
(2004) 08 CAL CK 0049

Calcutta High Court

Case No: Writ Petition No. 1390 of 2004

ABP Private Limited
and Another

APPELLANT

Vs

Union of India (UOI)
and Another

RESPONDENT

Date of Decision: Aug. 17, 2004

Acts Referred:

- Companies Act, 1956 - Section 25
- Constitution of India, 1950 - Article 19(1), 226

Citation: (2005) 1 CALLT 103 : (2005) 4 CHN 708 : (2005) 62 SCL 493

Hon'ble Judges: Pinaki Chandra Ghose, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Pinaki Chandra Ghose, J.

The Court: The petitioner has filed this application challenging a Notification bearing No. 733 dated 25th June, 2004 as well as a further Notification bearing No. 734 dated 30th July, 2004 whereby the said respondent No. 2 sought to implement the new Audit Guideline in respect of its members publication.

2. The respondent No. 2 is an existing company within the meaning of Companies Act, 1956 and subsequently u/s 25 of the Companies Act, 1956 licence was issued by the Central Government in favour of the respondent No. 2.

3. At the time of moving of the said application on 5th August, 2004 this Hon"ble Court after hearing the petitioner passed an ad-interim order of injunction restraining the said Notification dated 25th June, 2004 and 30th July, 2004 without the leave of this Hon"ble Court and the matter was returnable before the Court on 11th August, 2004. The matter came up before this Hon"ble Court on 13th August, 2004. The respondent No. 2 and the

respondent No. 1 appeared through their learned Counsel for the parties.

Mr. Mukherjee, learned senior counsel, appearing on behalf of the petitioner, contended that the object of the said Association is to secure accurate circulation figures and data relating to all periodicals and media that sell advertising space and in regard to such publications to obtain information as to area of distribution and fix standard forms and methods for ascertaining the net sales figures of its members publications and further to collect and distribute amongst members of the Association information relating to all forms and methods of advertisement. According to him, by such circulation figures and after ascertaining the net sales figures it assists the advertisers in estimating the value of any publication for advertising purposes and thereby the members of the Association are benefited. He further contended that the advertisers after considering the circulations of the members of the said Audit Bureau of Circulations, respondent No. 2, published advertisement and by such method the rate of the advertisement is also based on the said circulation figures. He further contended that since 1988 the method of audit was fixed by the respondent No. 2 without any reason whatsoever by the said two Notifications, the respondent imposing a new guidelines for auditing circulations of its members publication and thereby affecting the rights of the petitioner.

4. He further relied upon the decision reported in [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others](#), and submitted that since the respondent No. 2 is performing an important public duty and functioning with regard to freedom of Press, the writ jurisdiction is attracted on the action of the respondent No. 2. It is further stated that the role carried out by the respondent No. 2 is nothing but concerning the rights guaranteed under Article 19(1)(a) of the Constitution of India. Hence, action on the part of the respondent No. 2 is amenable to the writ jurisdiction. He further contended that under Article 226 the writ can be issued against any person or authority who performs a public duty.

5. It is further submitted by Mr. Mukherjee relying on a decision reported in [Tata Press Ltd. Vs. Mahanagar Telephone Nigam Limited and Others](#), that advertising as a "commercial speech" has two facets. Public at large is benefited by the information made available through the advertisement. There cannot be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "commercial speech". Hence, he submitted that any restraint or curtailment of advertisements would affect the fundamental right under Article 19(1)(a) on the aspects of propagation, publication and circulation.

6. He further contended that the protection of Article 19(1)(a) is available to the speaker as well as to the recipient of the speech. On these grounds the Hon"ble Supreme Court has held that "commercial speech" is a part of the freedom of speech and the expression guaranteed under Article 19(1)(a) of the Constitution. According to Mr. Mukherjee, implementation of the new Guidelines by the Council of Management of the respondent

No. 2 would affect the rights of the petitioner and further it constitutes direct and immediate threat to the freedom of Press and arc thus violating Article 19(1)(a) read with Article 14 of the Constitution of India.

7. He further contended that the respondent No. 2 was incorporated to discharge a public duty in authenticating the actual figures of its members publications so as to enable the advertisers and advertising agencies to arrive at an educated decision regarding placement of advertisements and to enable members publications to justify the rates of advertisements on the basis of the authenticated circulation figures. According to him, implementation of the new Guidelines is opposed to public policy and against the public interest.

8. He also submitted that the respondent No. 1 has a duty and obligation to ensure the functioning of a company incorporated u/s 25 of the Companies Act, 1956 is such that the objects for which such company was granted licence is not diluted. It is further submitted that the petitioners are seriously affected and prejudiced by the said Notification and the Guidelines issued by the respondent No. 2 and the petitioner is likely to suffer loss.

9. He further contended that in order to arrive at the correct Net-Paid Sales figures of a publication, the respondent No. 2 framed various guidelines to put checks and balances on the unscrupulous practices of the member publications in arriving at the correct and actual circulation figures. According to him, implementation of a new guidelines would destroy such sanctity of the Circulation figures. Hence, he contended that the ad-interim order granted by this Hon"ble Court should be continued.

10. Mr. Chatterjee, learned senior counsel, appearing on behalf of the respondents contended that the writ application should be dismissed on the question of maintainability. The Audit Bureau of Circulations being the respondent No. 2 is a company incorporated u/s 25 of the Companies Act. 1956. The said respondent No. 2 certifies the figures of its members in respect of their Circulation of their publications. The petitioner is not bound to furnish such figures to the respondent No. 2. There is no bar on the petitioners to proceed with their publications without furnishing the circulation figures to the respondent No. 2. The respondent No. 2 is incorporated with the primary object of auditing the actual circulation figures of its members" publication. Therefore, according to him, under Article 226 of the Constitution the respondent No. 2 cannot come within the meaning "person" or "authority", nor it can be stated to be statutory authority and instrumentality of the State and thereby coming within the meaning of Article 12 as "State".

11. He further contended that the only question at this stage that whether the respondent No. 2 performs any public duty. It is relevant that the nature of the duty imposed on the respondent No. 2 whether can be treated as a public duty or such action of the respondent No. 2 has any public element. He further submitted that primary object of auditing the circulations figures of its members publications is only for the purpose of selling of advertisement space and the rate there for which can be arrived at by the

Net-Paid Sales figures of the members of the respondent No. 2. Therefore, according to him, such action is nothing but for the benefit of the petitioners as well as to the members of the said respondent No. 2. Therefore, such action on the part of the respondent No. 2 cannot be said to be a public duty and thereby it can attract the words "any person" or "authority" used in Article 226 of the Constitution of India.

12. He further submitted that the respondent No. 2 also not performing any statutory duty which has to be carried out by the respondent No. 2 in terms of the statute under or by which a company is constituted or to carry out duties placed on them by the statutes authorising the respondent No. 2 to perform the said duty. Hence, he submitted that by taking into account such action of the respondent No. 2, the respondent No. 2 cannot said to be performing any public duty and thereby is not amenable to the writ jurisdiction. He further contended that in the facts and circumstances of the instant case the decisions cited by Mr. Mukherjee reported in [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others](#), and [Tata Press Ltd. Vs. Mahanagar Telephone Nigam Limited and Others](#), have no application.

13. On the contrary, he relied upon a decision reported in [Federal Bank Ltd. Vs. Sagar Thomas and Others](#), and submitted that a writ petition under Article 226 of the Constitution of India is maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such statutory function. Then and then only a writ will lie. According to him, private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution provided they can come within the said tests as laid down by the Hon"ble Supreme Court.

14. He further submitted that the respondent No. 2 certifying the Circulation of its members publications cannot be termed as an institution or a company which is carrying on any statutory or public duty. He contended that merely regulatory provision to ensure that commercial activity guaranteed by the private bodies work within a discipline, neither confer any status upon the company nor can be enforced through issuance a writ under Article 226 of the Constitution. Relying on the said decision he submitted that the ad-interim order passed by this Hon"ble Court should be vacated. He also contended that none of the activities of the respondent No. 2 can be considered as a public duty performed by the said respondent No. 2. It is submitted that the respondent No. 2 is performing its duty voluntarily. Hence, he submitted that the ad-interim order should be vacated.

15. I have considered the case cited by the parties before me. I have also considered the decisions reported in 2003(4) SCC 255(G. Bassi Reddy v. International Crops Research

Institute and Ors.), [Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others](#), 2001(1) SCC 298 (VST Industries Ltd. v. VST Industries Workers' Union and Anr.) and [General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrughan Nishad and Others](#), and after scrutinizing the said decisions in my opinion, the respondent No. 2 cannot be treated as "authority" or "any person" as stated in Article 226 of the Constitution of India.

16. In [Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others](#), the Hon'ble Supreme Court considered the tests formulated in [Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others](#), for determining whether an entity is an instrumentality or agency of the State, are not a rigid set of principles so that a body falling within any one of them must be considered to be "State" within the meaning of Article 12. The question in each case would be - whether in the light of 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 the said test is satisfied by the body, then the said 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". Therefore, applying the said test in my opinion, the respondent -No. 2 cannot be treated as "authority" or "any other person".

17. It further appears to me that the Audit Bureau of Circulations being the respondent No. 2, is a voluntary body formed by publishers, advertising agencies and advertisers in print media. The primary object is to certify circulation figures of member publications and disseminate the data among all members every six months. In order to avail an ABC Certificate, publishers voluntarily enroll themselves as members of the Bureau and accept to abide by Bureau's prescribed guidelines and procedures. Therefore, it appears to me from the Preamble of the respondent No. 2 that the publishers have voluntarily enrolled themselves with the respondent No. 2 for its primary object to have the figures of members' publications and disseminate the data among all members every six months. Therefore, it appears to me that the only primary object of the respondent No. 2 is to certify circulation figures among its members and not otherwise. It would also appear from the Memorandum of Association of the respondent No. 2 that the objects for which the Association is established, are as follows :

"(a) To secure accurate circulation figures and data relating to all periodicals and media that sell advertising space and in regard to such publications to obtain information as to area of distribution and fix standard forms and methods for ascertaining the net sales figures and generally all information that will be of assistance to advertisers in estimating the value of any publication for advertising purposes and to record such information and circulate it to members of this Association and generally to establish a bureau of information in regard to all publications and the circulation of them for the benefit of members of this Association such service to be known as the "A.B.C." service or by such other name or description as the Council of this Association may determine from time to

time."

18. It would also be evident from the Memorandum of Association of the respondent No. 2 that the service of the Audit Bureau of Circulations was to help the members of their Circulation and further for the purpose of the cost of an advertisement, which is readily available to the advertisers and to its members. The members are providing funds for the purpose of carrying on the business by the respondent No. 2.

19. In [G. Basi Reddy Vs. International Crops Research Instt. and Another](#), the Hon^{ble} Supreme Court held as follows:

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

"28. A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty (Praga Tools Corporation v. C.A. Imanual, Shri Anadi Mukta Sadguru Trust v. V.R. Rudani, SCC at p. 698 and VST Industries Ltd. v. Workers' Union). ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world- While the Indian public may be the beneficiary of the activities of the Institute, it certainly cannot be said that ICRISAT owes a duty to the Indian public to provide research and training facilities. In Praga Tools v. C.V. Imanual this Court construed Article 226 to hold that the High Court to issue a writ of mandamus "to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest."

20. In "VST" Industries Ltd. v. VST Industries Workers' Union and Anr." reported in 2001(1) SCC 298, the Hon^{ble} Supreme Court observed as follows:

"7. In de Smith, Woolf and Jowell's Judicial Review of Administrative Action. 5th Ed., it is noticed that not all the activities of the private bodies are subject to private law, e.g., the activities by private bodies may be governed by the standards of public law when its decisions are subject to duties conferred by statute or when, by virtue of the function it is performing or possibly its dominant position in the market, it is under an implied duty to

act in the public interest. By way of illustration, it is noticed that a private company selected to run a prison although motivated by commercial profit should be regarded, at least in relation to some of its activities, as subject to public law because of the nature of the function it is performing. This is because the prisoners, for whose custody and care it is responsible, are in the prison in consequence of an order of the Court, and the purpose and nature of their detention is a matter of public concern and interest. After detailed discussion, the learned authors have summarized the position with the following propositions:

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

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

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

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

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

21. After considering all these aspects of the matter and the test laid down by the Hon^{ble} Apex Court and after analysing the facts of this case, in my opinion, the respondent No. 2 cannot be treated as "a person" or "any other authority" since it does not perform a public function or discharges a public duty for which Article 226 of the Constitution can be invoked.

22. The activities of the respondent No. 2 is purely voluntary. It has not been set up by a statute writs activities are controlled by any statute. It does not perform any public or statutory duty. Hence, this Hon^{ble} Court is of the opinion that the respondent No. 2 is not amenable to the writ jurisdiction and the writ will not lie against the respondent No. 2 .

23. Accordingly, for the reasons stated hereinabove, the ad-interim order is vacated.

Considering the prayers made in the writ petition, Affidavit-in-opposition to be filed by the respondents within a period of 2(two) weeks, reply, if any, within a week thereafter and the matter to appear in the List 4(four) weeks hence.

Mr. Mukherjee, learned senior counsel, appearing on behalf of the petitioner, prayed for Stay of the order. Considering the facts, the same is refused.