**(2007) 05 CAL CK 0006**

**In the Calcutta High Court**

**Case No :** A.P.O. No. 490 of 2005 with W.P. No. 1255 of 2005

Sunirmal Kumar Roy APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

**Date of Decision :** 15-05-2007

**Acts Referred:**

Companies Act, 1956 — Section 25
Constitution of India, 1950 — Article 12

**Citation :** (2008) 1 CHN 702 : (2007) 115 FLR 1055

**Hon'ble Judges :** Pranab Kumar Deb, J;Ashim Kumar Banerjee, J

**Bench :** Division Bench

**Advocate :** Arunava Ghosh and Soumya Majundar, for the Appellant; Sundarananda Pal and L.K. Pal for Respondent No. 2 and Debasish Pal, for the Respondent

**Final Decision :** Allowed

## Judgement

Ashim Kumar Banerjee, J.—Moot question involved in this appeal is whether Capexil (previously known as Chemical & Allied Products Export Promotion Council) is amenable to writ jurisdiction or not.

2. Appellant filed a writ petition challenging the order of suspension as well as chargesheet issued by Capexil and for other reliefs. The learned Single Judge held that Capexil was not amenable to writ jurisdiction. Hence, this appeal.

3. Mr. Arunava Ghosh, learned Counsel appearing for the appellant, contended that the Capexil was an autonomous body set up with the patronage of Ministry of Commerce, Union of India for the purpose of promoting export of chemical and allied products abroad. He drew our attention to various documents pertaining to the formation of Capexil to show that there had been deep and pervasive control by the Central Government over Capexil. Moreover, Capexil was discharging public duty on behalf of the Union. Earlier this Court declared Engineering Export Promotion Council, a similarly constituted body by the Ministry of Commerce "State" within the meaning of Article 12 of the Constitution

 

of India. He also drew our attention to various provisions of the service rules to show Government control over the service conditions of the employees of Capexil.

4. In support of his contention Mr. Ghosh cited the following decisions:

(i) 2006(4) CHN, Page 741 (Indian Jute Industries Research Association and Ors. v. Debabrata Sarkar and Ors.

(ii) Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others,

(iii) 2003 (3) CHN 430 and 466 Jogesh Chandra Mondal v. Union of India and Ors.

(iv) Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others,

(v) S.S. Rana Vs. Registrar, Co-operative Societies and Another,

(vi) Unreported decision of this Court in the case of Engineering Export Promotion Council, W.P. No. 15835(W) of 2003 dated February 3, 2005.

5. Mr. Sundarananda Pal, learned Senior Counsel appearing for Capexil on the other hand contended that Capexil was an autonomous body having no control by the Central Government. Mr. Pal also contended that while framing service rules the autonomous body thought it fit to adopt certain conditions of the Central Government. Such unilateral and/or voluntary act could not be construed to mean that the body was being controlled by the Central Government through Ministry of Commerce. Mr. Pal also contended that the financial grant so received by Capexil was insignificant compared to the total expenditure incurred by Capexil throughout the financial year. According to him, Capexil was a company registered under the provisions of Companies Act, 1956. It was run by its members through subscription and other financial resources free from Governmental aid. Salaries of the employees were paid out of own resources and not from the Governmental grant. The grant so received by Capexil were being used for particular projects for which the grant was allotted. Hence, it could not be said that Capexil was having Government control. According to Mr. Pal, the Governmental duty was being discharged by the statutory authorities stipulated under the Foreign Trade Regulation Act and not through Capexil.

6. In support of his contention Mr. Pal relied upon two decisions of the Apex Court reported in Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others, and S.S. Rana Vs. Registrar, Co-operative Societies and Another, .

7. Before deciding the issue let us first examine the formation of Capexil. On perusal of the pages 48-56 of the Paper Book it would appear that the Department of Commerce to augment international trade policy encouraged formation of various export promotion councils under the administrative control of the department. With regard to various products separate promotion councils were set up. There were altogether 12 export promotion councils under the administrative control of the Department of Commerce as given in Appendix II.

 

These bodies were registered as non-profit organizations under the Companies Act and/or Societies Registration Act. The councils also functioned as registering authority for exporters under the Foreign Trade Department of the Government. In Appendix - II Capexil was at serial No. 2 whereas Engineering Export Promotional Council was at serial No. 5. The Memorandum and Article of Association of Capexil were included in the Paper Book at pages 57-70 of the Paper Book. Under Clause 6 of the Memorandum of Association, Memorandum of Association could not be altered without the approval of the Central Government. From the reconstituted committee of 1999-2000 appearing at pages 73-75 it appears that out of 23 members, 5 members were nominated by the Central Government and one each from the Federation of Indian Chamber of Commerce and Federation of Association of Small Industries. On perusal of the Balance Sheet and Annual Report it would appear that the Government had a financial control over the grants time to time to extended to Capexil. From the correspondence annexed to the pleadings appearing at the Paper Book it would appear that the Central Government from time to time supervised the export promotion activities conducted through Capexil under various projects. Hence, the issue of Government control could not be brushed aside. For example, under Rule 35 of Service Rules provision for earn leave was incorporated as per the directive of the Ministry.

8. Clause 2.65.1 of the Hand Book of Procedure published by the Ministry of Commerce and Industry as on April 19, 2007 is set out below:

EPCs shall be autonomous and shall regulate their own affairs. However, if Central Government frames uniform by-laws for constitution and/or for transaction of business for EPCs, they shall adopt the same with such modifications as the Central Government may approve having regard to the subject-nature or functioning of such EPC.

The above is the composite picture on formation and functioning of Capexil.

9. Learned Single Judge while deciding the issue adopted a peculiar method to find out the answer. The Apex Court in the case of Pradip Biswas (supra) held that CSIR was a "State" within the meaning of Article 12 of the Constitution of India. Hence, applying the ratio in the case of Pradip Biswas (supra) His Lordship made a comparative study between CSIR and Capexil and ultimately came to a finding that Capexil could not be equated with CSIR. His Lordship held that Capexil was an autonomous body without having any control of the Government and as such was not amenable to writ jurisdiction. Since His Lordship followed such particular method let us examine whether such finding was correct or not.

10. (1)FORMATION OF CSIR and CAPEXIL: His Lordship held that CSIR was set up by the Ministry of Commerce with the broad objective of promoting industrial growth in the country. It was a society registered under the provisions of the Societies Registration Act whereas Capexil was a company registered under the Companies Act, 1956 and the Government of India had no share in the said

 

company.

11. His Lordship possibly overlooked the fact that Capexil was also formed with the active patronage of Department of Commerce for the purpose of development of the export market abroad under various Governmental projects. Capexil might have been registered under the provision of Companies Act, 1956. However, it was registered u/s 25 of the said Act of 1956 being a non-profiteering organization. At least 5 members of the executive committee are to be nominated by the Central Government. The hand book of procedures so referred to above would also depict the Central Government was having the control over Capexil. Hence, we are unable to agree with His Lordship on the issue of formation of these two Bodies.

12. (2) FINANCIAL AID: His Lordship placed heavy reliance on the fact that CSIR was being funded by the Central Government to a large extent whereas Capexil was not. The audit of CSIR was to be conducted by Comptroller and Auditor General whereas Capexil was having their private auditor.

13. CSIR is a research organization. Hence, Central Government to promote research activity had to extend substantial financial support whereas Capexil was a body of industrialists and/or exporters. Hence, the members were competent enough to run the organization and its establishment. Pertinent to mention, the projects were being funded by the Central Government. Those funds were being used as subsidy and/or other financial incentives to encourage export. It is the prerogative of the Government to fund its allied organizations. To what extent a particular organization is to be funded, is within the domain of the Central Government. That, in our view, cannot be the sole guiding factor (may be a material factor) to decide whether the organization was having any control from the Central Government.

14. (3) His Lordship placed reliance on the fact that CSIR was amenable to the jurisdiction of the Central Administrative Tribunal whereas Capexil was not.

15. His Lordship perhaps missed out the vital issue involved herein to the extent that the Central Government in their wisdom was entitled to bring any of its allied organization within the purview of Central Administrative Tribunal Act. There are various Government Undertakings and/or fully owned Government companies who are still outside the purview of Central Administrative Tribunal. That, in our view, cannot be a guiding factor here.

16. (4) His Lordship placed reliance upon the dissolution clause. We do not find any relevance at all.

17. Subject issue came up before one of us (Ashim Kumar Banerjee, J.) while sitting singly. Question was raised whether Balmer Lawrie Company Limited, a company within the meaning of Companies Act, 1956 could be termed as "State" within the meaning of Article 12 of the Constitution. His Lordship held that Balmer Lawrie Company Limited was a "State". However, since another learned

 

Single Judge held it otherwise the matter was referred to the Division Bench. The Division Bench in the case of Jogesh Chandra Mondal (supra) could not be ad idem on the issue and the matter was referred to the 5"1 Judge. The learned Single Judge in the case of Jogesh Chandra Mondal (supra) held Balmer Lawrie Company Limited was a "State". By the time the matter was heard by the learned Single Judge on a reference by the Division Bench the decision of the Apex Court in the Pradip Kumar Biswas (supra) was had and the learned Judge did have the benefit of the 7 Judges decision of the Apex Court. In paragraph 14 of the decision in the case of Jogesh Chandra Mondal (supra) the learned Single Judge held that to determine whether a particular body corporate was a "State" or not the following investigations and/or tests were to be conducted:

(i) Origin of the Company;

(i) Nature of business;

(iii) Monopoly business;

(iv) Financial Aid;

(v) Deep and pervasive control of the Government.

18. In the instant case we have already discussed the origin of the company. It was set up with the active patronage of the Department of Commerce. The company is discharging public duty on behalf of the Union to espouse the cause of export promotion abroad. Such moto and/or object is being espoused by the company with the dictate and financial aid of the Central Government. With regard to monopoly, the present company Capexil is the only authorized body to espouse the cause of the Government on export promotion of chemical and allied products. With regard to the control of the Government, Clause 2.65.1 of the hand book of Ministry of Commerce, in our view, is sufficient to infer that the Government had a control over the company. Taking a sum total of the situation we are of the view that the learned Single Judge was wrong in holding that Capexil was not amenable to writ jurisdiction and it was an autonomous body free from any Governmental control.

19. Reliance was placed on the decision of ZEE Telefilms Limited (supra) There 5-Judges'' Bench interpreted the 7-Judges'' decision in the case of Pradip Kumar Biswas (supra). While doing so the Apex Court per majority (3:2) held BCCI was not a "State" within the meaning of Article 12. We do not wish to deal with this case as our purpose is achieved on analysis of the 7 Judges'' Bench decision of the Pradip Kumar Biswas (supra). That decision has a greater binding force on us. Paragraph 40 of the decision in the case of Pradip Kumar Biswas (supra) being relevant herein is quoted below:

The picture that ultimately emerges is that the tests formulated in Ajoy Hasia are not a rigid set of brothers so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. 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 a body "State".

20. In the unreported judgment in the case of Engineering Export Promotion Council one of us (Ashim Kumar Banerjee, J.) observed as follows:

Legal Proposition Raised: On the issue that the Council is not a ''State'' within the meaning of Article 12. Mr. Chowdhury has not seriously made any submission on that score. He has, however, made it clear that he has not given up the said point. As discussed above, on a total construction of Article of Association, the work being carried out by the Council, the principal object, it would appear that the Ministry of Commerce has a deep control over the council. The Government subsidies are released to the exporters by dint of recommendation from the Council. Various schemes for export propounded by the Ministry of Commerce are being implemented through instrumentality of the Council. Hence, it would not be proper for me to hold that the Council is not a ''State'' within the meaning Article 12 of the Constitution. From the averment made in the pleadings I am of the view that the Council is a ''State'' within the meaning of Article 12 of the Constitution. I do not, however, wish to deliberate in detail as no such detailed argument has been made on that score before me.

21.Our view is also supported by another Division Bench judgment of this Court in the case of Indian Jute Research Association (supra).

22. We are of the view that to find out whether a body corporate is a "State" or not taking a sum total of the situation after conducting the tests as laid down in the case of Jogesh Chandra Mondal (supra) one has to come to a decision. As we have observed earlier, only financial grant or nature of business may not be the sole criteria to find out the Governmental control. Each and every aspect was to be examined and if upon such test being conducted one comes to a conclusion that the authority cannot function contrary to the policy of the Government the said body must be called a "State" within the meaning of Article 12. Here Capexil is not free to decide their course of action contrary to the policy of the Government. Its primary and sole object is to promote and/or espouse the cause of the chemical and allied industry relating to export under the patronage of the Ministry of Commerce. It recommends extension of subsidy to various exporters. It controls the entire export trade promotion abroad on behalf of the Government of India. Its managing committee is having a substantial control through Central Government having 5 representatives nominated by the Government. Only because the financial aid is not to the extent it was required compared to the expenditure of the company or that its audit is not being conducted by the Comptroller and Auditor General it would not be appropriate for us to exclude this body from the purview of Article 12. From the nature of the work as recognized by the Ministry of Commerce in Clause 2.65.1 it is clear that the

 

Capexil is discharging public duty. Hence, with deepest regard we have for the learned Single Judge, we are unable to accept His Lordship''s view.

23. The appeal, thus, succeeds and is allowed. The judgment and order of the learned Single Judge impugned herein is quashed and set aside. The matter is remanded back to the learned Single Judge for being decided on merits.

There would be no order as to costs.

Urgent xerox certified copy would be given to the parties, if applied for.

Pranab Kumar Deb, J.

I agree.

 