the Government and in view of above cumulative facts and on consideration of the Rules, it is stated that the State Government has not only regulatory control, but also deep and pervasive control in the financial matters of the Samiti and neither the General Body or the Executive Body has got any control over the financial matters of the Samiti. So far as functional control is concerned, the petitioner relied upon Rule 10 where conditions of the services of the employees have been prescribed and it is stated that financial control lies with the State Government. Analyzing the administrative control, it is stated referring to Rule 5 that the Governor of the State is the ex-officio Patron-in-Chief, Minister of the concerned department, i.e. Animal Husbandry and Veterinary Services is the ex-officio Patron of the Samiti and the Director of Animal Husbandry and Veterinary Services, Orissa is the Ex-Officio Honorary Secretary of the Samiti by virtue of his office as Director. Apart from that a Technical Officer of the veterinary Department and the Secretary to the Government of Orissa in-charge of Animal Husbandry or his nominee is the ex-officio member of the Samiti. Therefore, it is stated that the administrative control lies with the State Govt. authorities in the

Department of Animal Resources Development and therefore, it is a ''State'' within the meaning of Article 12 of the Constitution of India.

7. Mr. B.K. Sahoo, learned counsel appearing for opposite parties 2 and 3 states that a close reading of the Rules and Regulations does not indicate that the State Government has got any control over the financial, functional and administrative control over the organization and the function, which has been done by the Society is not a governmental function and apart from the same, the Government has no pervasive control over the management and out of 13 members, three are only Government officials and other 10 members have been elected to the Board of Directors. Therefore, it cannot be construed that the State Government has got pervasive control over the management of the Samiti.

8. Unless the Samiti is a ''State'' or "instrumentality of the State" or "other authorities", the writ application is not maintainable. Article 12 of the Constitution of India reads as follows:

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 State and all local or other authorities within the territory of India or under the control of the Government of India.

9. The definition of ''State'' is not confined to Governmental function and the legislature but extends to any action administrative (whether statutory or non-statutory), judicial or quasi judicial, which may be brought within the fold of State action being the action, which violates fundamental rights. It appears that prima facie protection against infraction of Article 14 is available only against the State and complaint of arbitrariness and denial of equality can therefore, be sustained against the society only if the society can be shown to be State for the purpose of Article 14. The ''State'' is defined in Article 12 to include inter alia the Government of India and the Government 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 and the question therefore is whether the Society can be said to be ''State'' within the meaning of this definition. Obviously the Society cannot be equated with the Government of India or the Government of any State nor can it be said to be a local authority and therefore, it must come within the expression of "other authorities" if it is to fall within the definition of ''State''. Therefore, the question is what are "other authorities" contemplated in the definition of ''State'' in Article 12. While considering this question, it is necessary to bear in mind that an authority falling within the expression "other authorities" is, by reason of its inclusion within the definition of ''State'' in Article 12, subject to the same constitutional limitations as the Government and is equally bound by the basic obligation to obey the constitutional mandate of the Fundamental Rights enshrined in Part III of the Constitution. Similar question as to whether a corporation can be regarded as an ''authority'' within the meaning of Article 12 arose for consideration in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and the apex Court though has given wide

enlargement of the meaning of "other authorities", but cautioned that it must be tempered by a wise limitation.

10. In Sabhajit Tewary Vs. Union of India (UOI) and Others, the apex Court has held in no uncertain terms, that a society registered under the Societies Registration Act, 1860 can never be regarded as an ''authority'' within the meaning of Article 12.

11. If the Society is an ''authority'' and therefore, "State" within the meaning of ''Article 12, it must follow that it is subject to the constitutional obligation under Article 14. The true scope and ambit of Article 14 has been the subject matter of numerous decisions and it is not necessary to make any detailed reference to them and it is sufficient to state that the content and reach of Article- 14 must be confused with the doctrine of classification because the view taken was that that Article forbids discrimination and there would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; (ii) that the differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. Reference can also be made to other judgments of the apex Court in Gulam Abbas and Others Vs. State of Uttar Pradesh and Others, , Som Prakash Rekhi Vs. Union of India (UOI) and Another, . But all these questions have been considered by the Constitution Bench of the apex Court in Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, .

12. In Tekraj Vasandi alias K.L. Basandhi Vs. Union of India (UOI) and Others, , with the approval, the observations of Justice Shah in Uajm Bai case, it is held that 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. But in paragraph 20 the Court observed as follows:

In a Welfare State, as has been pointed out on more than one occasion by this Court, Governmental control is very pervasive and in fact touches all aspects of social existence in the absence of a fair application of the tests to be made, there is possibility of turning every nongovernmental society into agency or instrumentality of the State. That obviously would not serve the purpose and may be far from reality.

13. In Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], , the apex Court held as follows:

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 Art. 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''.

14. In Ajay Hasia (supra) the Constitution Bench summarized the relevant tests gathered from the decision in R.D. Shetty for determining whether an entity is a ''State'' or "instrumentality of the State" 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 indicting that the corporation is an instrumentality or agency or 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 classified the corporation as a 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.

It was held in Ajay Hasia that if on consideration of the 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. The same view has also been taken into consideration by the apex Court in Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee, .

15. The tests, which have been determined in Ajay Hasia (supra) are also held not rigid set of principles so that a body falling within any one of them must be considered to be ''State''. The question in case would be: whether on facts, the body is financially, functionally and administratively dominated by or under the control of Government and such control must be particular to that body and must be pervasive. Therefore, the decision in Sabhaijit Tewary(supra) has been overruled by the 7 Bench judgment of the apex Court in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, and the apex Court by overruling Sabhaijit Tewary (supra) held as follows:

(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 been 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 or other people their rights, duties, liabilities or other legal relations. It 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 flavor 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. Therefore, the question whether an entity is an "authority" cannot be answered by applying Ajay Hasia tests.

(2) The tests laid down in Ajaya Hasia case 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.

16. Taking into consideration Pradip Kumar Biswas (supra) the apex Court in Virendra Kumar Srivastava Vs. U.P. Rajya Karmachari Kalyan Nigam and Another, has held that the question in each case would be-whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State. Applying the test laid down in Pradip Kumar Biswas (supra), Ajay Hasia (supra), and Virendra Kumar Srivastava (supra) to the present context and on the aims and objectives of the Rules and constitution of Samiti, it does not satisfy the test to come within the meaning of ''State'' or ''Instrumentality of the State" or "other authorities" so that writ can be issued against the opposite parties 2 and 3. Merely because out of 13 members of the

Board of Directors, three members belong to Government, it cannot be construed that the Government has got pervasive control with the management of the Samiti, rather the Rules and Regulations of the Samiti have given its power and functions with funding and management vested with the Board on which the Government has got no control and merely because some funding is received from the Government, that ipso facto cannot be characterized as Governmental function. In General Manager, Kisan Sahkari Chini Mills Ltd. (supra) applying the tests laid down by the apex Court, it is held that the form in which the body is constituted, namely, whether it is a society or a cooperative society or a company, is not decisive. The real status of the body with respect to the control of Government would have to be looked into. The various tests, as indicated above, would have to be applied and considered cumulatively and as such, there can be no hard-and-fast formula and in different facts/situations, different factors may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution. In this context, the bye-law, Rules and Regulations of the Samiti have been taken into consideration for coming to such conclusion.

17. Applying the decision in Ajay Hasia (supra) to the present facts of the case, even if it is taken into consideration that the State Government has granted some grant-in-aid, but there are other source of income as per the provisions of the Rules, the 1st test laid down is not fulfilled by the Samiti. So far as the 2nd test is concerned, receiving some money in the shape of grant-in-aid from the Government does not itself construe that the State Government has control over the same, rather funds are being collected from different sources as per the Rules over which the Government has got no control. More so, the entire regulatory system is managed by a body formulated under the said Rules and Regulations. Applying the test-3, there is nothing to show that the Samiti enjoys monopoly status which is state conferred and state protected in the matter of achieving its aims and objects. Now coming to test-4, it appears that the membership of the Samiti is open to different categories and the management is consisting of 13 members out of which 3 are Government officials and 10 are elected representatives from different categories. Therefore, the management of the Committee is dominated by the non-Government members. Therefore, under the Rules and Regulations, the State Government can neither issue any direction to the Samiti nor determine its policy as it is an autonomous body and as such the State has got no control at all in the functioning of the Samiti much less deep and pervasive one.

18. Therefore, considering the above facts and position and applying the tests envisaged by the apex Court in Ajay Hasia (supra), the Samiti cannot be considered as an "instrumentality of the State" or "agency of the Government" and cannot be said to be ''authority''. Thus, it is not a ''State'' within the meaning of Article 12 of the Constitution. In view of such position, since writ does not lie against the opposite parties 2 and 3, this Court has not examined the question on the merits of the case. Accordingly, the writ application fails and the same is

dismissed.

