

(2003) 02 BOM CK 0135

Bombay High Court

Case No: Writ Petition No. 5083 of 1994

R.V. Dnyansagar

APPELLANT

Vs

Maharashtra Industrial and
Technical Consultancy
Organisation Limited

RESPONDENT

Date of Decision: Feb. 26, 2003

Acts Referred:

- Companies Act, 1956 - Section 224, 225, 226, 227, 228
- Constitution of India, 1950 - Article 119, 12, 16(4), 226, 5A

Citation: (2003) 3 ALLMR 192 : (2003) 4 BomCR 118 : (2005) 123 CompCas 520 : (2003) 3 LLJ 348 : (2003) 2 MhLJ 547 : (2003) 46 SCL 153

Hon'ble Judges: R.M. Lodha, J; A.S. Aguiar, J

Bench: Division Bench

Advocate: P.K. Hushing, for the Appellant; S.K. Talsania, instructed by Manilal Kher and Ambalal and Co., for the Respondent

Final Decision: Dismissed

Judgement

R.M. Lodha, J.

By this writ petition filed under Article 226 of the Constitution of India, the petitioner prays for direction to respondent to pay him amount of arrears of salary from june 1993 until September 1993, the gratuity, provident fund, etc. with interest at the rate of 21% per annum from 1.10.1993 till actual payment of the entire amounts due and further direction to respondents to pay the petitioner's amount of Rs. 14,000/- towards encashment of earned leave for 46 days with interest at the rate of 21% p.a from 1.10.1993 till actual payment of the same and also direction to respondents to settle the account of the petitioner in respect of other allowances such as leave travel allowance, travelling allowance, maintenance of the office cum residence, medical reimbursement.

2. The respondent is Maharashtra Industrial and Technical Consultancy Organisation Limited. Unless the respondent falls within the meaning of the State or Agency/instrumentality of the State within the meaning of Article 12 of the Constitution of India, the claim of the petitioner does not deserve to be examined on merits. We shall, therefore, first see whether Maharashtra Industrial and Technical Consultancy Organisation Limited (respondent) is a State or Agency/instrumentality of the State within the meaning of Article 12 of Constitution or not.

3. In this regard, the averment made by the petitioner is that the respondent is deemed Government company registered under the Companies Act; it is a joint venture of the Industrial Credit and Investment Corporation of India (ICICI), Industrial Development Bank of India (IDBI), Industrial Finance Corporation of India (IFCI) and other Corporations of the Government of Maharashtra and Nationalised Banks and the entire share capital is held amongst themselves. It is on this basis alone that according to the petitioner the respondent is a State or agency/instrumentality of the State within the meaning of Article 12 of the Constitution of India.

4. The respondent has, however, denied that is a State within the meaning of Article 12 of the Constitution of India. Though it is not in dispute that until 1.6.1995 the respondent company was a deemed Government company u/s 619B of Companies Act, but the State Government has had no control over the affairs of the said company much less deep and pervasive control. It is submitted that it is not a Government undertaking in any sense and the only fact that it has equity from Banks and Industrial Infrastructure Corporation does not make it covered under Article 12. It gets no grant for its survival. It has to earn its livelihood through fee base income. The company does not discharge any public function nor public duty nor any public function or duty is cast upon it by the State or by Government orders. Even otherwise, it is submitted that after 1.6.1965, the respondent company has ceased to be deemed Government company ever Section 619B of Companies Act as composition and constitution of the shareholders of the company have undergone substantial change. It is, thus, submitted that the respondent company is not amenable to writ jurisdiction.

5. The question whether a Body, Association, Corporation or Company is State or agency/instrumentality covered under Article 12 had been matter of debate in large number of cases before Supreme Court from time to time. A few important decisions in this regard being [Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others, ; The Praga Tools Corporation Vs. Shri C.A. Imanual and Others, ; 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, ; Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, ; Som Prakash Rekhi v. Union of](#)

India, ; [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others,](#) ; [B.S. Minhas Vs. Indian Statistical Institute and Others,](#) ; [Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another,](#) ; [Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other\[OVERRULED\],](#) ; All India Sainik Schools Employees Association v. Defence Minister-cum-Chairman, Board of Governors, Sainik Schools Society 1989 Supp (1) SCC 205 ; [The Mysore Paper Mills Ltd. Vs. The Mysore Paper Mills Officers" Association and Another,](#) and [Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others,](#) . We do not intend to burden our judgment by referring to all those judgments since in our view consideration of two recent judgments wherein all these judgments have been considered would bring home the point we want to convey.

6. In Mysore Paper Mills, Interalia the question posed before the Apex Court, whether Mysore Paper Mills which was a company incorporated under the Companies Act, 1956 and was a Government company as defined in Section 617 of the Companies Act was covered within the meaning of the word "State" as defined in Article 12 of the Constitution of India. In that case, in the judgment of the High Court as noted by the Apex Court the following facts were adverted before its status was held as of "State" within the meaning of Article 12:

- "(a) That the appellant-company is a governmental company as per Section 617 of the Companies Act, 1956.
- (b) The declared objects of the company viz. 1, 1-A, 3, 4, 4-A, 5, 5-A and 5-B establish that the Company has been entrusted with an important function of public interest closely related to governmental functions and it enjoys monopoly status, which is State-conferred.
- (c) The functions entrusted to the appellant-Company go to show that the government operates behind a corporate veil carrying out governmental functions of vital importance and therefore, there is no difficulty in identifying the appellant-Company to be State within the meaning of Article 12 of the Constitution of India.
- (d) The summarized balance sheets for the years 1993-94, 1994-95 and 1995-96 disclosed that more than 97% of the share capital has been contributed by the State of Karnataka and the financial institutions controlled and belonging to the Government of India.
- (e) The business of the Company which has to be managed by the Board of Directors (Article 114 of the articles of association) shall have the Chairman of the Board and Managing Director (Article 119) and four Directors of whom one will be the Chairman will be nominated by the Government of Karnataka who shall not retire by rotation or be removed from office except under the orders of the Government of Karnataka (Article 94). The Directors to whom the management is entrusted shall

not be more than 12 or less than 9, inclusive of the government nominees and nominees of the financial institutions noticed under Article 94-A and not only such nominees of financial institutions hold office so long as moneys remain owed to those institutions or those institutions hold debentures in the Company as a result of direct subscription or private placement, but the Board also has no powers to remove them during such period.

(f) The appellant-Company is found to be under the control of the Government of Karnataka - sometimes directly and sometimes through the machinery of Karnataka State Bureau of Public Enterprises in respect of matters entrusted to it: as disclosed from the book published by the Department of Personnel and Administration Reforms of the Government of Karnataka.

(g) Apart from the Directors who are nominees of the Government and the financial institutions controlled by the Central Government even the elected Directors were also to be nominated by the Government of Karnataka and one cannot become a Director of the appellant-Company without the concurrence of nomination by the Government.

(h) Appointment of several officers, playing vital role in the day-to-day administration of the Company can be done only with the prior permission or approval of the Government of Karnataka. The General Manager also may be appointed on such terms and remunerations as may be fixed, only subject to the approval of the Government of Karnataka.

(i) For any investment or expenditure above 25 lakhs the approval of the Government of Karnataka is required. Any revision of pay scales and allowances of employees and officers also have to be done only with the approval of KSBPE. Recruitments to posts carrying pay scales above Rs. 4700 can only be with the permission of the Government and reservation policies under Article 16(4) of the Constitution are also applicable to recruitments by the Company. Deputation to Government and vice versa are also permitted. All foreign tours of officers have to be approved by the Government.

(j) All loans taken by the appellant-Company are guaranteed by the Government of Karnataka.

(k) The Company Secretary of the appellant-Company has in his communication Annexure "GGG" declared that the same is an undertaking under the control of the Government of Karnataka."

7. The Apex Court in paragraph 11 of the report observed, "The concept of instrumentality or agency of the Government is not to be confined to entities created under or which owes its origin to any particular statute or order but would really depend upon a combination of one or more of relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real

source of governing power, if need be, piercing the corporate veil of the entity concerned. In respect of facts obtaining with regard of Mysore Paper Mills in paragraph 12 it was held thus:

"12. The indisputable fact that the appellant-Company is a government company as envisaged in Section 617 attracting Section 619 of the Companies Act, that more than 97% of the share capital has been contributed by the State Government and the financial institutions controlled and belonging to the Government of India on the security and undertaking of the State Government, that the amendments introduced to the Memorandum of Association in the year 1994 introducing Articles 5-A and 5-B, entrusts the appellant-Company with important public duties obligating to undertake, sponsor rural development and for social and economic welfare of the people in rural areas by undertaking programmes to assist and promote activities for the growth of national economy which are akin and related to the public duties of the State, that out of 12 directors 5 are government and departmental persons, besides other elected directors also are to be with the concurrence and nomination of the Government and the various other forms of supervision and control, as enumerated supra, will go to show that the State Government has deep and pervasive control of the appellant-Company and its day-to-day administration, and consequently confirm the position that the appellant-Company is nothing but an instrumentality and agency of the State Government and the physical form of the Company is merely a cloak or cover for the Government. Despite best and serious efforts made on behalf of the appellant, the decision under challenge has not been shown to suffer from any infirmity whatsoever, to call for interference in our hands."

8. In unmistakable terms it was thus held by the Apex Court that the State Government of Karnataka has deep and pervasive control of the Mysore Paper Mills and its day-to-day administration and accordingly it confirmed the finding of the High Court that the said company viz. Mysore Paper Mills and noting but an instrumentality or agency of the State and the physical form of the company is merely a cloak or cover for the Government.

9. The seven Judge Bench of the Supreme Court in *Pradeep Kumar Biswas* dealing with the question whether the Council for Scientific and Industrial Research (CSIR) is a State within the meaning of Article 12 of the Constitution of India. Paragraph 40 of the majority judgment reads:

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

10. The majority view of the Supreme Court, thus, emphasises that the question, whether an entity is a State within the meaning of Article 12 has to be decided by taking into consideration the cumulative facts as established and that whether such body or entity is financially, functionally and administratively dominated by or under the control of the Government. In other words, whether the State Government has deep and pervasive control to the body in question. If the control was merely regulatory, whether under Statute or otherwise, the body would not be a State within the meaning of Article 12. The formation of CSIR was noted in paragraph 42 of the report and its objects and functions are noted in paragraph 44 of the report which read thus:

"42. On 27-4-1940, the Board of Scientific and Industrial Research and on 1-2-1941, the Industrial Research Utilisation Committee were set up by the Department of Commerce, Government of India with the broad objective of promoting industrial growth in this country. On 14-11-1941, a Resolution was passed by the Legislative Assembly and accepted by the Government of India to the following effect:

"This Assembly recommends to the Governor-General-in-Council that a fund called the Industrial Research Fund be constituted, for the purpose of fostering industrial development in this country and that provision be made in the budget for an annual grant of rupees ten lakhs to the fund for a period of five years.

44. The 26-9-1942 Resolution had provided that the functions of CSIR would be:

- (a) to implement and give effect to the following resolution moved by the Hon"ble Dewan Bahadur Sir A.R. Mudaliar and passed by the Legislative Assembly on 14-11-1941 and accepted by the Government of India... (quoted earlier in this judgment).
- (b) the promotion, guidance and coordination of scientific and industrial research in India including the institution and the financing of specific researches;
- (c) the establishment or development and assistance to special institutions or department of existing institutions for scientific study of problems affecting particular industries and trade;
- (d) the establishment and award of research studentships and fellowships;
- (e) the utilisation of the results of the researches conducted under the auspices of the Council towards the development of industries in the country and the payment of a share of royalties arising out of the development of the results of researches to those who are considered as having contributed towards the pursuit of such researches;
- (f) the establishment; maintenance and management of laboratories, workshops, institutes, and organisation to further scientific and industrial research and utilise

and exploit for purposes of experiment or otherwise any discovery or invention likely to be of use to Indian industries;

(g) the collection and dissemination or information in regard not only to research but to industrial matters generally;

(h) publication of scientific papers and a journal of industrial research and development; and

(i) any other activities to promote generally the objects of the resolution mentioned in (a) above."

11. As regards, "Management and Control" in paragraphs 48 and 49 of the report, the majority judgment noted thus:

"48. When the Government of India resolved to set up CSIR on 26-2-1942, it also decided that the Governing Body would consist of the following members:

(1) The Honourable Member of the Council of His Excellency the Governor-General in charge of the portfolio of Commerce (Ex officio).

(2) A representative of the Commerce Department of the Government of India, appointed by the Government of India.

(3) A representative of the Finance Department of the Government of India, appointed by the Government of India.

(4) Two members of the Board of Scientific and Industrial Research elected by the said Board.

(5) Two members of the Industrial Research Utilisation Committee elected by the said Committee.

(6) The Director of Scientific and Industrial Research.

(7) One or more members to be nominated by the Government of India to represent interests not otherwise represented.

49. The present Rules and Regulations, 1999 of CSIR provide that:

"(a) The Prime Minister of India shall be the ex officio President of the Society.

(b) The Minister in charge of the ministry or department, dealing with the Council of Scientific and Industrial Research shall be the ex officio Vice-President of the Society:

Provided that during any period when the Prime Minister is also such Minister, any person nominated in this behalf by the Prime Minister shall be the Vice-President.

(c) Minister in charge of Finance and Industry (ex officio).

(d) The members of the Governing Body.

(e) Chairman, Advisory Board.

(f) Any other person or persons appointed by the President, CSIR."

The Governing Body of the Society is constituted by the:

(a) Director General;

(b) Member Finance;

(c) Directors of two national laboratories;

(d) Two eminent Scientists/Technologists, one of whom shall be from academia;

(e) Heads of two scientific departments/agencies of the Government of India."

12. The aspect of financial aid was noted in paragraph 55 of the report which reads thus:

"55. The initial capital of CSIR was Rs. 10 lakhs, made available pursuant to the Resolution of the Legislative Assembly on 14-11-1941. Paragraph 5 of the 26-9-1942 Resolution of the Government of India pursuant to which CSIR was formed reads:

"The Government of India have decided that a fund, viz., the Industrial Research Fund, should be constituted by grants from the Central revenues to which additions are to be made from time to time as moneys flow in from other sources. These other sources will comprise grants, if any, by Provincial Governments, by industrialists for special or general purposes, contributions from universities or local bodies, donations or benefactions, royalties, etc., received from the development of the results of industrial research, and miscellaneous receipts. The Council of Scientific and Industrial Research will exercise full powers in regard to the expenditure to be met out of the Industrial Research Fund subject to its observing the bye-laws framed by the Governing Body of the Council, from time to time, with the approval of the Governor-General-in-Council, and to its annual budget being approved by the Governor-General-in-Council."

13. In the light of the review of the judicial opinion as noted in the judgment, the majority view ultimately held that CSIR was a State within the meaning of Article 12 of the Constitution of India.

14. As regards the respondent company nothing is produced by the petitioner indicating formation of the respondent company, its objects and functions and management and control which may lead us to hold that respondent company is a State within the meaning of Article 12. The primary burden was on the petitioner to produce material to establish that the respondent company was a State within the meaning of Article 12 of the Constitution of India, which he has failed to discharge. Because the shares of the respondent company prior to 1.6.1995 were held by Banks or Industrial Banks Infrastructure Corporation by itself would not make it State or agency or instrumentality of State within meaning of Article 12 of the

Constitution of India. There is nothing on record to indicate that State Government has deep and pervasive control over the respondent. Pertinently the respondent company is not even a Government company within the meaning of Section 617 of the Companies Act. It is only a deemed Government company within the meaning of Section 619B of the Companies Act whereby the provisions of Section 619 have been made applicable. Sections 619 and 619B of the Companies Act read thus:

"619. (1) In the case of a Government company, the following provisions shall apply, notwithstanding anything contained in Sections 224 to 233.

(2) The auditor of a Government company shall be appointed or re-appointed by the Comptroller and Auditor-General of India;

Provided that the limits specified in Sub-sections (1B) and (1C) of Section 224 shall apply in relation to the appointment or re-appointment of an auditor under this sub-section.

(3) The Comptroller and Auditor-General of India shall have power -

(a) to direct the manner in which the company's accounts shall be audited by the auditor appointed in pursuance of Sub-section (2) and to give such auditor instructions in regard to any matter relating to the performance of his functions as such;

(b) to conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf; and for the purposes of such audit, to require information or additional information to be furnished to any person or persons, so authorised, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor-General may, by general or special order, direct.

(4) The auditor aforesaid shall submit a copy of his audit report to the Comptroller and Auditor-General of India who shall have the right to comment upon, or supplement, the audit report in such manner as he may think fit.

(5) Any such comments upon, or supplement to, the audit report shall be placed before the annual general meeting of the company at the same time and in the same manner as the audit report.

619B. The provisions of Section 619 shall apply to a company in which not less than fifty-one per cent of the paid-up share capital is held by one or more of the following or any combination thereof, as if it were a Government company, namely:-

(a) the Central Government and one or more Government companies;

(b) any State Government or Governments and one or more Government companies;

- (c) the Central Government, one or more State Governments and one or more Government companies;
- (d) the Central Government and one or more corporations owned or controlled by the Central Government;
- (e) the Central Government, one or more State Government and one or more corporations owned or controlled by the Central Government;
- (f) one or more corporations owned or controlled by the Central Government or the State Government;
- (g) more than one Government company."

15. What is provided by Section 619B is that the provisions of Section 619 shall be applicable to a company wherein not less than 51% of the paid up share capital is held by one or more of the combinations provided in Clauses (a) to (g). In case of the respondent company prior to 1.6.1995 though it was covered by Clause (g) of Section 619B as its shareholding was held by more than one Government company and accordingly Section 619 was applicable to it but that does not make it Government company within the meaning of Section 617. It is deemed to be Government company only for the purposes of Section 619 and as a result of which Sections 224 to 233 pertaining to audit of the company applicable to Government companies were also applicable to it. We are afraid, this would not make the respondent company a State or agency or instrumentality of State within the meaning of Article 12 of the Constitution of India.

16. Besides that from reply affidavit filed on behalf of respondent company, it transpires that after 1.6.1995 the respondent company has even ceased to be deemed Government company u/s 619B of Companies Act because of substantial change in the Constitution and composition of its shareholders. The status of the respondent company, therefore, today is no better than a public limited company under the Companies Act. We are afraid, such company is not and cannot be amenable to the writ jurisdiction under Article 226 of the Constitution of India.

17. Since the respondent company is not amenable to the writ jurisdiction under Article 226 of the Constitution of India, we do not deem it necessary to go into the merits of the case set up by the petitioner as the writ petition has to be dismissed on that ground alone.

18. Writ petition is, accordingly, dismissed. Rule is discharged. No costs.