

“Whether Public Corporations should be Amenable to Writ Jurisdiction in India?”

*Vaibhav Kartikeya Agrawal
Leiden University*

INTRODUCTION

India is a quasi federal country where Union or the Centre have plenary power to make laws. Constitution of India provides writ jurisdiction of Supreme Court by article 32 and that of High Courts by Article 226. Writ jurisdiction can be availed of against the State and the public authorities governed by the State. With the nationalization of banks in 1960, the Liberalization regime which commenced from 1991, doors were opened for domestic and foreign investments. Whether these private corporations can be dragged to the Court by jurisdiction under Articles 32 and 226 of the Constitution? This paper states some case laws of the Supreme Court to reflect the amenability of writ jurisdiction against public and private corporations.

SUPREME COURT AND HIGH COURTS ON WRIT JURISDICTION OF CORPORATIONS

In 1976, a writ petition¹ has been filed in the Supreme Court to enforce an agreement entered into between the appellant and the Corporation in reference to their promotion in the Cooperative bank. His specific grievance in the present case is that promotions to three categories of higher posts, viz., Assistant Inspecting Officers, Junior Accountants and Accountants were made by direct recruitment contrary to what he contends are service rules but, in substance, are the result of collective bargaining with the management, as the writ petition itself reveals. These triple categories of new posts have been filled, admittedly, without reference to the quota set apart for promotees, the defence of the respondent being that these new cadres are not covered by the agreement referred to in the writ petition. However, the High Court dismissed the writ petition on the preliminary ground that the writ was, in fact, directed against a Cooperative Bank registered under the Cooperative Societies Act and no writ would lie against such a body in the circumstances set out in the writ petition.

The Supreme Court stated:

“The reason why we are not inclined to add to the enormous erudition on the point already accumulated in case- law is that a close perusal of the writ petition will disclose that essentially the appellant is seeking merely to enforce an agreement entered into between the employees and the Cooperative Bank.

At its best, the writ petition seeks enforcement of a binding contract but the neat and necessary repellent is that the remedy of Art. 226 is unavailable to enforce a contract qua contract. We fail to see how a supplier of chalk to a government school or cheese to a government hospital can ask for a constitutional remedy under Art. 226 in the event of a breach of a contract,

¹ Kulchinder Singh v. Hardaya Singh, AIR 1976 SC 2216.

bypassing the normal channels of civil litigation. We are not convinced that a mere contract agreeing to a quota of promotions can be exalted into a service rule or statutory duty. What is immediately relevant is not whether the respondent is State or public authority but whether what is enforced is a statutory duty or sovereign obligation or public function of a public authority. Private law may involve a State, a statutory body, or a public body in contractual or tortious actions. But they cannot be siphoned off into the writ jurisdiction." Supreme Court thus dismissed the petition on ground of alternative remedy to enforce a contractual obligation for promotion of employees and stated that a contract cannot be made to enforce through the writ petitions. So, the petition against a Cooperative bank has been dismissed not because the appellants or the Bank cannot avail writ jurisdiction but because of an alternative remedy.

Later in *Ajay Hasia v. Khalid Mujib*, the bench of five judges headed by Hon'ble Justice P.N. Bhagwati, culled out the causes which make a private corporation amenable to the writ jurisdiction. Court held:

"We are clearly of the view that where a corporation is an instrumentality or agency of the government, it must be held to be an 'authority' within the meaning of Art. 12 and hence subject to the same basic obligation to obey the Fundamental Rights as the government.

We may point out that this very question as to when a corporation can be regarded as an 'authority' within the meaning of Art. 12 arose for consideration before this Court in *R. D. Shetty v. The International Airport Authority of India & Ores*. There, in a unanimous judgment of three Judges delivered by one of us (Bhagwati, J) this Court pointed out:

"So far as India is concerned, the genesis of the emergence of corporations as instrumentalities or agencies of Government is to be found in the Government of India Resolution on Industrial Policy dated 6th April, 1948 where it was stated inter alia that "management of State enterprises will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this."

It was in pursuance of the policy envisaged in this and sub-sequent resolutions on Industrial policy that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by Government departmentally through its service personnel but the instrumentality or agency of the corporation was resorted to in these cases having regard to the nature of the task to be performed. The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through instrumentality or agency of corporations should equally be subject to the same limitations." The Court then addressed itself to the question as to how to determine whether a

corporation is acting as an instrumentality or agency of the Government and dealing with that question, observed:

"A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act 1956 or the Societies Registration Act 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition there should be a certain amount of direct control exercised by Government and, if so what should be the nature of such control? Should the functions which the Corporation is charged to carry out possess any particular characteristic or feature, or is the nature of the functions immaterial? Now, one thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. But, as is quite often the case, a corporation established by statute may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by Government though this consideration also may not be determinative, because even where the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions. What then are tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate an inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula, which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not."

The Court then proceeded to indicate the different tests, apart from ownership of the entire share capital:

" if extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character, it may be a relevant circumstance supporting an inference that the corporation is an instrumentality or agency of Government..... It may therefore be possible to say that 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. But a finding of State financial

support plus an unusual degree of control over the management and policies might lead one to characterise an operation as State action-Vide *Sukhdev v. Bhagatram* [1975] 3 SCR 619 at 658. So also the existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. It may also be a relevant factor to consider whether the corporation enjoys monopoly status which is State conferred or State protected. There can be little doubt that State conferred or State protected monopoly status would be highly relevant in assessing the aggregate weight of the corporation's ties to the State."

"There is also another factor which may be regarded as having a bearing on this issue and it is whether the operation of the corporation is an important public function. It has been held in the United States in a number of cases that the concept of private action must yield to a conception of State action where public functions are being performed. Vide Arthur S. Miller: "The Constitutional Law of the Security State" (10) *Stanford Law Review* 620 at 664."

"It may be noted that besides the so-called traditional functions, the modern state operates as multitude of public enterprises and discharges a host of other public functions. If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. This is precisely what was pointed out by Mathew, J., in *Sukhdev v. Bhagatram* (supra) where the learned Judge said that "institutions engaged in matters of high public interest of performing public functions are by virtue of the nature of the functions performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions."

The court however proceeded to point out with reference to the last functional test:

"..... the decisions show that even this test of public or governmental character of the function is not easy of application and does not invariably lead to the correct inference because the range of governmental activity is broad and varied and merely because an activity may be such as may legitimately be carried on by Government, it does not mean that a corporation, which is otherwise a private entity, would be an instrumentality or agency of Government by reason of carrying on such activity. In fact, it is difficult to distinguish between governmental functions and non- governmental functions. Perhaps the distinction between governmental and non-governmental functions is not valid any more in a social welfare State where the *laissez faire* is an outmoded concept and Herbert Spencer's social statics has no place. The contrast is rather between governmental activities which are private and private activities which are governmental. [*Mathew, J. Sukhdev v. Bhagatram* (supra) at p. 652]. But the public nature of the function, if impregnated with governmental character or "tied or entwined with Government" or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government. Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of the inference."

These observations of the court in the International Airport Authority's case (supra) have our full approval.

The tests for determining as to when a corporation can be said to be a instrumentality or agency of Government may now be called out from the judgment in the International Airport Authority's case. These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority's case 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 indicating that the corporation is an instrumentality or agency of 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 classifying the corporation as an 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." If on a consideration of these 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.

We find that the same view has been taken by Chinnappa Reddy, J. in a subsequent decision of this court in the U. P. Warehousing Corporation v. Vijay Narain and the observations made by the learned Judge in that case strongly reinforced the view we are taking particularly in the matrix of our constitutional system.

We may point out that it is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory

corporation created by a statute or it may be a Government Company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article

The decision in *Sukhdev Singh v. Bhagat Ram* (1975) 3 SCR 619 was also strongly relied upon by the learned counsel for respondents Nos. 6 to 8 but we fail to see how this decision can assist the respondents in repelling the reasoning in the International Airport Authority's case or contending that a company or society formed under a statute can never come within the meaning of the expression "authority" in Article 12. That was a case relating to three juristic bodies, namely, the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation and the question was whether they were "State" under Article 12. Each of these three juristic bodies was a corporation created by a statute and the Court by majority held that they were "authorities" and therefore "State" within the meaning of Article 12. The Court in this case was not concerned with the question whether a company or society formed under a statute can be an "authority" or not and this decision does not therefore contain anything which might even remotely suggest that such a company or society can never be an "authority". On the contrary, the thrust of the logic in the decision, far from being restrictive, applies to all juristic persons alike, irrespective whether they are created by a statute or formed under a statute.

In *M.P. Cement Manufacturers' ... vs State Of Madhya Pradesh & Ors*,² the vires of Madhya Pradesh Upkar (Sanshodhan) Adhyadesh, 2001", i.e. the Ordinance of M.P, was challenged. The ordinance imposed a cess @ 20 paise per unit on the captive power producer on the total units of electrical energy produced.

The appellant in the first matter is an association representing the interest of its members who are cement manufacturers and owners of captive power plants. The connected appeals are by the captive power producers themselves. Court held:

“In the circumstances, we allow the appeals. Section 3(2) of the Upkar Adhiniyam, 1981 as introduced by the Amendment Act, 2001 and amended in 2003 is declared ultra vires the Constitution as being outside the legislative competence of the State.” Supreme Court thus allowed the petition, the appellants locus has not been an issue since they were a registered association competent to avail writ jurisdiction.

² AIR 2003 SC

West Bengal Head Masters Association v. UOI, is the writ petition³ challenging validity of the syllabus in the State of West Bengal. The question involved in this appeal is whether the revised History Syllabus for class VIII introduced by the West Bengal Board of Secondary Education, hereinafter referred to as the Board, with effect from January 1983 is valid or not. The appellant No. 1 is an Association registered under the Societies Registration Act. It is contended on behalf of the Board that these two Associations are not affected by the impugned revised syllabus, and that they cannot have any legal right. It is difficult to accept such a contention. Both these Associations are interested in the education of the boys and girls of the State and, if according to them, the syllabus has not been properly prepared they have, in pur opinion, locus standi to file a writ petition. In our view, any person interested in education may come to the High Court complaining about any irregularity or illegality committed by a statutory body entrusted with the education of children and seeking relief against such irregularity or illegality. There is, therefore, no substance in the contention of the respondents and it is rejected.

In Thanikachalam v. state of Madras, ⁴ a writ petition has been filed challenging the orders passed under the cooperative societies act

In the year 1989, a Full Bench of this Court, in R.Thamilarasan Etc., P.Kannan Etc., v. Director of Handlooms and Textiles, Madras and others, 1989 (1) LLJ 588, while deciding the issue as to whether a writ will lie against Co-operative Society, rendered a finding in negative, holding that no writ is maintainable against Co-operative Society, because it is not a statutory body or an authority or agency or instrumentality of the State, under Article 12 of the Constitution of India.

The Hon'ble Supreme Court in Andi Mukta Satguru Shree muktajee Vandas Swami Suvarna Jayanthi Mahotsav Sanmark and others v. V.R.Rudani and others, 1989 (2) LLJ 324 has observed that the words "any person or authority" used in Article 226 are therefore not to be confined only to statutory authorities and instrumentalities of the State, that the duty must be judged in the light of positive obligation owed by person or authority to the affected party, no matter by what means the duty is imposed, and if a positive obligation exists, mandamus cannot be denied. It has been further held that mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found, and that technicalities should not come in the way of granting that relief under Article 226. The contention urged on the maintainability of the writ petition was rejected.

Court observed:

“W.P.SR.Nos.58714, 61024 and 58948, 58716, 58950, 61026 and 61027 of 1999 have been referred by a Division Bench of this Court to consider the question, whether the writ. petition under Article 226 of the Constitution of India is maintainable against a Co-operative Society, after considering the decision of the earlier Full Bench of this Court in Ganesan. K. v. The

³ AIR 1983 SC.

⁴ AIR 2006 Mad.

Special Officer, Salem Co-op. Sugar Mills and 2 others, 1994 W.L.R. 509, wherein it was held that writ petition was not maintainable. Another Division Bench in R.Varadarajan v. Special Officer, K.C.L.D. Bank, 1995 (1) LLN 265, observed that the scope of Article 226 of the Constitution was wide enough even to issue directions against a private individual. A learned Single Judge of this Court in South Arcot District Central Co-op. Bank Ltd., Employers Association v. Deputy Commissioner of Labour, considering the decisions of the various High Courts held that when there is patent violation of the mandatory provisions of the Industrial Disputes Act constituting unfair labour practice, and when it is found that there is alteration of service conditions without following procedure laid down by law a writ petition is maintainable even against a Co-operative Society. The Division Bench of this Court in the above W.P.SR.Nos. has also considered the decision of the Apex Court in U.P.State Co-operative Land Development Rank Ltd., v. Chandra Bhan Dubey, , wherein it was observed that "the power conferred upon the High Courts under Article 226 of the Constitution is so vast, this Court has also laid down certain guidelines, and self-imposed limitations have been put there, subject to which the High Courts would exercise jurisdiction, but those guidelines cannot be mandatory in all circumstances. High Court does not interfere when an equally efficacious alternative remedy is available, or when there is established procedure to remedy a wrong or enforce a right".

10. References were also made to various other decisions namely., Shri Anadi Mukta Satguru Shree Muktajee Vandas Swami Suvarna Jayanthi Mahotsav Sanmark and others v. V.R.Rudani and others, , Kannan, P. Tamilarasan. H. & others v. The Director of Sugars, Office of the Director of Sugars, 1991 (2) LW 409 (FB), Varadarajan, A. v. Deputy Registrar, Co-op. Societies, Cuddalore and another, 1994 W.L.R. 516, Madras Labour Union v. Binny Ltd., 1995 (I) LLJ 588, Shanmuganathan v. The Registrar, Tamil University, Thanjavur, 1997 (II) MLJ 314, Air India Statutory Corporation and others v. United Labour Union and others, , Vinobha v. The Managing Director, Hindustan Photo Films, Ooty, 1998 (I) MLJ 168, A.K.Ansari v. Bharat Overseas Bank Ltd., 1999 (3) LLN 310 and N.Thomas v. Asst. Director of Handlooms and Textiles, 1999 Lab.I.C. 2638.

11. Law will be bereft of all its utility if it is thrown into a state of uncertainty, by reason of conflicting decisions, and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled. Keeping in mind, this view, this Larger Bench has been constituted to answer the question put forth as to whether the decision in Thamiiarasan's Case, 1989 (1) LLJ 588 which got the seal of approval by two Full Benches of this Court, requires re-consideration.”

Corut further observed, “In South Arcot District Central Co-operative Bank Ltd., Employees Association, Cuddalore v. Deputy Commissioner of Labour, Madras, 1999 (4) LLN 1102, it has been held that, "If a patent violation of the mandatory provisions of the Industrial Disputes Act, which will constitute unfair labour practice, and alteration of conditions of service without following the procedure laid down under section-9A of the Act, the powers of the High Court

under Article 226 of the Constitution of India can be exercised to rectify the mistake committed -by the management even if it is a co-operative society".

45. It will be fruitful to refer to the observations of Supreme Court in *Andi Mukta S.M.V.S.S.J.M.S. Trust v. V.R.Rudani*, 1989 (2) LLJ 324 which reads thus;

"Mandamus cannot be denied on the ground that the duty to be enforced is not imposed by charter, common law, custom or even contract. Judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found.

Technicalities should not come in the way of granting that relief under Article 226",

46. In *Madras Labour Union v. Binny Ltd.*, a Division bench of this Court, on an analysis of decisions of this Court and Supreme Court made out certain propositions, out of which we think it would be opt to quote the following:

1. A private body which is not a "State" within the meaning of Article 12 of the Constitution of India is not generally amenable to Article 226 of the Constitution.
2. A writ will issue against a private body to protect the fundamental rights declared under Part III of the Constitution of India.
3. A writ will issue in extraordinary circumstances if the monstrosity of the situation warrants it.

From the above discussion, it is also clear that the power under Article 226 has to be and should be extended to the helpless persons and that the technicalities should not come in their way. The litigant should not be the sufferer, in the absence of efficacious remedy."

CONCLUSION

Legislature, Executive and Judiciary are the vital organs of Government. However, government is endowed with functions to make laws with the term 'delegated legislation' and to adjudicate upon the matters of government servants. Tribunals also are also a quasi judicial entity governed by government. These legislative and judicial functions add to the plethora of functions of governance primarily exercised by the government. The question is whether the government can adjudicate upon matters of employees of the organizations which are directly or indirectly funded or governed by them? There is a specially constituted judicial system to adjudicate, however, these corporations some times evade the process of Courts due to technicalities causing grave breaches of fundamental and statutory rights of their employees. But a statutory corporation is not an entity established by the State. Rather, these are public bodies owned, controlled and managed by private individuals or citizens. Article 12 of the Constitution states 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

States and all local or other authorities within the territory of India or under the control of the Government of India. The term 'local or other authorities' is of wide significance and accompanies all those entities which are funded by the government or are established by a statute.

Hon'ble Supreme Court stated in *Ajay Hasia* that whether a corporation is incorporated by a statute or is a government established entity, they come within the purview of public authorities under Article 132 of the Constitution of India and thus are amenable to the writ jurisdiction of the Supreme court under Article 32 and of the High Courts under Article 226 of the Constitution. This judgment followed the *Ramana Dayaram Shetty v. International airport Authority* case of 1979.