Supreme Court of India
Som Prakash Rekhi vs Union Of India & Anr on 13 November, 1980
Equivalent citations: 1981 AIR 212, 1981 SCR (2) 111
Author: V Krishnaiyer
Bench: Krishnaiyer, V.R.

PETITIONER:
SOM PRAKASH REKHI

Vs.

RESPONDENT:
UNION OF INDIA & ANR.

DATE OF JUDGMENT13/11/1980

BENCH:
KRISHNAIYER, V.R.
BENCH:
KRISHNAIYER, V.R.
REDDY, O. CHINNAPPA (J)
PATHAK, R.S.

CITATION:
1981 AIR 212 1981 SCR (2) 111
1981 SCC (1) 449
CITATOR INFO :
RF 1986 SC1499 (16)
R 1986 SC1571 (55)
R 1987 SC 51 (3)
R 1987 SC1086 (18)
APL 1988 SC 469 (9,10)
F 1989 SC1642 (24)
RF 1990 SC1167 (10,14)
RF 1992 SC 76 (2)

ACT:
Constitution of India-Burmah Shell (Acquisition of Undertakings in India) Act, 1976-Company acquired by the Government and vested in a statutory corporation-Corporation if State-Test for determining whether a body is State within the meaning of article 12.

HEADNOTE:
Under a voluntary retirement scheme in force in the company the petitioner, a clerk in Burmah Shell Oil Storage Ltd., retired voluntarily after qualifying for pension. The pension payable to him was regulated by the terms of a trust deed of 1950 under which a pension fund was set up and regulations were made for its administration. The petitioner

was also covered by a scheme under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and to gratuity under the Payment of Gratuity Act, 1972.

The annual pension to which he was entitled under the trust deed, without making the authorised deductions as provided under regulation 16 of the trust deed, worked out to a sum of Rs. 165.99 per mensem. He was also paid supplementary retirement benefit of Rs. 86/- per month for a period of 13 months after his retirement which was stopped thereafter.

The employer informed the petitioner that from out of his pension of Rs. 165.99 two deductions were made, one of which was on account of employees provident fund payment made to the pensioner and the other on account of payment of gratuity with the result the pension payable to him was shown as Rs. 40.05. The company also cut off the monthly payment of Rs. 86/- which was paid as supplementary retirement benefit on the score that it was ex gratia, discretionary and liable to be stopped at any time by the employer.

In the meantime the company was statutorily taken over by force of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976. Thereafter the Central Government took steps to vest the undertaking in the second respondent, the Bharat Petroleum, which then became the statutory successor of the petitioner's employer. His pensionary rights such as he had, therefore, became claimable from the second respondent.

A preliminary objection was raised on behalf of the corporation that no writ would lie against the second respondent since it is neither a government department nor a statutory corporation but just a company.

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HELD : By the Court :

The petitioner is entitled to the payment of full pension.

(per majority Krishna Iyer and Chinnappa Reddy, JJ Pathak, J dissenting).

1. The Bharat Petroleum is State within the meaning of Article 12 of the Constitution and a writ will lie against it under Article 32. [128A]

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(a) The settled position in law is that any authority under the control of Government of India comes within the definition of State. On the appointed day the right title and interest in Burmah Shell did vest in the Central Government and by virtue of section 3 the Central Government was the transferee of the undertaking. While the formal ownership was cast in the corporate mould, the reality reaches down to State control. The core fact is that the Central Government, through section 7 chose to make over its own property to its own offspring. Therefore, the Burmah Shell though a government company is but the alter ego of

the Central Government and must, therefore, be treated as definitionally caught in the net of State since a juristic veil worn for certain legal purposes cannot obliterate the true character of the entity for purposes of constitutional law. [121A; G; 124 D-E]

(b) Corporate personality is a reality and not an illusion or fictitious construction of the law. It is a legal person. Merely because a company or other legal person has functional and jural individuality for certain purposes and in certain areas of law, it does not necessarily follow that for the effective enforcement of fundamental rights under the constitutional scheme, the Court should not scan the real character of that entity. In the instant case section 7 gives a statutory recognition and a status above a mere government company. If the entity is no more than a company under the Company Law or society under the law relating to registered societies or cooperative societies one cannot call it an authority. [124F; 125B, E]

(c) An authority in administrative law is a body having jurisdiction in certain matters of a public nature. Therefore, the ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons must be present ab extra to make a person an "authority". When the person is an `agent or instrument of the functions of the State' the power is public. [125F-H]

Sometimes the test is formulated, by asking whether the corporation is formed by a statute or under a statute. The true test is not how legal person is born but why it is created. Apart from discharging functions or doing business as the proxy of the State there must be an element of ability to affect legal relations by virtue of power vested in it by law. [126A-B]

(d) In the instant case sections 3and 7 clothe the company with State functions. Section 7 contemplates that the company should step into the shoes of the executive power of the State. The legislative history of the corporation shows that it is more than a mere company registered under the Companies Act. Matters like conditions of service of employees, adjudication of disputes relating to employees, superannuation and welfare funds and so on are regulated statutorily unlike in the case of ordinary companies. Sections 9 and 10 create rights and duties vis a vis the government company itself apart from the Companies Act. Section 11 specifically gives the Act primacy vis a vis other laws. Section 12 clothes the Government company with power to take delivery of the property of Burmah Shell from every person in whose possession, custody or control such property may be. Whatever its character antecedent to the Act all the relevant provisions have transformed it into an instrumentality of the Central Government with a strong indicia of power to make it an "authority". It is a limb of

the Government, an agency of the State, a vicarious creature of statute. [126C-H, 127B-C]

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2. Some of the tests laid down by this Court for deciding whether a body is State within the meaning of Article 12 are :

(i) 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 the Government;

(ii) 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.

(iii) The existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.

(iv) Whether the corporation enjoys monopoly status which is State conferred or State protected is a relevant factor.

(v) If the functions of the corporation are important public functions and related to governmental functions it would be a relevant factor in classifying the corporation as instrumentality or agency of the Government.

(vi) If a department of Government is transferred to a corporation, it would be a strong factor supportive of the inference that it is an instrumentality of the State. [137E-H]

(vii) Where the chemistry of the corporate body answers the test of State it comes within the definition of Article 12. [136D]

(viii) Whether the legal person is a corporation created by a statute, as distinguished from under a statute is not an important criterion although it may be an indicium. [144H]

Airport Authority [1979] 3 S.C.C. 489, UP Warehousing Corporation case (Managing Director, U.P. Warehousing Corpn. v. V. N. Vajpayee) [1980] 3 S.C.C. 459 & Sukhdev Singh v. Bhagatram [1975] 3 S.C.R. 619 referred to.

Rajasthan Electricity Board v. Mohan Lal [1967] 3 S.C.R. 377, Sukhdev v. Bhagatram [1975] 3 S.C.R. 619, Praga Tool Corporation v. C. A. Immanuel [1969] 3 S.C.R. 773; Heavy Engineering Mazdoor Union v. State of Bihar [1969] 3 S.C.R. 995, S. L. Aggarwal v. General Manager, Hindustan Steel Ltd. [1970] 3 S.C.R. 363 & Sabhajit Tewari v. Union of India [1975] 3 S.C.R. 616 distinguished.

3(a) Having regard to the directive in Article 38 and the amplitude of the other articles in part IV Government may appropriately embark upon almost any activity which in a non-socialist republic may fall within the private sector. Any person's employment, entertainment, travel, rest and leisure, hospital facility and funeral service may be controlled by the State and if all these enterprises are

executed through government companies, bureaus, societies, councils, institutes and homes, the citizen may forfeit his fundamental freedoms vis a vis these strange beings which are government in fact but corporate in form. If only fundamental rights were forbidden access to corporations, companies, bureaus, institutes, councils and kindred bodies which act as agencies of the administration there may be a breakdown of the rule of law and the constitutional order in a large sector of governmental activity carried on under the guise of `jural persons'. It may
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pave the way for a new tyranny by arbitrary administrators operated from behind by Government but unaccountable to part III of the Constitution. The Court cannot assent to an interpretation which leads to such a disastrous conclusion unless the language of Article 12 offers no other alternative. [147C-F]

(b) It is dangerous to exonerate corporations from the need to have constitutional conscience; and so that interpretation, language permitting, which makes governmental agencies, whatever their mein, amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperio. [148A-B]

(c) The common-sense signification of the expression "other authorities under the control of the Government of India" is plain and there is no reason to make exclusions on sophisticated grounds such as that the legal person must be a statutory corporation, must have power to make laws, must be created by and not under a statute and so on. [148C]

4(a) It is clear from section 10 which relates to the provident fund, pension, welfare fund and the like that the second respondent has made provision for the rights and interests of the beneficiaries of the trust established by Burmah Shell for the benefit of persons employed by it. Sub-section (1) puts this matter beyond doubt. This obligation of the second respondent is a statutory one and having regard to the provisions of section 11, it cannot be affected by any instrument or decree or order. The stautory continuation of a pre-existing liability to pay pension, provident fund or gratuity, cannot be avoided having regard to section 10. [150D-E]

(b) Assuming that regulation 16 authorities deduction and that discretionary payments, although enjoyed by the employees are liable to be stopped section 12 of the Provident Fund Act forbids any such reduction or deduction out of the benefits in the nature of old age pension on the score of the payment of contribution to the provident fund. The benignant provision contained in section 12 must receive a benignant construction and even if two interpretations are permissible, that which furthers the beneficial object should be preferred. From that perspective the inference is reasonable that the total quantum of benefits in the nature

of old age pension, gratuity or provident fund, shall not be reduced by reason only of the liability of the employer for payment of contribution to the fund. The section prevails over the trust deed. The provident fund accrues by statutory force and section 12 overrides any agreement authorising deductions. The expression `instrument' contained in section 15 covers a trust deed and notwithstanding the deduction that may be sanctioned by the trust deed, the overriding effect of section 14 preserves the pension and immunises it against any deduction attributable to the statutory payment of the provident fund. The deduction made by the second respondent is in that event illegal. [151A-H]

(c) If regulation 16 is a provision which imposes a cut in certain eventualities it is possible to hold that the employee has a certain pensionary right. But if he draws provident fund or gratuity that pension will be pared down by a separate rule of deduction from the pension. It follows that there is no straining of the language of the regulations to mean, firstly, a right to pension quantified in certain manner and, secondly, a right in the Management to make deduction from out of that pension if other retiral benefits are drawn by the employee. That appears to be the pension scheme.

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If this be correct, there is no substance in the argument that the pension itself is automatically reduced into a smaller scale of pension on the drawl of provident fund or gratuity. Pension is one thing, deduction is another. The latter is independent of pension and operates on the pension to amputate it, as it were. If a law forbids such cut or amputation the pension remains intact. [152B-D]

(d) The payment of gratuity or provident fund should not occasion any deduction from the pension as a "set-off". Otherwise, the solemn statutory provisions ensuring provident fund and gratuity become illusory. Pensions are paid out of regard for past meritorious services. The root of gratuity and the foundation of provident fund are different. Each one is a salutary benefaction statutorily guaranteed independently of the other. Even assuming that by private treaty parties had otherwise agreed to deductions before the coming into force of these beneficial enactments they cannot now be deprivatory. It is precisely to guard against such mischief that the non-obstante and overriding provisions are engrafted on these statutes. [152F-G]

(e) It is not open to the second respondent to deduct from the full pension any sum based upon regulation 16 read with regulation 13. If regulation 16 which now has acquired statutory flavour, having been adapted and continued by statutory rules, operates contrary to the provisions of the P.F. Act and the Gratuity Act, it must fail as invalid. [153C]

(f) What is discretionary depends on the discretion of the employer. But that power when exercised by an agency of

government like the second respondent, must be based upon good faith and due care. If as a measure of reprisal or provoked by the drawl of gratuity, or by resort to legal authorities, such supplementary benefit is struck off, it will cease to be bona fide or valid. [153D-E]

Pathak, J. (dissenting)

On the merits the petitioner should be granted relief as proposed by the majority. [154 G]

It is difficult to accept the proposition that the Bharat Petroleum Corporation Limited is a "State" within the meaning of Article 12 of the Constitution, but the matter appears to be concluded because of the direction taken by the law since Ramana Dayaram Shetty v. International Airport Authority [1979] 3 S.C.R. 489 a wider range of debate on the fundamental principles involved in the issue would have been welcomed in view of the implications flowing from the definition of a "government company" in the Companies Act, 1956. [154 D]

The provisions of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 do not alter the basic nature of a "government company". They are provisions which could well have been applied to a private corporation, if the Act had selected one for vesting the undertaking in it. Had that been done, they would not have made the private corporation a State. [154F]

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petition No. 1212 of 1977. (Under Article 32 of the Constitution).

Petitioner in Person.

S. Markendeya and Miss A. Subhashini for Respondent No.

1. G. B. Pai, O. C. Mathur and K. J. John for Respondent No. 2.

P. R. Mridul, M. K. Ramamurthi and Jitendra Sharma for the Intervener (The Petroleum Workers' Union) P. N. Tiwari (Secretary of Union) for the Intervener (Petroleum Employees' Union).

B. B. Sawhney and B. P. Ghosh for the Intervener (C. H. Kewalramani).

The Judgment of V. R. Krishna Iyer and O. C. Reddy, JJ. was delivered by Krishna Iyer, J. Pathak, J. gave a dissenting Opinion.

KRISHNA IYER, J.-Three seminal issues arise in this little lis harbouring larger principles. We may state them, each with a quote to drive home the social stakes, and then proceed to the pedestrian factual-legal narrative and discussion.

> "They (corporations) cannot commit treason, nor be out-lawed, nor excommunicated, for they have no souls."
>
> (Edward Coke, Sutton's Hospital Case) A legal power, which projects an awesome portent has been sprung upon the court by the defending respondent-. The Bharat Petroleum Corporation Ltd (the Corporation, for short)-as to whether a writ will issue under Art. 32 of the Constitution against a government company, belonging, as it does, to an increasing tribe of soulless ubiquity and claiming, as it does, to constitutional immunity. This is the first issue to which he will address ourselves.

Jawaharlal Nehru warned the Constituent Assembly about the problem of poverty and social change :

> The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and sufferings, so long our work will not be over.

The second question which claims our attention turns on the petitioner's plea of alleged stultification of Art. 41 by the State itself reincarnating as a government company, by defending the paring down the pension of the petitioner to a pathetic pittance thus sterilising a directive principle to a decorative paper.

Law cannot stand aside from the social changes around it.

(Justice Brennan in Roth v. United States 354 U.S. 476) The third problem, not humdrum but heuristic, turns on the construction of the relevant legislations and regulations covered by the writ petition, remembering the social dynamics of the law of statutory interpretation.

This writ petition under Art. 32 relates to a poor employee's small pension on retirement and the legality of the deductions effected by the employer which make the net sum payable traumatically trivial (Rs. 40/-). A principle of wider application is involved beyond the individual's pensionary fate.

The petitioner was employed as a clerk in the Burmah Shell Oil Storage Ltd., (Burmah Shell, for short) and retired betimes (at 50) after qualifying for a pension, on April 1, 1973. He was also covered by a scheme under the Employees Provident Funds and Family Pension Fund Act, 1952 (for short, the PF Act). The employer undertaking was statutorily taken over by force of The Burmah Shell (Acquisition of Undertakings in India) Act, 1976 (hereinafter called the Act). Thereafter, the Central Government, acting under the statute, took necessary steps for the vesting of the Undertaking in the second respondent, the Corporation and became the statutory successor of the petitioner's employer. His pensionary rights, such as he had, therefore, became claimable from the second respondent. What was the quantum ? Was any cut illegally effected by Burmah Shell and

continued by respondent 2 ? Could a writ be issued against the second respondent in respect of the cut ? These are the questions argued before us. The petitioner- pensioner, being too poor, Shri Parekh, assigned by the Legal Aid Society, appeared promptly and argued passionately. At a re-hearing, the petitioner preferred to make a few brief supplementary submissions on his own.

The pensionary provision for the Burmah Shell employees depended on the terms of a Trust Deed of 1950 under which a Pension Fund was set up and regulations were made for its administration. Regulations 13 and 15 entitled the petitioner to pension and contained the formula for quantification. Regulation 13 has a significant clause : "less the authorised deductions specified in reg. 16, namely .....". The bone of contention between the parties is about these deductions and we may set out this Regulation (relevant part) even here :

> 16. The authorised deductions to be made in calculating the amount of a non-contributing member's pension shall be as follows :
>
> (1) A sum equal to four per cent of such amount standing to the credit of the member at the relevant date in any Provident Fund as represents any Company's contributions to that fund in respect of the period of the member's Accredited Service (including bonuses and interest on such contributions upto that date). (2) A sum equal to four per cent of any amount which before the relevant date the member has withdrawn from a Provident Fund in so far as such withdrawal is under the Rules of the Provident Fund charged against the period of the member's Accredited Service (including bonuses and interest thereon) or has been paid out to him during his Accredited Service under the Rules of Provident Fund, together with interest thereon from the date of such withdrawal or receipt to the relevant date.
>
> (3) If the Company so elects, a sum not exceeding six per cent of the amount of any payments which any company has made or may make or which any company shall be or have been required by law to make to the member in connection with the termination of his service with that company together with interest thereon from the date of payments down to the relevant date.

The Pension Fund, on the vesting of Burmah Shell in Respondent 2, came to be administered by the latter under the Burmah Shell (Acquisition of Undertakings in India) (Administration of Fund) Rules, 1976. The Rules provided for the Government company, viz. Respondent 2 acting in accordance with the provisions of the rules and regulations applicable to or of any law governing the respective Provident Fund, Welfare Fund or other fund and in force immediately before the 24th day of January, 1976.

If any legal provision overrode the regulation authorising deductions the 2nd respondent could and should act according to the legislation. Thus, the statutory rules for administering pensionary matters direct Respondent 2 to conform to `any law' governing provident fund and like items. And if, as is contended before us by the petitioner, such law exists, the regulation based deduction ceases to be an `authorised deduction'.

By virtue of reg. 13, the petitioner was entitled to a pension of Rs. 165.99 subject to certain deductions which form the controversy in this case. He was also being paid Supplementary Retirement Benefit of Rs. 86/- per month for a period of 13 months after his retirement which was stopped thereafter. This stoppage is also assailed before us.

By letter dated September 25, 1974, the employer (Burmah Shell) explained that from out of the pension of Rs. 165.99 two deductions were authorised by reg. 16. One such deduction was based on reg. 16(1) because of Employees Provident Fund payment to the pensioner and the other rested on reg. 16(3) on account of payment of gratuity. Resultantly, the `pension payable' was shown as Rs. 40.05.

The case becomes clear if one more fact is mentioned. The petitioner claimed and received his Provident Fund amount under the PF Act and recovered a gratuity amount due under the Payment of Gratuity Act, 1972 (for short, the Gratuity Act). It is necessary to mention that Burmah Shell was refused exemption, under s. 5, from the operation of this Act (vide Annexure F to the Writ Petition). In short, two sums, one under the PF Act and the other under the Gratuity Act, were drawn by the pensioner. Consequent on this, Burmah Shell made 2 deductions from the petitioner's pension, taking its stand on reg. 16 read with reg. 13 already referred to. Indeed, the company went even beyond this, in its letter of May 8, 1974, by cutting off the monthly payment of Rs. 86/- paid as Supplementary Retirement Benefit on the score that it was ex gratia, discretionary and liable to be stopped any time by the employer.

The petitioner was intimated by the Burmah Shell that consequent on his drawal of provident fund and gratuity benefits, the quantum of his pension would suffer a pro tanto shrinkage, leaving a monthly puny pension of Rs. 40/-. Since no superannuated soul can survive, in Indian indigence and inflationary spiral, on Rs. 40/- per month, the petitioner has come to this court challenging the deductions from his original pension as illegal and inhuman and demanding restoration of the full sum which he was originally drawing. His right to property under Art. 19 has been violated, he claims.

It may well be, as urged by the Corporation, that if reg. 16 does govern, the deductions are warranted. Likewise, if the Supplementary Retiral Benefit is purely a mercy gesture, savouring of no manner of right nor subject to restrictions on discretionary exercise, the sudden stoppage of that sum perhaps not illegal. It may be heartless, but not necessarily lawless, for a prosperous undertaking, now in the public sector, which pays over- generous salaries to higher officials and liberal scales even to its lesser employees, to destroy the pensionary survival of an erstwhile employee who had served 28 long and fruitful years of his limited span of life for the profit of his employer.

Justice according to law being the rule, let us examine the validity of the rival contentions. The employer relies on reg. 16 and the pensioner rests his claim on its invalidity. The mantle of `Burmah Shell' has statutorily fallen on `Bharat Petroleum' and it cannot be controverted that if reg. 16, read with reg. 13, be valid the second respondent can insist on its `pound of flesh' and claim lawfully that the deductions made are `authorised' and the discretion to stop supplementary pension is charity

which can be choked off at pleasure or anger.

A preliminary objection has been raised by Shri G. B. Pai that no writ will lie against the second respondent since it is neither a government department nor a statutory corporation but just a company and so the court should reject out of hand this proceeding under Art. 32. We do see the force of this contention, notwithstanding the observations in the Airport Authority Case, that the status of `State' will attach to the government companies like the second respondent.

Let us first look at the facts emerging from the Act and the superimpose the law in Art. 12 which conceptualises `State' for the purposes of Part III. After all, cynicism apart, Mark Twain is good chewing gum for lawyers :(3) Get your facts first, and then you can distort them as much as you please.

It is common ground that the present writ petition, invoking Art. 32, is limited to issuing directions or orders or writs for the enforcement of fundamental rights and the question is whether the addressee is the `State' within the meaning of Art. 12 of the Constitution. We will examine this position more closely a little later, but granting that Art. 19 is aimed at State action the contours of `State', conceptually speaking, are largely confined to Art. 12. We have to study the anatomy of the Corporation in the setting of the Act and decide whether it comes within the scope of that Article. We have only an inclusive definition, not a conclusive definition. One thing is clear. Any authority under the control of the Government of India comes within the definition. Before expanding on this theme, we may scan the statutory scheme, the purpose of the legislative project and the nature of the juristic instrument it has created for fulfillment of that purpose. Where constitutional fundamentals, vital to the survival of human rights, are at stake functional realism, not facial cosmetics, must be the diagnostic tool. Law, constitutional law, seeks the substance, not merely the form. For, one may look like the innocent flower but be the serpent under it. The preamble, which ordinarily illumines the object of the statute, makes it plain that what is intended and achieved is nationalisation of an undertaking of strategic importance :

> AND WHEREAS it is expedient in the public interest that the undertakings in India, of Burmah Shell Oil Storage and Distributing Company of India Limited, should be acquired in order to ensure that the ownership and control of the petroleum products distributed and marketed in India by the said company are vested in the State and thereby so distributed as best to subserve the common good;

It is true that what is nationalised is a private enterprise motivated, undoubtedly, by the need for transferring the ownership and control of the company and its petroleum products distributed and marketed in India. Section 3 is important from this angle :

> 3. On the appointed day, the right, title and interest of Burmah Shell, in relation to its undertakings in India, shall stand transferred to, and shall vest in the Central Government.

This provision lays bare the central object of making the Central Government the proprietor of the undertaking. It hardly needs argument to convince a court that by virtue of s. 3, the Central Government is the transferee of the Undertaking. Had a writ proceeding been commenced during the period of vesting in the Central Government, it could not have been resisted on the score that the employer is not "the State". The appointed day did arrive and the right, title and interest in Burmah Shell did vest in the Central Government.

A commercial undertaking although permitted to be run under our constitutional scheme by Government, may be better managed with professional skills and on business principles, guided, of course, by social goals, if it were administered with commercial fexibility and celerity free from departmental rigidity, slow motion procedures and hierarchy of officers. That is why a considerable part of the public undertakings is in the corporate sector.

It is interesting that with the industrial expansion, economics was assisted by jurisprudence and law invented or at least expanded the corporate concept to facilitate economic development consistently with the rule of law. Said Woodrow Wilson, several decades back :

> There was a time when corporations played a minor part in our business affairs, but now they play the chief part, and most men are the servants of corporations.

And Franklin D. Roosevelt mourned :

> Concentration of economic power in all embracing corporations.....represents private enterprise become a kind of private government which is a power unto itself-a regimentation of other people's money and other people's lives.

This legal facility of corporate instrument came to be used by the State in many countries as a measure of immense convenience especially in its commercial ventures. The trappings of personality, liberation from governmental stiffness and capacity for mammoth growth, together with administrative elasticity, are the attributes and advantages of corporations.

A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of the law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers on it, either expressly, or as incidental to its very existence. Those are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression be allowed, individuality; properties by which a perpetual succession of many persons are considered the same, and may act as a single individual.

Although corporate personality is not a modern invention, its adaptation to embrace the wide range of industry and commerce has a modern favour. Welfare States like ours called upon to execute many economic projects readily resort to this resourceful legal contrivance because of its practical advantages without a wee-bit of diminution in ownership and control of the Undertaking. The true owner is the State, the real operator is the State and the effective controllerate is the State and accountability for its actions to the community and to Parliament is of the State. Nevertheless, a

distinct juristic person with a corporate structure conducts the business, with the added facilities enjoyed by companies and keeping the quasi-autonomy which comes in handy from the point of view of business management. Be it remembered though that while the formal ownership is cast in the corporate mould, the reality reaches down to State control. With this background we have to read s. 7 of the Act which runs thus :

> 7. (1) Notwithstanding anything contained in sections 3, 4 and 5, the Central Government may, if satisfied that a Government company is willing to comply, or has complied with such terms and conditions as that Government may think fit to impose, direct by notification that the right, title and interest and the liabilities of Burmah Shell in relation to any of its undertakings in India, shall instead of continuing to vest in the Central Government, vest in the Government company....

(emphasis added) The core fact is that the Central Government, through this provision, chooses to make over, for better management, its own property to its own offspring. A government company is a mini-incarnation of Government itself, made up of its blood and bones and given corporate shape and status for defined objectives, not beyond.

Nor is this any isolated experiment in government formally transferring ownership to a company. There are a number of statutory take-overs in India as in other countries, where the initial vesting is in government, followed by a later transfer to another instrumentality-may be an existing government company or a corporation created by statute or even a society or other legal person. In the present case, a government company was created anteriorly and by virtue of a notification under s. 7 it became the transferee of the right, title and interest as well as the liabilities of Burmah Shell.

The device is too obvious for deception that what is done is a formal transfer from government to a government- company as the notification clearly spells out :

> In exercise of the powers conferred by sub-section (1) of Section 7 of the Burmah Shell (Acquisition of Under takings in India) Act, 1976 (2 of 1976), the Central Government, being satisfied that Burmah-Shell Refineries Ltd., a Government company is willing to comply with such terms and conditions as may be imposed by the Central Government hereby directs that the right, title and interest and the liabilities of Burmah-Shell Oil Storage and Distributing Co. of India Ltd. in relation to its undertakings in India, shall, instead of continuing to vest in the Central Government vest with effect from the twenty fourth day of January, 1976, in Burmah-Shell Refineries Ltd.

This is the well-worn legal strategy for government to run economic and like enterprises. We live in an era of public sector corporations, the State being the reality behind, Law does not hoodwink itself and what is but a strategy cannot be used as a stratagem :

These are the facts when we come to brass tacks. Facts form the raw material out of which the finished product of judicial finding is fabricated after processing through established legal

principles. Indeed, in life as in law "it is as fatal as it is cowardly to blink facts because they are not to our taste". What, then, are the basic facts available from the Act ? Constitutional law is not a game of hide and seek but practical real-life conclusions. So viewed, we are constrained to hold that Burmah-Shell, a government company though, is but the alter ego of the Central Government and must, therefore, be treated as definitionally caught in the net of 'State' since a juristic veil worn for certain legal purposes cannot obliterate the true character of the entity for the purposes of constitutional law.

If we distil the essence of Art. 12 textually and apprehend the expanded meaning of "State" as interpreted precedentially, we may solve the dilemma as to whether the Bharat Petroleum is but a double of Bharat Sarkar. Let us be clear that the jurisprudence bearing on corporations is not myth but reality. What we mean is that corporate personality is a reality and not an illusion or fictitious construction of the law. It is a legal person. Indeed, 'a legal person' is any subject matter other than a human being to which the law attributes personality. "This extension, for good and sufficient reasons, of the conception of personality....is one of the most noteworthy feats of the legal imagination." Corporations are one species of legal persons invented by the law and invested with a variety of attributes so as to achieve certain purposes sanctioned by the law. For those purposes, a corporation or company has a legal existence all its own. The characteristics of corporations, their rights and liabilities, functional autonomy and juristic status, are jurisprudentially recognised as of a distinct entity even where such corporations are but State agencies or instrumentalities. For purposes of the Companies Act, 1956, a government company has a distinct personality which cannot be con-

fused with the State. Likewise, a statutory corporation constituted to carry on a commercial or other activity is for many purposes a distinct juristic entity not drowned in the sea of State, although, in substance, its existence may be but a projection of the State. What we wish to emphasise is that merely because a company or other legal person has functional and jural individuality for certain purposes and in certain areas of law, it does not necessarily follow that for the effective enforcement of fundamental rights under our constitutional scheme, we should not scan the real character of that entity; and if it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State and in effect an incarnation of the State, constitutional lawyers must not blink at these facts and frustrate the enforcement of fundamental rights despite the inclusive definition of Art. 12 that any authority controlled by the Government of India is itself State. Law has many dimensions and fundamental facts must govern the applicability of fundamental rights in a given situation.

Control by Government of the corporation is writ large in the Act and in the factum of being a government company. Moreover, here, s. 7 gives to the government company mentioned in it a statutory recognition, a legislative sanction and a status above a mere government company. If the entity is no more than a company under the Company Law or society under the law relating to registered societies or co-operative societies you cannot call it an authority. A ration shop run by a cooperative store financed by Government is not an authority being a mere merchant, not a sharer of State power. 'Authority' in law belongs to the province of power:

> Authority (in Administrative Law) is a body having jurisdiction in certain matters of a public nature.

Therefore, the "ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons" must be present ab extra to make a person an 'authority'. When the person is an 'agent or instrument of the functions of the State' the power is public. So the search here must be to see whether the Act vests authority, as agent or instrument of the State, to affect the legal relations of oneself or others.

Sometimes the test is formulated, over-simplified fashion, by asking whether the corporation is formed by a statute or under a statute. The true test is functional. Not how the legal person is born but why it is created. Nay more. Apart from discharging functions or doing business as the proxy of the State, wearing the corporate mask there must be an element of ability to affect legal relations by virtue of power vested in it by law.

In the present instance, the source of both, read in the light of ss. 3 and 7, is saturated with State functions. Avowedly, the statutory contemplation, as disclosed by s. 7, is that the company should step into the shoes of the executive power of the State. The legislative milieu in which the second respondent came to be the successor of Burmah Shell suggests that the former is more than a mere company registered under the Companies Act. It has a statutory flavour acquired under s. 7. Moreover, everything about the second respondent in the matter of employees, their provident, superannuation and welfare funds, is regulated statutorily unlike in the case of ordinary companies. Sections 9 and 10 deal with these aspects. These two provisions which regulate the conditions of service and even provide for adjudication of disputes relating to employees indicate that some of the features of a statutory corporation attach to this government company. Sections 9 and 10, in terms, create rights and duties vis a vis the government company itself apart from the Companies Act. An ordinary company, even a government company simpliciter has not the obligation cast on the second respondent by ss. 9 and 10. And s.11 specifically gives the Act primacy vis a vis other laws. Section 12, although it has no bearing on the specific dispute we are concerned in this case, is a clear pointer to the statutory character of the government company and the vesting of an authority therein. This provision clothes the government company with power to take delivery of the property of Burmah Shell from every person in whose possession, custody or control such property may be. There are other powers akin to this one in s. 12. The provision for penalties if any person meddles with the property of the second respondent emphasises the special character of this government company. Equally unique is the protection conferred by s. 16 on the government company and its officers and employees "for anything which is, in good faith, done or untended to be done under this Act". Such an immunity does not attach to employees of companies simpliciter, even if they happen to be government companies. In the same strain is the indemnity conferred by s. 18. This review, though skeletal, is sufficient strikingly to bring home the point that the Corporation we are concerned with is more than a mere government company. Whatever its character antecedent to the Act, the provisions we have adverted to have transformed it into an instrumentality of the Central Government with a strong statutory flavour super-added and clear indicia of power to make it an "authority". Although registered as a company under the Indian Companies Act, the second respondent is clearly a creature of the statute, the Undertaking having vested in it by force of s. 7 of

the Act. The various provisions to which our attention was drawn, an elaboration of which is not called for, emphasise the fact that the second respondent is not a mere company but much more than that and has a statutory flavour in its operations and functions, in its powers and duties, and in its personality itself, apart from being functionally and administratively under the thumb of government. It is a limb of government, an agency of the State, a vicarious creature of statute working on the wheels of the Acquisition Act. We do not mean to say that for purposes of Art. 309 or otherwise this government company is State but limit our holding to Art. 12 and Part III.

We may now proceed to examine the authorities cited before us by both sides on this point with special reference to Art. 12 of the Constitution vis a vis government companies and like bodies. Shri G. B. Pai concedes that the recent trend of rulings of this Court has broadened the concept of "authorities.... under the control of the Government of India." For instance, the Airport Authority Case and the U.P. Warehousing Corporation case. His submission is that the core question which called for decision in those cases did not demand pronouncement on the larger issue of what is "State" under Art. 12 and also ran counter to the earlier rulings by larger benches. True, a tour of the case-law runs zigzag, but guided by principle and jurisprudential discernment, it is possible to reach the same destination to which the two rulings referred to above take us. Shri G. B. Pai pressed us to reconsider the latest decisions in view of their error when read in the perspective of prior rulings by referring the issue to a larger bench. We will presently explain by examining the earlier cases why we hold the recent decisions to be right and reconcilable with the broad approach in the older authorities. Moreover, rulings of this court are calculated to settle the law and not to unsettle it by reconsideration in season and out merely because it hurts one party or the other or tastes sour for one judge or the other. If incompatibility between the ratios stares us in the face we must clear the confusion by the process suggested by Shri Pai. But we are satisfied that the Airport Authority (supra) has been consistently and correctly decided and, being bound by it, hold that a writ will lie against the second respondent under Art. 32. An explanatory journey is necessary to make good this assertion.

The UP Warehousing Corporation case (supra)-the latest on the point-related to a statutory corporation and the litigation was by an employee for wrongful dismissal. One of the questions considered there was the maintainability of a writ petition against a statutory corporation at the instance of an employee. The court reviewed many decisions, Indian and English, and upheld the employee's contention that the writ could and should issue to such a body if illegality were established. It is significant that pointed reference has been made to Sukhdev Singh, Airport Authority (supra), and the judgment of the House of Lords in Malloch v. Aberdeen Corpn., Sarkaria, J. adverted to the observations of Lord Wilberforce that in cases where there is an element of public employment or service, or support by statute or something in the nature of public office or status, the court would correct illegal acts. Of course, the specific question as to whether such a body could be regarded as 'State' did not and could not arise in the English case. But it did arise in the Airport Authority (supra) where Bhagwati, J. launched on an international survey of this branch of jurisprudence and highlighted the factors which made a legal person-a statutory corporation, a government company or even a registered society-"an agency or instrumentality of government" and therefore an 'authority' for purposes of Art. 12. The forensic focus was turned sharply by one of us (Chinnappa Reddy, J. who was party to that decision) on the target issue of what it "the State" for

purposes of Part III. The crucial observations which have pertinence to the point argued before us deserve excerption and enjoy our affirmation:

> I find it very hard indeed to discover any distinction on principle between a person directly under the employment of the government and a person under the employment of an agency or instrumentality of the government or a corporation, set up under a statute or incorporated but wholly owned by the government. It is self-evident and trite to say that the function of the State has long since ceased to be confined to the preservation of the public peace, the exaction of taxes and the defence of its frontiers. It is now the function of the State to secure 'social, economic and political justice', to preserve 'liberty of thought, expression, belief, faith and worship', and to ensure 'equality of status and of opportunity'. That is the proclamation of the people in the preamble to the Constitution. The desire to attain these objectives has necessarily resulted in intense governmental activity in manifold ways. Legislative and executive activity have reached very far and have touched very many aspects of a citizen's life. The government, directly or through the corporations, set up by it or owned by it, now owns or manages, a large number of industries and institutions. It is the biggest builder in the country. Mammoth and minor irrigation projects, heavy and light engineering projects, projects of various kinds are undertaken by the government. The government is also the biggest trader in the country. The State and the multitudinous agencies and corporations set up by it are the principal purchasers of the produce and the products of our country and they control a vast and complex machinery of distribution. The government, its agencies and instrumentalities, corporations set up by the government under the statutes and corporations incorporated under the Companies Act but owned by the Government have thus become the biggest employers in the country. There is no good reason why, if government is bound to observe the equality clauses of the Constitution in the matter of employment and in its dealings with the employees, the corporations set up or owned by the government should not be equally bound and why, instead, such corporations could become citadels of patronage and arbitrary action. In a country like ours which teems with population, where the State, its agencies, its instrumentalities and its corporations are the biggest employers and where millions seek employment and security, to confine the applicability of the equality clauses of the Constitution, in relation to matters of employment, strictly to direct employment under the government is perhaps to mock at the Constitution and the people. Some the employee beyond the reach of the rule which denies him access to a court to enforce a contract of employment and denies him the protection of Articles 14 and 16 of the Constitution. After all employment in the public sector has grown to vast dimensions and employees in the public sector often discharge as onerous duties as civil servants and parti-

> cipate in activities vital to our country's economy. In growing realisation of the importance of employment in the public sector, Parliament and the Legislatures of the States have declared persons in the service of local authorities, government

> companies and statutory corporations as public servants and, extended to them by express enactment the protection usually extended to civil servants from suits and prosecution. It is, therefore, but right that the independence and integrity of those employed in the public sector should be secured as much as the independence and integrity of servants.

The compelling force of this reasoning in the Indian setting and constitutional matrix cannot be missed.

Let us dilate a little on the living essence of constitutional fundamentals if we are not to reduce fundamental rights to paper hopes and people's dupes ! The judicial branch shall not commit breach of faith with the bill of rights by interpretative exoneration of the State from observance of these founding faiths. The higher values enacted into Part III of the Constitution certainly bind the State in its executive and legislative branches. They are constitutional guarantees to the Indian people, not fleeting promises in common enactments. So long as they last in the National Charter they should not be truncated in their application unless a contra-indication is clearly written into the prescription, a la Arts. 31A, 31B and 31C. Art. 12 is a special definition with a broader goal. Far from restricting the concept of State it enlarges the scope to embrace all authorities under the control of Government. The constitutional philosophy of a democratic, socialist Republic mandated to undertake a multitude of socioeconomic operations inspires Part IV and so we must envision the State entering the vast territory of industrial and commercial activity, competitively or monopolistically, for ensuring the welfare of the people. This expansive role of the State under Part IV is not played at the expense of the cherished rights of the people entrenched in Part III since both the sets of imperatives are complementary and co-exist harmoniously. Wherever the Constitution has felt the need to subordinate Part III to Part IV it has specificated it and, absent such expression provision, both the Parts must and can flourish happily together given benign judicial comprehension a Kerala v. Thomas. There is no inherent conflict between the two parts if orchestrated humanely. We are at pains to emphasise this perspective because the substance of Part III, save where the Constitution says so, shall not be sacrificed at the altar of Part IV by the stratagem of incorporation. It is well known, and surely within the erudite and experienced ken of our 'founding fathers', that Government embarks on myriad modern commercial activities by resort to the jurisprudential gift of personification through incorporation. This contrivance of carrying on business activities by the State through statutory corporations, government companies and other bodies with legal personality, simplifies and facilitates transactions and operations beyond the traditional and tardy processes of governmental desks and cells noted for their red tape exercise and drowsy dharma. But to use the corporate methodology is not to liberate the State from its basic obligation to obey Part III. To don the mantle of company is to free the State from the inevitable constraints of governmental slow-motion, not to play truant with the great rights. Otherwise, a cunning plurality of corporations taking over almost every State business-the post and the rail-road, the T.V. and the radio, every economic ministry's activity, why, even social welfare work-will cheat the people of Part III rights by the easy plea: "No admission for the bill of rights; no State here." From Indian Posts and Telegraphs Limited to Indian Defence Manufacturers Limited, from Social Welfare Board to Backward Classes Corporation the nation will be told that 'the State has ceased to be, save for the non-negotiable sovereign functions; and fundamental rights may suffer eclipse only

to be viewed in museum glass cases. Such a situation will be a treachery on the founding fathers, a mockery of the Constitution and a government by puppetry because the crowd of corporations which have carved out all functions will still be controlled completely by the switch boards of bureaucrats and political bosses from remote control rooms in Government Secretariats. The extended definition of "the State" in Art. 12 is not to be deadened but quickened by judicial construction. Before our eyes the corporate phenomenon is becoming ubiquitous. What was archaically done yesterday by government departments is alertly executed to- day by government companies, statutory corporations and like bodies and this tribe may legitimately increase tomorrow. This efficiency is not to be purchased at the price of fundamental rights. As Mathew J. stated in V. Punnan Thomas v. State of Kerala:

> The Government, is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.
>
> What's in a name that which we call a rose By any other name would smell as sweet.

And the State is fragrant with fundamental rights whatever the legal hue or jural cloak of its surrogate. And, to alter the imagery, Maricha is Ravana, the misleading golden deer mask notwithstanding! This court in Airport Authority (supra) pointed its unanimous finger on these events and portents:

> Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socioeconomic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens came into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise.....
>
> Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships of Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in

> many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more business enjoy largesse in the form of Government contracts .....All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms.

We do not suggest that there is any vice at all in government undertaking commercial or other activities through the facile device of companies or other bodies. But to scuttle Part III through the alibi of 'company, not State'-'ay, there's the rub !' The rationale of this proposition is well brought by Bhagwati, J :

> 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 April 6, 1948 where it was stated inter alia that "management of State enterprise 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 subsequent 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 instrumentally or agency of the corporations 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 the instrumentality or agency of corporations should equally be subject to the same limitations.

(emphasis added) Article 12 gives the cue to forbid this plea. "Other authorities ..... under the control of the Government of India" are comprehensive enough to take care of Part III without unduly stretching the meaning of "the State" to rope in whatever any autonomous body which has some nexus with government. A wide expansion coupled with a wise limitation may and must readily and rightly be read into the last words of Art. 12.

Addressing itself to the question of identifying those bodies which are agencies or instrumentalities of Government, the court, in Airport Authority, 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..... 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.....What then are the tests to determine whether a corporation established by statute or incorporated under law is instrumentality or agency of Government ? It is not possible to formulate an all-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.

(emphasis added) The court proceeded to crystallise the tests to determine the 'State' completion of corporate bodies, beyond furnishing the full share capital:

> 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. 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 corporations' 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. Millers: The Constitutional Law of the 'Security State. 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 or 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."

Bhagwati, J. dwelt on the functional formula and reasoned:

> But 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 disting-
>
> uish 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..... 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 this inference.

The conclusion is impeccable that if the corporate body is but an 'instrumentality or agency' of Government, then Part III will trammel its operations. It is a case of quasi- governmental beings, not of non-State entities. We have no hesitation to hold that where the chemistry of the corporate body answers the test of 'State' above outlined it comes within the definition in Art. 12. In our constitutional scheme where the commanding heights belong to the public sector of the national economy, to grant absolution to government companies and their ilk from Part III may be perilous. The court cannot connive at a process which eventually makes fundamental rights as rare as "roses in December, ice in June". Article 12 uses the expression "other authorities" and its connotation has to be clarified. On this facet also, the Airport Authority case supplies a solution:

> If a statutory corporation, body or other authority is an instrumentality or agency of the Government, it would be an 'authority' and therefore 'State' within the meaning of that expression in Article 12.

The decisions are not uniform as to whether being an instrumentality or agency of Government ipso jure renders the company or other similar body 'State'. This again involves a navigation through precedents and Bhagwati, J. In Airport Authority (supra) has spoken for the Court, after referring to Rajasthan Electricity Board v. Mohan Lal Sukhdev v. Bhagatram, Praga Tool Corporation v. C. A. Immanuel, Heavy Engineering Mazdoor Union v. State of Bihar, S. L. Aggarwal v. General Manager, Hindustan Steel Ltd., and Sabhajit Tewari v. Union of India :

> We may point out here that when we speak of a Corporation being an instrumentality or agency of Government, we do not mean to suggest that the Corporation should be an agent of the Government in the sense that whatever it does should be binding on

> the Government. It is not the relationship of principal and agent which is relevant and material but whether the corporation is an instrumentality of the Government in the sense that a part of the governing power of the State is located in the Corporation and though the Corporation is acting on its own behalf and not on behalf of the Government, its action is really in the nature of State action.

Let us cull out from Airport Authority (supra) the indicia of "other authorities.....under the control of the Government of India" bringing a corporation within the definition of "the State". The following factors have been emphasised in that ruling as telling, though not clinching. These characteristics convert a statutory corporation, a government company, a cooperative society and other registered society or body into a State and they are not confined to statutory corporations alone. We may decoct the tests for ready reference:

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. Existence of "deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."

3. "It may also be a relevant factor..... whether the corporation enjoys monopoly status which is the State conferred or State protected."

4. "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."

5. "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."

The finale is reached when the cumulative effect of all the relevant factors above set out is assessed and once the body is found to be an instrument or agency of Government, the further conclusion emerges that it is 'State' and is subject to the same constitutional limitations as Government.

This divagation explains the ratio of the Airport Authority (supra) in its full spectrum. There the main contention was that the said authority, a statutory corporation, was not State and enforcement of fundamental rights against such a body was impermissible. As is apparent from the extensive discussion above, the identical issue confronting us as to what are the "other authorities" contemplated by Art. 12 fell for consideration there. Most of the rulings relied on by either side received critical attention there and the guidelines and parameters spelt out there must ordinarily govern our decision. A careful study of the features of the Airport Authority and a government company covered by ss. 7, 9, 10 and 12 of the Act before us discloses a close parallel except that the

Airport Authority is created by a statute while Bharat Petroleum (notified under s. 7 of the Act) is recognised by and clothed with rights and duties by the statute.

There is no doubt that Bhagwati, J. broadened the scope of State under Art. 12 and according to Shri G. B. Pai the observations spill over beyond the requirements of the case and must be dismissed as obiter. His submission is that having regard to the fact that the International Airport Authority is a corporation created by statute there was no occasion to go beyond the narrow needs of the situation and expand upon the theme of State in Art. 12 vis a vis Government companies, registered societies and what not. He assails the decision also on another ground, namely, the contradiction between Sukhdev and Airport Authority. We will examine both these contentions and, incidentally, consider what the law laid down in the other rulings is. We are free to confess that the propositions have not been neatly chiselled and presented in any of the rulings and further, some measure of incongruity may be noticed if we search for the same; but our approach is not to detect contradictions but to discover a broad consensus if there be any and distil the law in accordance therewith.

We may first deal with Tewary's case where the question mooted was as to whether the C.S.I.R. (Council of Scientific and Industrial Research) was 'State' under Art. 12. The C.S.I.R. is a registered society with official and non- official members appointed by Government and subject to some measure of control by Government in the Ministry of Science and Technology. The court held it was not 'State' as defined in Art. 12. It is significant that the court implicitly assented to the proposition that if the society were really an agency of the Government it would be 'State'. But on the facts and features present there the character of agency of Government was negatived. The rulings relied on are, unfortunately, in the province of Art. 311 and it is clear that a body may be 'State' under Part III but not under Part XIV. Ray, C. J., rejected the argument that merely because the Prime Minister was the President or that the other members were appointed and removed by Government did not make the Society a 'State'. With great respect, we agree that in the absence of the other features elaborated in Airport Authority case the composition of the Governing Body alone may not be decisive. The laconic discussion and the limited ratio in Tewary hardly help either side here.

Shri G. B. Pai hopefully took us through Sukhdev's case at length to demolish the ratio in Airport Authority. A majority of three judges spoke through Ray, C. J. while Mathew, J. ratiocinated differently to reach the same conclusion. Alagiriswamy, J. struck a dissenting note. Whether certain statutory corporations were 'State' under Art. 12 was the question mooted there at the instance of the employees who invoked Arts. 14 and 16. The judgment of the learned Chief Justice sufficiently clinches the issue in favour of the petitioner here. The problem was posed thus :

> In short the question is whether these statutory corporations are authorities within the meaning of Article 12.

The answer was phrased thus :

> The employees of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. By was of abundant caution we state that these

> employees are not servants of the Union or the State. These statutory bodies are "authorities" within the meaning of Article 12 of the Constitution.

Thus, the holding was that the legal persons involved there (three corporations, viz. The Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation) were 'State' under Art. 12. The reasoning adopted by Ray, C. J. fortifies the argumentation in Airport Authority.

Repelling the State's plea that these bodies were not 'other authorities' under Art. 12. Ray, C. J. observed :

> The State undertakes commercial functions in combination with Governmental functions in a welfare State. Governmental function must authoritative. It must be able to impose decision by or under law with authority. The element of authority is of a binding character. The rules and regulations are authoritative because these rules and regulations direct and control not only the exercise of powers by the Corporations but also all persons who deal with these corporations.....

The expression "other authorities" in Article 12 has been held by this Court in the Rajasthan Electricity Board to be wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India. This Court further said referring to earlier decisions that the expression "other authorities" in Article 12 include all constitutional or statutory authorities on whom powers are conferred by law. The State itself is envisaged under Article 298 as having the right to carry on trade and business. The State as defined in Article 12 is comprehended to include bodies created for the purpose of promoting economic interests of the people. The circumstance that the statutory body is required to carry on some activities of the nature of trade or commerce does not indicate that the Board must be excluded from the scope of the word 'State'. The Electricity Supply Act showed that the Board had power to give directions, the disobedience of which is punishable as a criminal offence. The power to issue directions and to enforce compliance is an important aspect (emphasis added) Dealing with governmental purposes and public authorities, the court clarified:

> In the British Broadcasting Corporation v. Johns (Inspector of Taxes) (1965) (1 Ch. 32), it was said that persons who are created to carry out governmental purposes enjoy immunity like Crown servants. Government purposes include the traditional provinces of Government as well as non-traditional provinces of Government if the Crown has constitutionally asserted that they are to be within the province of Government.....
>
> A public authority is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit.

(emphasis added) Taking up each statute and analysing its provisions the learned Chief Justice concluded:

The structure of the Life Insurance Corporation indicates that the Corporation is an agency of the Government carrying on the exclusive business of life insurance. Each and every provision shows in no uncertain terms that the voice is of the Central Government and the hands are also of the Central Government.

xx xx xx These provisions of the Industrial Finance Corporation Act show that the Corporation is in effect managed and controlled by the Central Government.

(emphasis added) The italicised portion pithily sums up the meat of the matter. If the voice is of the Government and so also the hands, the face will not hide the soul. There is nothing in this judgment which goes against a government company being regarded as 'State'. On the contrary, the thrust of the logic and the generality of the law are far from restrictive and apply to all bodies which fill the bill.

Mathew, J. is more positive in his conception of 'State' under Art. 12:

> The concept of State has undergone drastic changes in recent years. Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation.
>
> "If we clearly grasp the character of the state as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability to render service." (see Mac Iver, "The Modern State" 183).
>
> xx xx xx A state is an abstruct entity. It can only act through the instrumentality or agency of natural or judicial persons. Therefore, there is nothing strange in the notion of the state acting through a corporation and making it an agency or instrumentality of the State.....
>
> The tasks of government multiplied with the advent of the welfare state and consequently, the framework of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialised and highly technical character. At the same time, 'bureaucracy' came under a cloud. The district of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through separate corporation which would operate largely according to business principles and be separately accountable. The public corporation, therefore, became a third arm of the Government. In Great Britain, the conduct of basic industries through giant corporation is now a permanent feature of public life.

The Indian situation is an a fortiori case, what with Part IV of the Constitution and the Government of India Resolution on Industrial policy of 1956 ?

> Accordingly, the State will progressively assume a pre-dominant and direct responsibility for setting up new industrial undertakings and for developing transport facilities. It will also undertake State trading on an increasing scale.

Of course, mere State aid to a company will not make its actions State actions. Mathew, J. leaned to the view that:

> ..... State financial support plus an unusual degree of control over the management and policies might lead one to characterise an operation as state action.

Indeed, the learned Judge went much farther:

> Another factor which might be considered is whether the operation is an important public function. The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a governmental agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description, then mere addition of state money would not influence the conclusion.

It must be noticed that the emphasis is on functionality plus State control rather on the statutory character of the Corporation:

> Institutions engaged in matters of high public interest or performing Public functions are by virtue of the nature of the function performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions.
>
> We may read the ratio from the judgment of Mathew, J.

where he says:

> It is clear from the provisions that the Central Government has contributed the original capital of the Corporation, that part of the profit of the Corporation goes to that Government, that the Central Government exercises control over the policy of the Corporation, that the Corporation carries on a business having great public importance and that it enjoys a monopoly in the business. I would draw the same conclusions from the relevant provisions of the Industrial Finance Corporation Act which have also been referred to in the aforesaid judgment. In these circumstances, I think, these corporations are agencies or instrumentalities of the 'State' and are,

> therefore, 'State' within the meaning of Article 12. The fact that these corporations have independent personalities in the eye of law does not mean that they are not subject to the control of government or that they are not instrumentalities of the government. These corporations are instrumentalities or agencies of the State for carrying on businesses which otherwise would have been run by the State departmentally. If the state had chosen to carry on these businesses through the medium of government departments, there would have been no question that actions of these departments would be 'state actions'. Why then should the actions be not state actions ?
>
> xx xx xx ..... merely because a corporation has legal personality of its own, it does not follow that the corporation cannot be an agent or instrumentality of the state, if it is subject to control of government in all important matters of policy. No doubt, there might be some distinction between the nature of control exercised by principal over agent and the control exercised by government over public corporation. That, I think is only a distinction in degree. The crux of the matter is that public corporation is a new type or institution which has sprung from the new social and economic functions of government and that it therefore does not neatly fit into old legal categories. Instead of forcing it into them, the later should be adapted to the needs of changing times and conditions.

There is nothing in these observations to confine the concept of State to statutory corporations. Nay, the tests are common to any agency or instrumentality, the key factor being the brooding presence of the State behind the operation of the body, statutory or other.

A study of Sukhdev's case (a Constitution Bench decision of this Court) yields the clear result that the preponderant considerations for pronouncing an entity as State agency or instrumentality are financial resources of the State being the chief funding source, functional character being governmental in essence, plenary control residing in Government, prior history of the same activity having been carried on by Government and made over to the new body and some element of authority or command. Whether the legal person is a corporation created by a statute, as distinguished from under a statute, is not an important criterion although it may be an indicium. Applying the constellation of criteria collected by us from Airport Authority, on a cumulative basis, to the given case, there is enough material to hold that the Bharat Petroleum Corporation is 'State' within the enlarged meaning of Art.

12. The Rajasthan Electricity Board case (the majority judgment of Bhargava, J.) is perfectly compatible with the view we take of Art. 12 or has been expressed in Sukhdev and the Airport Authority. The short question that fell for decision was as o whether the Electricity Board was 'State'. There was no debate, no discussion and no decision on the issue of excluding from the area of 'State', under Art. 12, units incorporated under a statute as against those created by a statute. On the other hand, the controversy was over the exclusion from the definition of State in Art. 12 corporations engaged in commercial activities. This plea for a narrow meaning was negatived by Bhargava, J. and in that context the learned Judge explained the signification of "other authorities"

in Art. 12:(1) The meaning of the word "authority" given in Webster's Third New International Dictionary, which can be applicable, is "a public administrative agency or corporation having quasi-governmental powers and authorised to administer a revenue-producing public enterprise." This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi- governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Art. 12 of the Constitution.

xx xx xx These decisions of the Court support our view that the expression "other authorities" in Art. 12 will include all constitutional on statutory authorities on whom powers conferred may be for the purpose of carrying on commercial activities. Under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Art. 19(1)(g). In Part IV, the State has been given the same meaning as in Art. 12 and one of the Directive Principles laid down in Art. 46 is that the State shall promote with special care the educational and economic interests of the weaker sections of the people. The State, as defined in Art. 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people. The State, as constituted by our Constitution, is further specifically empowered under Art. 298 to carry on any trade or business. The circumstance that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore, give any indication that the Board must be excluded from the scope of the word "State as used in Art. 12. The meaning of the learned judge is unmistakable that "the State" in Art. 12 comprehends bodies created for the purpose of promoting economic activities. These bodies may be statutory corporations, registered societies, government companies or other like entities. The court was not called upon to consider this latter aspect, but to the extent to which the holding goes, it supports the stand of the petitioners.

We are not disposed to discuss more cases because two constitution benches and two smaller benches have already pronounced on the amplitude of "other authorities" in Art.

12. Even so, a passing reference may be made to a few more cases. In Praga Tools Corporation v. Immanuel this court was called upon to consider the enforceability of two industrial settlements against the management which was a company with substantial share-holding for the Union Government and the Government of Andhra Pradesh. There was no specific reference to Art. 12 as such although it was mentioned early in the judgment that the company was a separate legal entity and could not be said to be "either a government corporation or an industry run by or under the authority of the Union Government." It must be noticed that 12% shares in the company were held by private individuals and nothing more is known about the plenary control by Government and other features we have referred to earlier in this judgment. On the other hand, the short passage, part of which we have extracted, almost suggests that a government corporation may stand on a different footing from Praga Tools Corporation (supra). If so, it supports the view we have taken. The Hindustan Steel case which was cited at the bar, considered the question as to whether an employee of that company was holding a post under the Union or a State so as to claim the

protection of Art. 311. This claim was negatived, if we may say so, rightly. In the present case, Art. 12 is in issue and not Art. 311 and, therefore, that citation is an act of supererogation. The Vaish College case which too was referred, related to the status of the managing committee of a college and the enforceability of the contractual rights of a teacher by a writ under Art. 226. That problem is extraneous to our case and need not detain us.

Imagine the possible result of holding that a government company, being just an entity created under a statute, not by a statute, it is not 'State'. Having regard to the directive in Art. 38 and the amplitude of the other Articles in Part IV Government may appropriately embark upon almost any activity which in a non-socialist republic may fall within the private sector. Any person's employment, entertainment, travel, rest and leisure, hospital facility and funeral service may be controlled by the State. And if all these enterprises are executed through government companies, bureaus, societies, councils, institutes and homes, the citizen may forfeit his fundamental freedoms vis- a-vis these strange beings which are government in fact but corporate in form. If only fundamental rights were forbidden access to corporations, companies, bureaus, institutes, councils and kindred bodies which act as agencies of the Administration, there may be a breakdown of the rule of law and the constitutional order in a large sector of governmental activity carried on under the guise of 'jural persons'. It may pave the way for a new tyranny by arbitrary administrators operated from behind by Government but unaccountable to Part III of the Constitution. We cannot assent to an interpretation which leads to such a disastrous conclusion unless the language of Art. 12 offers no other alternative.

It is well known that "corporations have neither bodies to be kicked, nor souls to be damned" and Government corporations are mammoth organisations. If Part III of the Constitution is halted at the gates of corporations Justice Louis D. Brandeis's observation will be proved true:

> The main objection to the very large corporation is that it makes possible-and in many cases makes inevitable-the-exercise of industrial absolutism.

It is dangerous to exonerate corporations from the need to have constitutional conscience; and so, that interpretation, language permitting, which makes governmental agencies, whatever their mein, amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperio.

The common-sense signification of the expression "other authorities under the control of the Government of India" is plain and there is no reason to make exclusions on sophisticated grounds such as that the legal person must be a statutory corporation, must have power to make laws, must be created by and not under a statute and so on. The jurisprudence of Third World countries cannot afford the luxury against which Salmond cavilled :

> Partly through the methods of its historical development, and partly through the influence of that love of subtlety which has always been the besetting sin of the legal mind our law is filled with needless distinctions, which add enormously to its bulk and nothing to its value, while they render a great part of it unintelligible to any but

the expert.

Having concluded the discussion on the amenability of the respondent-company to Part III we proceed to consider the merits of the case on the footing that a writ will issue to correct the illegality if there be violation of Arts. 14 and 19 in the order deducting from the pension of the petitioner two sums of money mentioned right at the beginning.

We may now proceed to consider the substantial questions raised by the petitioner to invalidate the deductions from his original pension on the ground of his drawal of provident fund and gratuity. The justification for such deduction is claimed to be regulation 16 and its antidote is urged to be a provision in the two respective enactments relating to provident fund and payment of gratuity, namely, ss. 12 and 14.

The petitioner retired voluntarily under an extant voluntary retirement scheme. The quantum of pension was regulated by that scheme. The petitioner was also a member of the statutory scheme framed within the scope of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and was entitled to Provident Fund payment on retirement. Likewise, he was entitled to payment under the Gratuity Act, 1972. These were the statutory rights which he enjoyed. Being a non-contributory member of the Pension Fund of Burmah Shell under the Trust Deed set up by it, he earned his pension. But the Trust Deed contained many regulations. The normal annual pension under the regulations worked out to a sum of Rs. 165.99 per month for the petitioner. Regulation 16 provided for certain "authorised deductions" from the amount of pension of non-contributing members. The quantification of these deductions was provided for in the said regulation. If these deductions were not to be made, the petitioner would be eligible for his pension of Rs. 165.99 and Rs. 86 per month by way of Supplementary Retirement Benefits which, he asserted was a part of the pensionary benefits. This was being paid by the Burmah Shell to its employees and naturally this obligation devolved on the successor second respondent under the statutory rules framed in this behalf [Burmah Shell (Acquisition of Undertakings of India) (Administration of Fund) Rules, 1976]. But, by letter dated August 10, 1973, the petitioner was informed that a sum of Rs. 56.12 would be deducted as an 'authorised deduction' pursuant to reg. 16 mentioned above. The cause for this was the drawal of the provident fund amount. Likewise, when the gratuity was drawn by the petitioner, another letter dated October 24, 1973 was issued to him that there would be a further reduction of the pension. When the petitioner complained to the appropriate authority that Burmah shell was declining to pay the gratuity, a direction was issued the management to pay the sum of gratuity due. Thereupon, a further deduction of Rs. 68.81 from the monthly pension of the petitioner was effected as an 'authorised deduction' under reg. 16(3). The discretionary payment by way of retirement benefits, namely, Rs. 86/- per month was also stopped, maybe because the petitioner litigatively withdrew gratuity and provident fund. The pitiable position was that the petitioner found himself with a miserable amount of Rs. 40.06 per month, a consequence directly attributable to his receiving provident fund and gratuity amounts. Of course, legality cannot be tested on the size of the sum and the court must examine the merits de hors any sympathy.

The petitioner's attempt to recover his full pension under s. 33C(2) of the Industrial Disputes Act failed since that jurisdiction was more than that of an executing court and there should be a

substantive order creating the obligation before enforcement could follow.

The liability for the payment of full pension was that of Burmah Shell, but, by virtue of ss. 3 and 4 of the Act, all the assets and liabilities vested in the Central Government and thereafter, in the second respondent. Section 10 of the Act relates to provident fund, superannuation, welfare fund and the like. Section 10(3) is important:

> 10(3). The Government company in which the under taking of Burmah Shell in India are directed to be vested shall, as soon as may be after the date of vesting, constitute, in respect of the moneys and other assets which are transferred to, and vested in, it under this section, one or more trusts having objects as similar to the objects of the existing trusts as in the circumstances may be practicable, so, however, that the rights and interests of the beneficiaries of the trust referred to in sub-section (1) are not, in any way, prejudiced or diminished.

(emphasis added) Follow-up steps were accordingly taken and there is no quarrel over it. It is clear, therefore, that the second respondent has made provision for the rights and interests of the beneficiaries of the Trust established by Burmah Shell for the benefit of the persons employed by it. Section 10(1) puts this matter beyond doubt. This obligation of the second respondent is a statutory one and having regard to the provisions of s. 11, it cannot be affected by any instrument or decree or order. The statutory continuation of a pre-existing liability to pay pension, provident fund or gratuity, cannot be avoided having regard to s. 10.

Shri Pai contends that the very root of the claim to pension is the Trust Deed which is to be read integrally. Regulation 16 is part and parcel of the right to pension and cannot be divorced from reg. 13. Indeed, these regulations are so intertwined that the "authorised deductions" are an inextricable part of the right to pension. If this approach be correct and if there be no other legal prohibition in making the deductions, the conclusion is convincing that the quantum of pension must sustain the authorised deduction immediately provident fund and gratuity are drawn. The counter argument of Shri Parekh is that there is a statutory prohibition against any deduction from the pension if the ground is drawal of provident fund or gratuity amount. In view of the statutory taboo he contends, that the deduction is unauthorised even if the contract or trust may provide so. So, the crucial question is whether there is a statutory ban on any diminution in the pension because of provident fund and gratuity benefits having been availed of. The PF Act and the Gratuity Act contain certain protective provisions whose true import falls for construction and is decisive of the point in dispute.

Let us assume for a moment that reg. 16 authorises deductions and that discretionary payments, although enjoyed by the employees, is liable to be stopped. The question is whether s. 12 of the PF Act forbids any such reduction or deduction out of the benefits in the nature of old age pension on the score of the payment of contribution to the provident fund. We may extract s. 12 here for, according to Shri Parekh, the language speaks for itself.

12. No employer in relation to an establishment to which any scheme or the insurance scheme applies shall, by reason only of his liability for the payment of any contribution to the Fund or the

Insurance Fund or any charges under this Act or the scheme, reduce whether directly or indirectly the wages of any employee to whom the scheme of the Insurance Scheme applies or the total quantum of benefit in the nature of old age pension gratuity provident fund or Life Insurance to which the employee is entitled under the terms of his employment, express or implied. (emphasis added) We take the view that this benignant provision must receive a benignant construction and, even if two interpretations are permissible, that which furthers the beneficial object should be preferred From that perspective, the inference is reasonable that the total quantum of benefits in the nature of old age pension, gratuity or provident fund, shall not be reduced by reason only of the liability of the employer for payment of contribution to the fund. The Section prevails over the Trust Deed. The provident fund accrues by statutory force and s. 12 overrides any agreement authorising deductions, argues Shri Parekh.

A similar result holds good even under the Gratuity Act. Section 14 of that Act reads thus:

> 14. The provisions of this Act or any rule made there under shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.

The expression "instrument" certainly covers a Trust Deed and, notwithstanding the deduction that may be sanctioned by the Trust Deed, the overriding effect of s. 14 preserves the pension and immunises it against any deduction attributable to the statutory payment of the provident fund. The deduction made by the second respondent is, in that event, illegal.

Shri Pai argues that no reduction of retiral benefit is effected because the entitlement to pension under reg. 13 is itself conditioned by the clause for deduction and has no separate amplitude de hors the `authorised deduction' spelt out in reg. 16 Let us examine these rival contentions. If reg. 16 is a provision which imposes a cut in certain eventualities it is possible to hold that the employee has a certain pensionary right. But if he draws P.F. or gratuity that pension will be pared down by a separate rule of deduction from the pension. It follows that there is no straining of the language of the regulations to mean, firstly, a right to pension quantified in certain manner and, secondly, a right in the Management to make deduction from out of that pension if other retiral benefits are drawn by the employee. That appears to be the pension scheme. If this be correct, there is no substance in the argument that the pension itself is automatically reduced into a smaller scale of pension on the drawal of provident fund or gratuity. Pension is one thing, deduction is another. The latter is independent of pension and operates on the pension to amputate it, as it were. If a law forbids such cut or amputation the pension remains intact.

The public policy behind the provisions of ss.10, 12 and 14 of the respective statutes is clear. We live in a welfare State, in a `socialist' republic, under a Constitution with profound concern for the weaker classes including workers (Part IV) welfare benefits such as pensions, payment of provident fund and gratuity are in fulfillment of the Directive Principles. The payment of gratuity or provident fund should not occasion any deduction from the pension as a "set off". Otherwise, the solemn statutory provisions ensuring provident fund and gratuity become illusory. Pensions are paid out of

regard for past meritorious services. The root of gratuity and the foundation of provident fund are different Each one is a salutary benefaction statutorily guaranteed independently of the other. Even assuming that by private treaty parties had otherwise agreed to deductions before the coming into force of these beneficial enactments they cannot now be deprivatory. It is precisely to guard against such mischief that the non-obstante and overriding provisions are engrafted on these statutes.

We must realise that the pension scheme came into existence prior to the two beneficial statutes and Parliament when enacting these legislations must have clearly intended extra benefits being conferred on employees. Such a consequence will follow only if over and above the normal pension, the benefits of provident fund and gratuity are enjoyed. On the other hand, if consequent on the receipt of these benefits there is a proportionate reduction in the pension, there is no real benefit to the employee because the Management takes away by the left hand what it seems to confer by the right, making the legislation itself left- handed. To hold that on receipt of gratuity and provident fund the pension of the employee may be reduced pro tanto is to frustrate the supplementary character of the benefits. Indeed, that is why by ss. 12 and 14 overriding effect is imparted and reduction in the retiral benefits on account of provident fund and gratuity derived by the employee is frowned upon. We, accordingly, hold that it is not open to the second respondent to deduct from the full pension any sum based upon reg. 16 read with reg. 13. If reg. 16 which now has acquired statutory flavour, having been adapted and continued by statutory rules, operates contrary to the provisions of the P.F. Act and the Gratuity Act, it must fail as invalid. We uphold the contention of the petitioner.

The only point that survives turns on the stoppage of the discretionary supplementary pensionary benefit. What is discretionary depends on the discretion of the employer. But that power when exercised by an agency of government like the second respondent, must be based upon good faith and due care. If as a measure of reprisal or provoked by the drawal of gratuity, or by resort to legal authorities, such supplementary benefit is struck off, it will cease to be bona fide or valid. We have no material to hold that the second respondent has independently considered this matter and so we direct that if the petitioner moves the second respondent stating his case for the continuance of the supplementary benefit, it will be considered on its merits uninfluences by extraneous factors. We do not think it right or necessary to issue any further direction.

We hold that the petitioner is entitled to his full pension of Rs. 165.99. We further hold that, on appropriate representation by him, the second respondent shall consider the grant or stoppage of the supplementary pensionary benefit on its merits. The petition is allowed with costs which we quantify at Rs. 2,000/- Shri Parekh represents that this sum may be directed to be paid to the Legal Aid Society in the Supreme Court. We appreciate this gesture of counsel and direct the Registry to act accordingly.

Social justice is the conscience of our Constitution, the State is the promoter of economic justice, the founding faith which sustains the Constitution and the country is Indian humanity. The public sector is a model employer with a social conscience not an artificial person without soul to be damned or body to be burnt. The stance that, by deductions and discretionary withholding of payment, a public sector company may reduce an old man's pension to Rs. 40/-from Rs. 250/- is

unjust, even if it be assumed to be legal. Law and justice must be on talking terms and what matters under our constitutional scheme is not merciless law but humane legality. The true strength and stability of our polity is society's credibility in social justice, not perfect legalise; and this case does disclose indifference to this fundamental value. We are aware that, Shri G.B. Pai, for the Management, did urge that `principle' was involved and that settlements had been reached between Labour and Management on many issues. We do appreciate the successful exercises of the Management in reaching just settlements with its employees but wonder whether the highest principle of our constitutional culture is not empathy with every little individual.

PATHAK, J.-I must confess to some hesitation in accepting the proposition that the Bharat Petroleum Corporation Limited is a "State" within the meaning of Art. 12 of the Constitution. But in view of the direction taken by the law in this Court since Ramana Dayaram Shetty v. International Airport Authority. I find I must lean in favour of that conclusion. I would have welcomed a wider range of debate before us on the fundamental principles involved in the issue and on the implications flowing from the definition in the Companies Act, 1956 of a "Government Company", but perhaps a future case may provide that.

As regards the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 I am unable to see any support for the proposition in the provisions of that Act. The provisions will apply to any Government Company, and they do not alter the basic nature of that company. They are provisions which could well have been applied to a private corporation, if the Act had selected one for vesting the undertaking in it. Would that have made the private corporation a "State"?

On the merits of the petitioner's claim I need say no more than that I agree with my learned brothers that the petitioner should be granted the relief proposed by them.

P.B.R. Petition allowed.