

(2015) 01 OHC CK 0043
In the Orissa High Court
Case No : O.J.C. No. 962 of 1992

Surendranath Sahu and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 20-01-2015

Acts Referred:

Companies Act, 1956 — Section 3

Constitution of India, 1950 — Article 12, 13(2), 213

Citation : (2015) 119 CLT 1106 : (2015) LabIC 3223

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

Bench : Single Bench

Advocate : Dayananda Mohapatra, for the Appellant; Sangram Das, Addl. SC and S.P. Sarangi, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. B.R. Sarangi, J.—The Petitioners, who were the employees of Orissa Mining Corporation Alloys Limited, a subsidiary unit of Orissa Mining Corporation Ltd., and has successfully been transferred to TISCO have filed this application for a direction to the Opp. Parties for retrospective revision of their scale of pay at par with the similarly situated employees working under the Orissa Mining Corporation Ltd. and after re-fixation, benefit should be extended by the Tata Iron Steel Company Ltd., a transport company, which was taken over by the said organization. The short facts of the case in hand, are that Orissa Mining Corporation Alloys Limited, a subsidiary unit of Orissa Mining Corporation Ltd. was engaged in production of Charge Chrome. The Petitioners were appointed in the Orissa Mining Corporation Alloys Limited, Bamanipal in different posts from the date of their joining. By Order No. SO-562(E) dated 30.8.1991 issued by the Department of Company Affairs, Government of India, the Orissa Mining Corporation Alloys limited was merged with the Orissa Mining Corporation Ltd. and became the Charge Chrome Division of the said Corporation. In the year 1991, the State Government was satisfied that Charge Chrome Division had suffered a substantial loss and is not in a position to repay the loans of the

foreign banks and State Bank of India, which has been counter-guaranteed by the State Government. Therefore, the Governor of Orissa in exercise of the powers conferred by Clause I of Article 213 of the Constitution of India was pleased to promulgate the Orissa Ordinance No. 8 of 1991 on 24.9.1991 which was named as "Orissa Mining Corporation Ltd. Acquisition and Transfer of Charge Chrome Division) Ordinance, 1991", which was published in the Orissa Gazette (Extraordinary) on 24.9.1991. In consonance with the said provisions of the Ordinance, on and from the appointed date, the right, title and interest of the Company in relation to the Charge Chrome Division stood transferred and vested absolutely with the State Government. Clause 10 of the aforesaid ordinance annexed as Annexure-1 to the writ application reads as follows:

"10. In the event of the State Government transferring the Charge Chrome Division of the Company to any other Company, the Government shall safeguard the interest and the rights and privileges of the employees of the Charge Chrome Division of the Company which they had been enjoying immediately before the date of acquisition of such division by the State Government under Section 3 in conformity with the existing laws."

Basing on the aforesaid provision of the Ordinance, the Government shall safeguard the interest and the rights and privileges of the employees of the Charge Chrome Division of the Company, which they have been enjoying immediately before the date of acquisition of such division by the State Government under Section 3 in conformity with the existing law. The Opp. Party No. 3-TISCO, which is a registered company under the Companies Act, 1956 gave an offer to the State Government that it was ready and willing to comply the terms and conditions stipulated in the ordinance for taking over the assets and liabilities of the Charge Chrome Division of the Orissa Mining Corporation and subsequently entered into an agreement with the State Government which spelt out different terms and conditions as mutually settled by the State Government and Opp. Party No. 3 pertaining to different issues of assets and liabilities of the Charge Chrome Division of the Orissa Mining Corporation Ltd. The benefit admissible to the counterparts working in the Orissa Mining Corporation having not been extended, the Petitioners have approached this Court by filing the present application.

2. Mr. D. Mohapatra, Learned Counsel for the Petitioners strenuously urged that in view of the provisions contained in Clause 10 of the Ordinance vide Annexure-1, the interest and rights of the Petitioners who are the employees in Charge Chrome Division are being protected. Therefore, the Petitioners are entitled to get the revised scale of pay as well as consequential service benefits as admissible to them at par with their counterparts working in the Orissa Mining Corporation from the date it has become admissible to their counterparts. Therefore, from the date of vesting with the State Government and subsequent transfer in favour of Opp. Party No. 3, the entitlement of the Petitioners for revised scale of pay and consequential benefits should be extended in

consonance with the provisions contained under Clause 10 of the Ordinance.

3. Mr. S. Das, Learned Addl. Standing Counsel for the State strenuously refuted the claim made by the Petitioners stating that Orissa Mining Corporation Alloys Limited is a separate entity being a subsidiary of Orissa Mining Corporation and the benefit admissible to the employees of Orissa Mining Corporation Alloys Limited cannot be treated/equated with that of the employees of the Orissa Mining Corporation and as such, whatever benefit was made available to the employees of Orissa Mining Corporation Alloys Limited, the same has been extended to the Petitioners even after vesting pursuant to the Ordinance in Annexure-1 and subsequently, the same has been transferred in favour of Opp. Party No. 3, thereby the Petitioners are not entitled to get any benefit as claimed in the writ application.

4. Mr. S.P. Sarangi, Learned Counsel for Opp. Party No. 3 strenuously urged that the writ application is not maintainable as against Opp. Party No. 3. He submitted that in the event the writ application is allowed by extending the benefit of revised scale of pay to the Petitioners, who are the employees of the Charge Chrome Division which has been created by virtue of amalgamation of Orissa Mining Corporation Alloys Limited with Orissa Mining Corporation, ultimately, the Opp. Party No. 3 is to pay the amount. Therefore, if the writ application is not maintainable as against Opp. Party No. 3, no mandamus can be issued for implementation of any further relief in the event this Court grants the relief as claimed by the Petitioners. To substantiate his contention, he has relied upon the Judgments in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, (2002) 4 JT 146 : (2002) 3 SCALE 638 : (2002) 5 SCC 111 : (2002) 3 SCR 100 and Ram Gopal Pujari Vs. The State of Bihar and Others, AIR 1997 Patna 1 : (1996) 2 PLJR 15 .

5. Considering the contentions raised by the Learned Counsel for the parties and after going through the records, it appears that admittedly the Petitioners were the employees of the Orissa Mining Corporation Alloys Limited and subsequently, it was amalgamated with Orissa Mining Corporation and a Charge Chrome Division was created and the Petitioners were rendering service under the said division. But due to constant loss sustained by such Charge Chrome Division, the State Government acquired the said Charge Chrome Division and it vested with the State Government and subsequently by virtue of the agreement, the same was transferred to Opp. Party No. 3. At the time of acquisition and vesting, whatever financial benefit has been extended to the employees of the Charge Chrome Division, has been protected and the said benefit has been extended by the transferee company, namely, TISCO-Opp. Party No. 3. By filing the present writ application, the Petitioners claim that they should be treated at par with the employees of Orissa Mining Corporation and extended the benefits of revised scale and other consequential service benefits at par with their counterparts in the Orissa Mining Corporation and consequently, the said benefit be also granted by Opp. Party No. 3- TISCO. The claim of the Petitioners is based on surmises

and conjectures inasmuch as there is no iota of doubt that the scale of pay which the Petitioners were getting when they were continuing under the Orissa Mining Corporation Alloys Limited, has been duly protected even after merger with the Orissa Mining Corporation and subsequently on transfer to Opp. Party No. 3. The benefit which now they are asking for, cannot be extended because of the reason that ultimately the benefit has to be extended by Opp. Party No. 3.

6. By virtue of the agreement of transfer dated 27.9.1991 in favour of TISCO-Opp. Party No. 3, the interest of the employees of Charge Chrome Division has been protected. The TISCO after taking over the said division, entered into an agreement to retain the scale of pay of the employees of the Charge Chrome Division. The employees of the Charge Chrome Division through their Union, i.e., Charge Chrome Plant Employees. Union, filed a writ application bearing O.J.C. No. 419 of 1991, wherein they had indicated that the employees of the plant has been greatly benefited both financially and otherwise as employees of TISCO. The employees have also become entitled towards enhancement of LTC from Rs. 500-700 to Rs. 2,000-4,000 and accepting such demand of the Union, the Opp. Party No. 3 has agreed to give them wage scale comparable to the employees of TISCO from 1.4.1991 and lowest basic scale has been raised from Rs. 875 to Rs. 1350 and other benefit has also been extended to the employees. Therefore, since the Petitioners have accepted such conditions, they are now estopped to claim revised scale of pay, which is in violation of the terms and conditions of the agreement of transfer.

7. On consideration of the grievance of the Petitioners, if the benefit will be extended, ultimately it has to be paid by Opp. Party No. 3 and in that case, the Opp. Party No. 3-TISCO being a company, no mandamus can be issued for extension of such benefit.

8. In Pradeep Kumar Biswas (supra), the Apex Court has held as follows:

"99. We sum up our conclusions as under:

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

obligations of the State. It is this strong statutory flavour and clear indicia of power constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in *Ajay Hasia* enable determination of governmental ownership or control. Tests 3, 5 and 6 are "functional" tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Unfortunately thereafter the tests were considered relevant for testing if an authority is the State and this fallacy has occurred because of difference between "instrumentality and agency" of the State and an "authority" having been lost sight of *sub silentio*, unconsciously and undeliberated. In our opinion, and keeping in view the meaning which "authority" carries, the question whether an entity is an "authority" cannot be answered by applying *Ajay Hasia* tests.

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

9. In *Ram Gopal pujari* (*supra*) the Learned Single Judge of Patna High Court in paragraphs 5 and 9 held as follows:

"5. Learned Counsel for the Petitioner admitted that the entire Writ Petition is directed against the action of the said Company. The said Company is admittedly not a State within the meaning of Article 12 of the Constitution of India. In that view of the matter, this Court holds that no Writ Petition is maintainable against the said company.

9. Therefore, following all the aforesaid Judgments this Court is of the view that what is required to be seen in order to find out whether an organization can be called a State within the meaning of Article 12 of the Constitution is the nature of pervasive State control over its management and functioning. Merely because an organization performs functions of public importance, one cannot hold, that the organization is "State" within the meaning of Article 12 of the Constitution. This Court is of the view that before an organization can be called "State" or before it can be endowed with "Statehood", one has to examine the nexus of such organization with the State, the extent and area of State control, namely, whether it is entirely financed by the State or by private individuals, it may also

happen that there are functions of public importance which can be performed by private organization also. In this connection the following excerpts from the Full Bench Judgment of Bombay High Court in the case of Shamrao Vithal Co-operative Bank Limited (supra) are set out below-

"There may be many functions of public importance which can be performed by private organization also. We have a large number of organizations doing important social work vital to the community. There are, for example, organizations which look after, educate and train handicapped persons or the blind, provide them with jobs and rehabilitate them. There are private charitable organizations which may provide free or subsidized housing to the poor or free medical aid. They may supply text-books to poor students, freeships and scholarships. There may be private organizations engaged in transport of goods and men. They perform functions which are, undoubtedly of public importance; and they subserve a public need. But this does not necessarily make such organizations "State" under Article 12. Banking is undoubtedly a function of public importance. In fact, the nationalized banks do carry out these functions under the control of the State. But that does not mean that banks which are not so controlled, or banks which are set up by private organizations or co-operative societies becomes "State" under Article 12. In a welfare State, many activities, which are often carried on by private organizations are undertaken by the State, in such cases the Supreme Court has said that we must look at the overall position of the organization in the light of the order tests also, especially when the function of the organization is not such as can be carried on only by the state or is not connected with Governmental function."

10. Applying the above test, this Court has come to the conclusion that this writ application as against the Opp. Party No. 3- Company is not maintainable. In view of the aforesaid facts and circumstances, since the service conditions of the Petitioners have been duly protected by the transfer agreement with Opp. Party No. 3 and the same having been duly accepted without any protest and the benefit having been enjoyed, at the subsequent stage, the claim of higher benefit contrary to the conditions stipulated in the transfer agreement cannot be sustained. Therefore, the writ application being devoid of merit and not maintainable as against Opp. Party No. 3, the same is dismissed. No cost.