

Virendra Kumar Srivastava vs U.P. Rajya Karmachari Kal. Nigam And ... on 23 November, 2004

Equivalent citations: AIR 2005 SUPREME COURT 411, 2004 AIR SCW 6628, 2005 ALL. L. J. 62, 2005 (1) SRJ 561, (2004) 10 JT 17 (SC), 2005 (2) SERVLJ 80 SC, (2005) 2 SERVLJ 80, 2005 (1) SLT 428, 2005 (1) SCC 149, 2004 (9) SCALE 623, 2004 (8) ACE 571, (2005) 1 LABLJ 544, (2005) 1 SERVLR 524, (2004) 103 FACLR 1203, (2005) 1 SCT 153, (2005) 1 SUPREME 550, (2005) 2 ESC 161, (2005) 1 ALL WC 228, (2005) 1 CURLR 1, (2004) 9 SCALE 623, (2005) 1 LAB LN 52, (2004) 107 FJR 979, 2005 SCC (L&S) 1

Author: D. M. Dharmadhikari

Bench: D. M. Dharmadhikari

CASE NO.:

Appeal (civil) 5047 of 2000

PETITIONER:

Virendra Kumar Srivastava

RESPONDENT:

U.P. Rajya Karmachari Kal. Nigam and another

DATE OF JUDGMENT: 23/11/2004

BENCH:

Y. K. Sabharwal & D. M. Dharmadhikari

JUDGMENT:

J U D G M E N T Dharmadhikari J.

The sole point that arises for decision in this appeal before us is whether U.P. Rajya Karmachari Kalyan Nigam [for short 'the Corporation'] is covered by the definition of "State" under Article 12 of the Constitution of India and is amenable to writ jurisdiction of the High Court under Article 226 of the Constitution of India.

The services of the petitioner from the post of Salesman in one of the stores of the Corporation have been terminated against which he approached the High Court of Allahabad. A preliminary objection was raised by the Corporation to the maintainability of writ petition on the ground that the Corporation does not fall in the definition of "State" under Article 12 of the Constitution.

Relying on decisions of the Lucknow Bench of the same Court in the case of Vijay Kumar Verma vs. U.P. Government Employees Welfare Corporation [Writ Petition No. 8246 (ss) of 1992 decided on 13.4.1993], the writ petition filed by the petitioner in the High Court was dismissed as not maintainable against which the petitioner has preferred the present appeal.

After passing of the impugned judgments by the High Court, the scope of Article 12 came up for consideration before a Constitution Bench comprising seven judges of this Court in the case of Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology [2002 (5) SCC 111]. The seven judges Constitution Bench in the case of Pradeep Kumar Biswas (supra) overruled the decision of five judges Constitution Bench in the case of Sabhajit Tewary vs. Union of India [1975 (1) SCC 485]. By explaining and relying on Constitution Bench decision in the case of Ajay Hasia vs. Khalid Mujid Sehravardi [1981 (1) SCC 722] by a majority of five against two this Court has laid down a multiple test for determining whether a particular Corporation or Body can be held to be included within the definition of "State" under Article 12 of the Constitution. Learned Sister Ruma Pal J., expressing the opinion of majority of Judges in the case of Pradeep Kumar Biswas (supra) on re-examination of all previous cases decided by this Court on the subject, laid down the multiple test in the following words :-

"The picture that ultimately emerges is that the tests formulated in Ajay Hasia's case (supra) are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

[Emphasis supplied] We may also refer to the minority view expressed by learned Brother Lahoti J. [as he then was] in the case of Pradeep Kumar Biswas (supra) because the examination of nature of difference in opinion between majority and minority view, for the purpose of present case, may be of some relevance. In the minority view, different tests are required to be applied in each particular case. The claim of a body as included within the definition of "State" based on it being a statutory body falling in the expression 'other authorities' is to be considered differently from claim of a body based on the principles propounded in the case of Ajay Hasia (Supra), that it is an 'instrumentality or agency' of the State. In the opinion of minority, the tests laid down in the case of Ajay Hasia (supra) are relevant only for the purpose of determining whether an entity is 'an instrumentality or an agency of the State'. The minority view is expressed thus :-

"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.
..... 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.

.....

The tests laid down in the case of *Ajay Hasia* (supra) 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.

In the background of the views expressed by majority and minority of the judges in the case of *Pradeep Kumar Biswas* (supra), we have to apply the laid down tests for determining the character of the Corporation involved in this case. We may clarify at the outset that the Corporation herein has not been created by any statute. It is merely a society registered under the Societies Registration Act of 1860. We will confine, therefore, our enquiry and decision as to whether the present Corporation is an 'instrumentality' or 'agency' of the State and can claim the status of 'State' as defined in Article 12 of the Constitution.

Object for which the Corporation was formed :-

The object of formation of the Corporation can be gathered from a letter dated 20.3.1965 sent by Chief Secretary of the State of Uttar Pradesh to all Heads of Departments, District Magistrates and Commissioners of Divisions, District Sessions Judges and all Principal Heads of the Offices in the State of Uttar Pradesh. In the contents of the letter, the object of formation of Corporation is stated to be as under :-

"I am directed to say that of late, there has been an abnormal rise in prices of almost all consumer goods, including food grains and being persons of fixed and inelastic income government servants are finding it difficult to balance their budget. One of the methods by which real and substantial relief can be given to them is to provide them with articles of daily requirement at reasonable rates.

Government have, therefore, decided to set up a corporation wholly financed by government for establishing a chain of stores throughout the State for supply of essential commodities to the State Government employees at normal rates. It is hoped that the scheme will not only provide substantial relief to the families of government employees, but will also help in bringing down prices generally. The salient features of the scheme are given in the attached note.

In the meantime the scheme will function under the supervision and management of a staff welfare Board at the Headquarters of Government. The Board will consist of the following :-

- i) Chief Secretary President
- ii) Commissioner and Secretary, Finance Department
- iii) Commissioner and Secretary, Food & Civil Supplies Deptt.
- iv) Secretary, Industries Department
- v) Secretary, Appointment Department
- vi) Director of Industries, U.P.
- vii) Deputy Secretary, Welfare Scheme, Chief Secretary's Branch Secretary To fulfil the above object contained in the letter of the Chief Secretary which was addressed to all departments of the State, a society was formed and registered under the Societies Registration Act, 1860 with the name of the society as Uttar Pradesh Rajya Karamchari Kalyan Nigam. In the Memorandum of Association of the Corporation in clause(3), objects of the Corporation are stated to be as under :-
 - i) To carry on and promote activities aimed at the welfare of the employees of the State Government and to equip itself with capital, credit, means, resources and technical and managerial assistance for this purpose.
 - ii) To provide and help for the welfare of the employees, the places of interests, recreation, sports and medical attendance and to subscribe money to or for, or otherwise help any other charitable and benevolent object which is in the opinion of the Corporation useful to the employees.
 - iii) To establish and run stores, shops, canteens for carrying on retail business in essential commodities of daily use and other consumer goods without profit motive in such localities within the State of Uttar Pradesh as the Board of Directors of the Corporation may decide from time to time.

iv) To help by planning sales of the said commodities in a no profit, no loss basis as a whole in maintaining the prices of such commodities at a reasonable level to the advantage of the community as a whole.

v) To act as an agent or stockist on behalf of any government or any institution, manufacturer or concern for procurement, supply and distribution of consumer goods.

vi) To make or enter into arrangements for transport, processing, manufacturing, grading, packing and distribution of consumer goods.

vii) To acquire by purchase or on lease or hire or by licences or otherwise, buildings and premises required for the activities of the Corporation.

viii) To lease or let on hire, mortgage, sale, pledge or transfer by licence or otherwise and lands, buildings or other property moveable or immoveable.

ix) To enter into any arrangements with the Union or the State Government or any local authority or any person for the purpose of carrying out the objects of the Corporation or furthering its interests and to obtain from such government of authority or person subsidizing, loans, indemnities, grants, contract licences rights, concessions, privileges or immunities which the Corporation may think it derisable to obtain and exercise and comply with any such arrangements, rights privileges and concessions.

x) To erect buildings or other structures on lands acquired by the Corporation in any manner.

xi) To accept gifts, donations etc., of any nature, whatsoever.

xii) To lend or borrow money on such terms and conditions as it thinks fits.

xiii) To draw, make, accept, endorse, discount, execute, and issue cheques, promissory notes, bills of exchange or other negotiable or transferable instruments.

xiv) To do all such other matters and things as may appear to be incidental or conducive to the attainment of the above objects or any of them or consequential upon the exercise of its powers or discharge of its duties.

The first members including office bearers of the governing body with the names, addresses and occupation indicate that they are working for the Corporation ex officio holding different executive posts in different departments of the State of Uttar Pradesh. The Rules of the Association of the Corporation are also registered. Rule 5 makes it clear that members of the Corporation or the Board who are members by virtue of their offices which they hold in the State shall stand terminated when

they cease to hold the office in the State and their successors to that office shall become members. The names of the members and office bearers of the governing body are as under :-

1. Shri K. K. Dass Chief Secretary to Govt. Chairman of the Ex officio Board Board
2. Shri V. M. Bhide Commissioner & Secretary, Finance Deptt. UP Govt. Ex officio Director
3. Shri H. C. Saxena Secretary, Industries Deptt.

Ex officio	Director
------------	----------
4. Shri Bhagwant Singh
Commissioner & Secretary,
P&C Deptt. UP Govt. Ex. Officio

	Director
--	----------
5. Shri B. B. Malik
Director of Industries, UP
Ex officio

	Director
--	----------
6. Shri B. L. Chak
Secretary, Appt. & G.A.D.
Ex officio

	Director
--	----------
7. Shri S. B. Saran
Dy. Secretary, Chief Secretaries
Branch, UP Govt. Ex officio

	Exe. Director of the Board
--	-------------------------------

The most important is clause 4 of the Memorandum of Association of the Corporation which reads thus :-

"If on the winding up or dissolution of the Corporation there shall remain, after the satisfaction of its debts and liabilities, any property, the same shall not be paid to any of its members or distributed amongst them but subject to the provisions of section 14 of the Act shall be disposed of in such manner as the State Government may determine."

Rule 4 of the Rules of Association of the Corporation is also relevant for the purpose of finding out the real nature of the Corporation. It reads thus :-

"The Board may with the previous approval of the State Government admit any employee of the State Government as member of the Corporation."

Similarly, rule 6 is also relevant and reads thus :-

"The Board may, subject to its general control and supervision and subject to such restrictions as it may like to impose, delegate all or any of its powers to any one or more members of the Board. The Board may, likewise delegate any of its powers, not being the powers under clause (b), (c), (h), (i) and (k) of sub-rule 5 of rule 3 of the said Rules in favour of any officer of the Corporation or to an officer of the State Government, not below the rank of a District Magistrate (which will include an Additional District Magistrate also)."

[Emphasis supplied] Similarly, rule 12 confers powers of the delegation on Executive Director in favour of any officer of the Corporation or the State. It reads thus :-

"The Executive Director may, subject to his general control and supervision and such restrictions as he may like to impose delegate all or any of his powers to any officer of the Corporation or of the State Government."

Rule 17 dealing with amendments of the rules puts restriction on amendments or variation of the rules which can be done only with prior approval of the State Government :-

Rule 17 "The Corporation may add to, amend, vary or delete the rules.

Provided that no such rules shall be added to, amended, varied and deleted unless a resolution to that effect has been passed by not less than 3/5th of the members present in the meeting of the Corporation specially called for that purpose and provided further that no such rules shall be added to, amended, varied or deleted without the prior approval of the State Government."

[Emphasis supplied] So far as funding and financing of the Corporation are concerned, petitioner has filed additional documents in this appeal containing various grants annually made from time to time by the State Government to the Corporation. Letter dated 14.1.1992 of Joint Secretary, Govt. of U.P. to the Executive Director of the Corporation informed that additional grant of 50 lacs was granted for the financial year 1991-92 for expenditure of 100% amount on the salary allowances of employees working in the Headquarters of the Corporation and 50% of the amount spent on salaries and allowances of employees working at the canteens. By letter dated 15.9.1994 the State Government granted sanction for revival of the post of Assistant Director earlier sanctioned in the year 1980 for the Corporation. By letter 6.9.1997, the earlier grant of 75% in the year 1996-97 was increased to cent percent to meet the expenditure of salaries and allowances of employees of canteens run by the Corporation. By letter dated 16.12.1999, the Secretary of Government of Uttar Pradesh wrote to the Commissioner, Food and Supplies Deptt. And the Executive Director of the Corporation that to solve the problem of pending bills of the Corporation with the Secretariat Administrative Department, against the total bill of Rs.1.12 crores, the Food Department will immediately pay the amount from its trading account which will be reimbursed to the Department on receipt of budget. It

was also directed that a sum of Rs. 45 lacs every quarter shall be made available by the Food Department to the Corporation on which the Corporation will pay interest at the rate of 12.34%. By letter dated 16.9.1999, the Secretary informed the Commissioner of Food and Supplies Department and Executive Director of the Corporation that the Food Department will provide amount up to Rs.10 crores from its trading account to the Corporation as working capital for its business and Food Department will be responsible for return of the working capital made available to the Corporation within time. The letter, however, directs the Corporation to return the said amount with interest through a cheque to Commissioner, Department of Food and Civil Supplies before 31.3.2000. On the expenditure of the working capital provided some restrictions have been placed which read thus:-

"Out of this working capital, the Corporation will purchase products already approved or to be approved in future by the Product Approval Committee of U.P. State Employees Welfare Corporation constituted vide GO dated 4.9.1999. The Food Commissioner will separately maintain account for the arrangement and will ensure that it functions smoothly."

Letter sent on 7.3.2001 by the Executive Director of the Corporation to all District Magistrates indicates overall control on the activities of the Corporation by the functionaries of the State. The contents of the letter directing physical verification of stocks of essential commodities in various stores of the Corporation through the Commissioner and Secretary of Food and one gazetted officer nominated by District Magistrate is a clear pointer to the pervasive control exercised by the State and its officers on the functioning and activities of the Corporation.

The multiple test which is to be applied to ascertain the character of a body as falling within Article 12 or outside as laid down by majority view in Pradeep Kumar Biswas case (supra) is to ascertain nature of financial, functional and administrative control of the State over it and whether it is dominated by the State Government and the control can be said to be so deep and pervasive as described the minority view in Pradeep Kumar Biswas case (supra) so as to satisfy the court 'of brooding presence of the government' on the activities of the Corporation.

We may, therefore, briefly indicate the evidence produced by the parties relevant to the multiple test to determine the composition and character of the Corporation :-

Administrative Control :-

The Corporation was formed by a decision of the government with the object of providing articles of daily requirement to the government servants at reasonable rates. In this respect, the contents of the minutes of the meeting held on 1.10.1971 in the Chairmanship of Minister of Food for considering the note prepared by the Cabinet of the Government with Chief Secretary, Commissioner and Secretary to Food and Commissioner and Secretary, Finance is revealing. In the course of meeting, the Chief Secretary suggested that the finances of the Corporation can be

raised by raising share capital to be sold to the government employees. The Food Secretary thereupon objected to the proposal saying that the Corporation is a government organization and raising of share capital would change its character from government institution to a cooperative institution. The minutes also record the suggestion of the Chief Secretary that as the government employees are being provided facility of making them available articles of daily need on reasonable price apart from dearness allowance in cash, the activities of the Corporation and the object for which its set up, should be made known to the Pay Commission.

By notification dated 01.4.1987, issued in exercise of powers under sub-section (3) of section 3 of the U.P. Shops and Commercial Establishments Act, 1962, all stores, depots and canteens run by the Corporation have been exempted from the provisions of section 4(b) of the said Act.

From the memorandum of the Articles of Association, it is clear that one of its objects is that it can act as an agent or stockist on behalf of the government. The members and office bearers of the Corporation are all executive officers of the State representing different departments concerned with civil supplies. They are on the management of the Corporation in their capacity as officers of the State Government. In accordance with Rule 4 of the Rules of Association, other employees of the State Government can be included as members of the Corporation only with the previous approval of the State Government. In accordance with rule 6, the Board may delegate specified powers to the officers of the State Government not below the rank of District Magistrate or Addl. District Magistrate. Similarly, in accordance with rule 12, Executive Director can delegate his powers to any officers of the State Government. The rules of the Corporation can be added to, amended, varied or deleted only with prior approval of the State Government. The above mentioned objects and the provisions in the memorandum and rules of the Corporation clearly go to show that the administrative control of the Corporation vests in the Executive Officers representing different departments of the State.

Financial Control :-

The financial control of the Corporation is to a large extent with the State Government. Hundred percent grant is made for payment of the salary of employees at the Headquarters of the Corporation and initially 50% grant was given for employees working in the canteens which was later increased to 75% and lastly cent percent. Working capital to the Corporation was made available by the Food Department to the extent of 10 crores and although the amount is returnable but its expenditure and reimbursement is to be ensured by Secretariat Administrative Department of the State of U.P. In the letter dated 16.9.1999, working capital of 10 cores is provided to the Corporation with the responsibility placed on the Food Department for its return.

Admittedly, therefore, there is total financial support to the Corporation of the State of U.P. although it is expected that the Corporation will generate sufficient amount to be able to run on 'no profit no loss' basis.

Functional Control :-

There is complete functional control of the Corporation by the State which is evident from the fact that Executive Officers of the State are ex officio members and office bearers of the Corporation. From the minutes of the meeting held in the Chairmanship of Minister for Food with Commissioner and Secretary of Food and Civil Supplies Department, there is an indication that the government has taken responsibility to finance and fund the Corporation. The proposal, therefore, to raise share capital was declined. For auditing the accounts of the Corporation, services of Chief Finance Officer of the State were made available to the Corporation.

Most revealing is the letter dated 07.3.2000 mentioned above which describes the Corporation as an undertaking of the State and directs physical verification of the stocks in stores of the Corporation to be done by Gazetted Officer or Incharge Officer to be nominated by District Magistrate for the District in which the depot or store is operated. More important to indicate administrative and functional control is clause (4) of the Memorandum of Association which provides that on winding up or dissolution of the Corporation, the property available after satisfaction of debts and liabilities will not go to its members but shall be at the disposal of the State Government. As observed in the minority view in the case of Pradeep Kumar Biswas (supra) if the corporate mask of the registered society is removed it clearly exposes the real nature of the Corporation as entity of the State.

On behalf of the Corporation, learned counsel highlighted the Constitution of the Corporation and the Articles of the Association which regulate its affairs. It is submitted that it is an autonomous body. The Corporation is not engaged in any State function of vital importance making available daily needs of the government servants which is an activity like any other commercial activity. It is also submitted that merely because there is 'patronage', encouragement, push or recognition to the Corporation of the State, it would not make it as an entity following within the definition of 'State' under Article 12 of the Constitution.

We have in detail and very carefully examined the Constitution and Articles of Association of the Corporation by which it is regulated.

On detailed examination of the administrative, financial and functional control of the Corporation, we have no manner of doubt that it is nothing but an 'instrumentality and agency of the State' and the control of the State is not only 'regulatory' but it is 'deep and pervasive' in the sense that it is formed with the object of catering to the needs of the government employees as a supplement to their salaries and other perks. The top executives of the government department ex officio are members and office bearers of the Corporation. The Corporation is fully supported financially and

administratively by the State and its authorities. Even day-to-day functioning of the Corporation is watched, supervised and controlled by the various departmental authorities of the State particularly the Department of Food and Civil Supplies. The multiple test indicated to be applied both by the majority and minority view in Pradeep Kumar Biswas (supra) is fully satisfied in the present case for recording a conclusion by us that the Corporation is covered as an 'agency and instrumentality of the State' in the definition of 'State' under Article 12 of the Constitution. It is, therefore, amenable to the writ petition of the High Court under Article 226 of the Constitution.

Before parting with the case, it is necessary for us to clarify that even though a body, entity or Corporation is held to be a 'State' within the definition of Article 12 of the Constitution what relief to the aggrieved person or employee of such a body or entity is to be granted is a subject matter in each case for the court to determine on the basis of the structure of that society and also its financial capability and viability. The subject of denial or grant of relief partially or fully has to be decided in each particular case by the court dealing with the grievances brought by an aggrieved person against the bodies covered by the definition of 'State' under Article 12 of the Constitution.

In the result, the appeal is allowed. The impugned order dated 30.9.1999 of the High Court dismissing the writ petition on the preliminary ground based on Article 12 of the Constitution is set aside. The case is remitted to the High Court for taking a decision on the merits of the case. In the circumstances, the parties shall bear their own costs in this Court.