

CHAPTER 6

TEST FOR DETERMINING AGENCY OR INSTRUMENTALITY OF THE STATE

I. Meaning of Agency or Instrumentality

*Black's Law Dictionary*¹ defines "instrumentality" to mean "a means or agency through which a function of another entity is accomplished, such as a branch of a governing body". "Agency" is defined as:

"A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the Principal) and bind that other party by words or actions."

Thus instrumentality and agency are the two terms which to some extent overlap in their meaning; "instrumentality" includes "means" also, which "agency" does not, in its meaning. "Quasi-governmental agency" is "a government-sponsored enterprise or corporation (sometime called a government-controlled corporation)". Authority, as *Webster's Comprehensive Dictionary*² defines, is "the person or persons in whome government or aommend is vested ; often in the plural". The applicable meaning of the word "authority" given in *Webster's Third New International Dictionary*, is "a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise".

The definition of the State under Art, 12 has a specific purpose and that is Part III of the Constitution, and not for making it a Government or department of the Government itself. This is the inevitable consequence of the other authorities being entities with independent status distinct from the State and this fact alone dose not militate against such entities or institutions

1. *Black's Law Dictionary* 7th Edn..

2. *Webster's Comprehensive Dictionary*² International Edition.

being agencies or instrumentalities to come under the net of Art. 12. The concept of Instrumentality or agency of the Government is not to be confined to entities created under or which owes its origin to any particular statute or order but would really depend upon a combination of one or more of relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned.

II. Important Judgments

In *Sukhdev Singh v. Bhagathram*³ Mathew, J., opined that the question whether a public corporation of the nature of Oil and Natural Gas Commission, Life Insurance Corporation or Industrial Finance Corporation is a 'state' within the meaning of Art. 12 of the Constitution is one of far reaching importance⁴.

In Rajasthan State Electricity Board⁵ case, the question whether the Rajasthan Electricity Board was an authority within the meaning of the expression "other authorities" in Article 12 of the Constitution. Bhargava, J. delivering the judgment for the majority pointed out that the expression "other authorities" in Article 12 would include all constitutional and statutory authorities on whom powers are conferred by law. The learned judge also said that if any body of persons has authority to issue directions, the disobedience of which would be punishable as a criminal offence, that would be an indication that the authority is 'state'. Justice Shah who delivered a separate judgment agreeing with the conclusion reached by the majority preferred to adopt a slightly different meaning to the words "other authorities". He said that authorities, constitutional or statutory, would fall within the expression 'state' as defined in article 12 only if they are invested with severing power of the State, namely, the power to make rule or regulations which have the force of law⁶.

3. AIR 1975 SC 1331

4. 2. *Ibid* at 1348.

5. *Electricity Board, Rajasthan v. Mohan Lal*, AIR 1967 SC 1857, quoted in *Sukdev Singh v. Bhagatram*, AIR SC 1975 SC 1331 at 1348.

6. *Ibid.* at 1349.

The test propounded by the majority is satisfied so far as the Oil and Natural Gas Commission is concerned as Section 25 of the Oil and Natural Gas Commission Act provides for issuing binding directions to owners of land and premises not to prevent employees of the Commission from entering upon their property if the Commission so directs. In other words, as Section 25 authorizes the Commission to issue binding directions to third parties not to prevent the employees of the Commission from entering into their land and as disobedience of such directions is punishable under the relevant provision of the Indian Penal Code since those employees are deemed to be public servants under Section 21 of the Indian Penal Code by virtue of Section 27 of the Act, the Commission is an 'authority' within the meaning of the expression "other authorities" in Article 12.⁷

It is relevant to note that Article does not define the word 'State'. It only provides that 'State' includes the authorities specified therein. The question whether a corporation set up under a statute to carry on a business of public importance is 'State' despite the fact that it has no power to issue binding directions has to be decided on other considerations.

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 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 service⁸

To some people State is essentially a class-structure, 'an organization of one class dominating over the other class': others regard it as an organization that transcends all classes and stand for the whole community. They regard it as a power system. Some view it entirely as a legal structure, either in the old

7. *Ibid.*

8. see Mac Iver, "*The Modern State*, 183..

Austinian sense which made it a relationship of governors and governed, or, in the language of modern jurisprudence, as a community 'organized for action under legal rules'. Some regard it as no more than a mutual insurance society, other as the very texture of all our life. Some class the State as a great 'corporation' and others consider it as indistinguishable from society itself.⁹

Part IV of the Constitution gives a picture of the services which the state is expected to undertake and render for the welfare of the people. Article 298 provides that the executive power of the Union and State extends to the carrying on of any business or trade, the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13(2) of the Constitution. A state is an abstract entity. It can only act through the instrumentality or agency of natural or juridical 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.¹⁰

The Supreme Court of the United States in *McCullough v. Maryland*¹¹, held that the Congress has power to charter corporations as incidental to or in aid of governmental functions. So far as federal corporations are concerned, they are, by hypothesis, agencies of government. With this premise it would follow that action of a federally chartered corporation would be governed by the constitutional limitation imposed on an agency of the Federal Government.¹²

The tasks of government multiplied with the advent of the welfare State and consequently, the framework of civil service administration became

9. See Mac Iver, "The Modern State" at 3-4.

10. *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331 at 1350.

11. (1919) 4 Wheat 316.

12. Adolf A Berle, "Constitutional Limitations on Corporate Activity – Protection of Personal Rights from Invasion through Economic Power" 100 Univ. of Pennsylvania Law Rev. 933.

increasingly insufficient for handling the new tasks which were often a specialized and highly technical character. At the same time, 'bureaucracy' came under a cloud. The distrust of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through separate corporations which would operate largely according to business principles and as separately accountable.

The public corporation, therefore, became a third arm of the Government, In Great Britain, the conduct of basic industries: through giant corporations is now a permanent feature of public life¹³.

A public corporation is a legal entity established normally by Parliament and always under legal authority, usually in the form of a special statute, charged with the duty a carrying out specified governmental functions in the national interest, those functions being confined to a comparatively restricted field and subjected to control by the executive, while the corporation remains juristically an independent entity not directly responsible to Parliament. A public corporation is not generally a multi-purpose authority but a functional organization created for a specific purpose. It has generally no shares or shareholders. Its responsibility generally is to Government. Its administration is in the hands of a Board appointed by the competent Minister. The employees of public corporation are not civil servants. It is, in fact, likely that in due course a special type of training for specialized form of public service will be developed and the status of the personnel of public corporation may more and more closely approximate to that of civil service without forming part of it. In so far as public corporations fulfil public tasks on behalf of government, they are public authorities and as such subject to control by government¹⁴.

In France, "An enterprise publique is an enterprise the whole or the majority of whose capital belongs to the State or other public agencies. By reason of its industrial or commercial activities it is basically subject to private

13. *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331 at 1350.

14. *Ibid.* at 1351.

law (and particularly to commercial law as are private enterprises). But, because of its public nature, it finds itself subjected to a certain degree of dependence on and control by public authority”¹⁵.

The motivation for the creation of public corporation naturally plays much larger part in underdeveloped and poor countries than in industrially advanced countries. This accounts for the emergence of public corporations and the present significance of public enterprise carried on by them. The Government of India resolution on industrial policy dated April 6, 1948 stated, among other things 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”. The Government of India Resolution on Industrial Policy dated April 30, 1956 stated.¹⁶

The Constitution was framed on the theory that limitation should exist on the exercise of power by the State. The assumption was that the State alone was competent to wield power. But the essential problem of liberty and equality is one of freedom from arbitrary restriction and discrimination whenever and however imposed. The Constitution, therefore, should, wherever possible, be so construed as to apply to arbitrary application of power against individuals by centers of power. The emerging principle appears to be that a public corporation being a creation of the State is subject to the constitutional limitation as the State itself. The preconditions of this are two, namely, that the corporation is created by State, and the existence of power in the corporation to invade the constitutional right of individual.

Large corporations have power and this power does not merely come from the statutes creating them. They acquire power because they produce goods or service upon which the community comes to rely. The methods by which these corporations produce and the distribution made in the course of their production by way of wages, dividends and interest, as also the profits withheld

15. See “*Government Enterprise*”, ed. W. Friedmann & J.F. Garner, at 107-108.

16. See “*Government in Business*”, S.S. Khera, at 368, 373.

and used for further capital progress and the manner in which and the conditions under which they employ their workmen and staff are vital both to the lives of many people and to the continued supply line of the country. Certain imperatives follow from this. Both big business and big labour unions exercise much quasi public authority. The problem posed by the big corporation is the protection of the individual rights of the employees. Suggestions are being made that the corporate organizations of big business and labour are no longer private phenomena; that they are public organisms and that constitutional and common law restrictions imposed upon State agencies must be imposed upon them.

The governing power wherever located must be subject to the fundamental constitutional limitations. The need to subject the power center to the control of constitution requires an expansion of the concept of State action. The historical trend in America of judicial decisions has been that of bringing more and more activity within the reach of the limitations of the Constitution. "The next step would be to draw private governments into the tent of state action. This is not a particularly startling proposition, for a number of recent cases have shown that 'the conception of state action where public functions are being performed'¹⁷.

In *Marsh v. Alabama*¹⁸, a corporation owned a 'company town'. Marsh, a Jehovah's witness offered his pamphlets and preached his doctrine on one of the town corners. He was arrested for trespassing by one of the company guards, was fined five dollars and the case went all the way up to the Supreme Court. On straight property logic, Marsh of course was trespassing; he was unwanted visitor a company's real estate. But, Court said operation of a town is a public function. Although private in the property sense. It was public in the functional sense. The substance of the doctrine there laid down is that where a corporation is privately performing a 'public function' it is held to the constitutional

17. See Arthur S. Millar: "*The Constitutional Law of the 'Security State'*". 10 Stanford Law Rev. 620, at 664.

18. (1946) 326 US 501.

standards regarding civil rights and equal protection of the law that apply to the state itself. The Court held that administration of private property of such a town, though privately carried on, was, nevertheless in the nature of a 'public' function' that the private rights of the corporation must therefore be exercised within constitutional limitations, and the conviction for trespass was reversed.

But how far can this expansion go? Except in very few cases, our Constitution does not, through its own force, set any limitation upon private action. Article 13 (2) provides that no State shall make any law which takes away or abridges the right guaranteed by Part III. It is the State action of a particular character that is prohibited. Individual invasion of individual right is not, generally speaking, covered by Article 13 (2). In other words, it is against State action that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings are not prohibited. Articles 17, 23 and 24 postulate that fundamental rights can be violated by private individuals and that the remedy under Article 32 may be available against them. But by and large, unless an act is sanctioned in some way by the State, the action would not be State action. In other words, until some law is passed or some action is taken through officers or agents of the State, there is no action by the State. In the *Civil Rights*¹⁹ case, Bradley, J. speaking for the majority, took this view of the 14th Amendment. That Amendment provides:

No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws²⁰.

A finding of state financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as state action.

19. (1881) 109 US 3.

20 *Ibid*.

Another factor which can 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. 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.

The State may aid a private operation in various ways other than by direct financial assistance. It may give the organization the power of eminent domain, it may grant tax exemptions, or it may give it a monopolistic status for certain purposes. All these are relevant in making an assessment whether the operation is private or savours of state action²¹.

The difficulty of separating vital government functions from non-government functions has created further difficulties. Is the distinction between governmental and non-governmental functions which plagued the courts a rational one? The contrast is between governmental activities which are private and private activities which are governmental. Without the adoption of a radical laissez faire philosophy and the definition of state functions as they were current in the days of Herbert Spencer it is impossible to sort out proper from improper functions. Besides the so-called traditional functions, the modern state operates a multitude of public enterprises.

The Oil and Natural Gas Commission consisted of the Chairman, and not less than two, and not more than eight, other members appointed by the Central Government. The Central Government may, if it thinks fit, appoint one of the members as Vice-Chairman of the Commission. The Commission may, for the purpose of performing its functions or exercising its powers, appoint

21. See generally "*The meaning of State Action*, LX Columbia Law Rev. 1083.

such number of employees as it may consider necessary. The functions and the terms and conditions of service of such employees shall be such as may be provided by regulations made under the 1959 Act. The Commission may, with the previous approval of the Central Government, by notification in the Official Gazette, make regulations not inconsistent with the Act and the rules made there under, for enabling it to discharge its functions under the Act. The regulations provide inter alia for the terms and conditions of appointment and service and the scales of pay of employees of the Commission; the time and place of meetings of the Commission, the procedure to be followed in regard to the transaction of business at such meeting; the maintenance of minutes of meetings of the Commission and the transmission of copies thereof to the Central Government; the persons by whom, and the manner in which payments, deposits and investments may be made on behalf of the Commission; the custody of moneys required and the maintenance of accounts. The Central Government may amend, vary or rescind any regulation which it has approved; and thereupon the regulation shall have effect accordingly but without prejudice to the exercise of the powers of the Commission under sub-section (1) and Section 32²².

The Life Insurance Corporation was established by the Life Insurance Corporation Act, 1956. Under Section 49 of the Act the Corporation may, with the previous approval of the Central Government, by notification in this Gazette of India, make regulations not inconsistent with the Act and the rules made hereunder to provide for all matters for which provision is expedient for the purpose of giving effect to the provisions of this Act. The regulations may provide inter alia for the powers and functions of the Corporation which may be delegated to the Zonal Managers the method of recruitment of employees and agents of the Corporation and the terms and conditions of service of persons who have become employees of the Corporation under Section 11 of the Act; the number, term of office and conditions of service of members of Boards constituted under Section 22 of the Act; the manner in which the Fund of the

22. *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331 at 1363.

Corporation shall be maintained; the form and manner in which policies may be issued and contracts binding on the Corporation may be executed²³.

The Industrial Finance Corporation was set up by the Industrial Finance Corporation Act, 1948. The superintendence of the business of the Corporation is entrusted to a Board of Directors. The Central Government may make rules in consultation with the Development Bank not inconsistent with the provisions of the 1948 Act and to give effect to the provisions of the Act Sec. 43 of the Act enacts that the Board may with the previous approval of the Development Bank make regulations not inconsistent with the Act and the rules made hereunder to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act. The Development Bank means the Industrial Development Bank established under the Industrial Development Act, 1964. The shares of the Central Government in the Corporation shall stand transferred to the Development Bank when the Central Government shall so notify. The regulations provide inter alia for the holding and conduct of elections under this Act including the final decision of doubts or disputes regarding the validity of the election; the manner in which and the conditions subject to which the shares of the Corporation may be held and transferred; the manner in which general meetings shall be convened, the procedure to be followed thereat; the duties and conduct, salaries, allowances and conditions of service of officers and other employees and of advisers and agents of the Corporation²⁴.

All these Acts confer rulemaking power on the Central Government. It is necessary to refer to the regulation making power conferred on the three organizations under consideration. ON behalf of these organizations the contention advanced was that the regulations relate to internal management, that the terms and conditions of service of employees as laid down in the regulations are not law but merely rules for the purposes of internal management. In so far as the appointments of the various employees of these

23. *Ibid.*

24. *Ibid.* at 1364.

three organizations are concerned they are appointed by contract and these regulations merely form part of those contracts. On behalf of the employees the contention was that as the source of the power to make regulations is the statute the regulations are themselves law²⁵.

Finally, the Court was of the opinion that the Rules and Regulations of the Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation have the force of law. The employees of these statutory bodies have a statutory status and they are entitled to a declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. These statutory bodies are authorities within the meaning of Art. 12 of the Constitution²⁶.

In order that an institution must be an 'authority' it should exercise part of the sovereign power or authority of the State in this connection the definition of the word in the General Clauses Act, which reads as follows:

Local authority" shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund²⁷.

They are all concerned with exercising part of the powers of the State. That is why a Port Trust is given even the power to make regulations to provide that a breach of its regulations would be punishable. In such a case it is undoubtedly exercising part of the power of the State. The whole purpose of the provisions of Part III of the Constitution is to confer fundamental right on the citizen as against the power of the State or those exercising the power of the state²⁸.

25. *Ibid.*

26. *Ibid* at 1378.

27. *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331 at 1369.

28. *Ibid.*

The case in *British Broadcasting Corpn. V. Johns*²⁹ is very much in point. It is not necessary to burden this judgment by quoting extensively from that decision. It was held there that the B.B.C. was not an instrument of Government. It was argued in that case that the Crown was entitled to a monopoly of broadcasting and therefore the Government purposes also include non-traditional provisions of Government if the Crown has constitutionally asserted that they are to be within the province of Government. Willmer, L.J. quoted with approval the remarks of Wilberforce, J., against whose judgment the Court of Appeal was being heard, to the effect:

So I came to the conclusion that however widely one may be inclined to extend the conception of an act or function of government the Crown has not taken the path of engaging itself in a broadcasting service or of entrusting it to any agent. It has deliberately chosen the alternative of an independent instrument³⁰.

In the case of *Sabhajit Tewary v. Union of India*³¹, the Supreme Court held that the Council of Scientific and Industrial Research which was sponsored and controlled by the Central Government and registered under the Societies Registration Act cannot be said to be "State" within the meaning of Article 12.

Again, *Tewary case*³² has also been distinguished in a number of subsequent decisions. In *Ajay Hasia*³³ speaking for the Constitution Bench, Bhagwati, J. Observed :

The test which the court applied for determining this question was the same as the one laid by us, namely, whether the council

29. 1965(1) Ch. 32.

30. *British Broadcasting Corpn. V. Johns*, 1965(1) Ch. 32, quoted in *Sukhdev Singh v. Bhagatram*, AIR 1975 SC 1331 at 1369.

31. AIR 1975 SC 1329.

32. *Ibid.*

33. AIR 1981 SC 487.

was an instrumentality or agency of the Government. The court impliedly asserted to the proposition that if the council were an agency of the Government, it would undoubtedly be an authority. But having regard to the various features enumerated in the judgement, the court held that the council was not an agency of the Government and hence not be regarded as an “authority”.

In *Som Prakash Rekhi v. Union of India*³⁴ the Supreme Court held that there was sufficient material to hold Bharat Petroleum Corporation, registered as a company under the Indian Companies Act, 1956 as a “State” within the meaning of Article 12. It is clearly a limb of the Government, an agency of the State and recognised by and clothed with rights and duties by the statute. The court was of the opinion that, 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, and is subject to the same constitutional limitations as Government. The preponderant considerations for pronouncing an entity as State agency or instrumentality are (i) financial resources of the State being the chief funding source (ii) functional character being governmental in essence, (iii) plenary control residing in Government, (iv) prior history of the same activity having been carried on by Government and made over to the new body and (v) 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 indicium³⁵.

A careful study of the features of the Airport Authority and a government company covered by Secs. 7,9,10 and 12 of Burma Shell (Acquisition of Undertakings in India) Act (1976) discloses a close parallel except that the Airport Authority is created by a statute while Bharat Petroleum (notified under

34. AIR 1981 SC 212.

35. *Ibid.*

Section 7 of the Act) is recognized by and clothed with rights and duties by the statute. Applying the constellation of criteria collected from Airport Authority³⁶, 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 Article 12. The commonsense 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 on³⁷.

Pathak, J., opined that, the Bharat Petroleum Corporation Limited is “State” within the meaning of Article 12 of the Constitution. There is, however, no support for the above proposition in the provisions of the Burma Shell (Acquisition of Undertaking in India) Act (1976)³⁸.

On the other hand, in *Praga Tools Corpn. v. C.A. Imanuel*³⁹, some of the workmen sought a writ of mandamus against the Corporation which was a company registered under the Indian Companies Act, 1913. 56 percent of the share capital was held by the Central Government, 32 percent by the Government of Andhra Pradesh and remaining 12 percent was held by private individuals. The Supreme Court held:

The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a Statute in respect of which enforcement could ne sought by means of mandamus⁴⁰.

*Praga Tools Corpn. case*⁴¹ was dintinguished in *Internation Airport Authority case*⁴² and in *Som Prakash Rekhi Case*⁴³. In the latter case, Krishna

36. AIR 1979 SC 1628

37. AIR 1979 SC 1628.

38. *Ibid* at 213..

39. AIR 1969 SC 1306.

40. AIR 1969 SC 1306 (emphasis added).

41. *Ibid*.

42. AIR 1979 SC 1628.

43. AIR 1981 SC 212.

Iyer; J. observed:

There was no specific reference to Article 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 was also noticed that 12 percent shares in the company were held by private individuals and nothing more was known about the plenary control by government.

In *R.D. Shetty v. International Airport Authority*⁴⁴, the question before the Supreme Court was whether the International Airport Authority can be said to be "State" within the meaning of Article 12. Holding the Airport Authority to be "State" by following the earlier judgements in *Rajasthan State Electricity Board Case*⁴⁵ and *Sukhdev Singh Case*⁴⁶, and adopting the line of reasoning of Mathew, J. in *Sukhdev Singh case*⁴⁷, Bhagawati J. (as he then was) laid down certain tests for determining as to when a Corporation can be said to be an instrumentality or agency of government with the preface:

What are the tests to determine whether a Corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate an all inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula which would provide correct division of Corporations into those which are instrumentalities or agencies of Government and those which are not.

The following are the relevant factors which may convert a statutory Corporation, a Government Company, a Co-operative society and other

44. AIR 1979 SC 1628.

45. AIR 1967 SC 1857.

46. AIR 1975 SC 1331.

47. *Ibid.*

registered society or body into a “State” within the meaning of Article 12 of the Constitution :

- (1) 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) Whether the financial assistance of the State is so much to meet almost the entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with government character.
- (3) Whether the Corporation enjoys monopoly status which is State conferred or State protected.
- (4) Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.
- (5) If the functions of the Corporation 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.
- (6) If a department of Government is transferred to a Corporation, it would be a strong factor supporting the inference that the Corporation is an instrumentality or agency of Government.⁴⁸

His Lordship also rightly observed.⁴⁹

It is not enough to examine seriatim each of the factors upon which a Corporation is claimed to be an instrumentality or agency of Government and to support a finding to that effect. *It is the aggregate or cumulative effect of all viz. relevant factors that is controlling.*

His Lordship, however, added the following warning⁵⁰

48. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487, 496.

49. *R.D. Shetty v. International Airport Authority*, AIR 1979 SC 1628 (emphasis added).

50. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487, 496 (emphasis added).

These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because which stressing the necessity of a wide meaning to be placed on the expression “other authorities”. It must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with government within the sweep of the expression. *A wide enlargement of the meaning must in tempered by a wise limitation.*

In *Ajay Hasia v. Khalid Mujib*⁵¹ the Supreme Court held that the Regional Engineering College, Srinagar, established, administered and managed by a Society registered under the Jammu and Kashmir Registration of Societies Act, 1893 was a “State” within the meaning of Article 12. Extending the principle laid down by the Court in earlier cases, it was observed:

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

In the above mentioned case⁵², the Regional Engineering College, Srinagar was one of the fifteen Engineering Colleges in the country sponsored by the Government of India. The College was established and its administration and management are carried on by a Society registered under the Jammu and Kashmir Registration of Societies Act, 1998. Having regard to the Memorandum of Association and the Rules of the society it was held that the Society was an instrumentality of the agency of the State and the Central Governments and it was an “authority” within the meaning of Article 12. The composition of the Society was dominated by the representatives appointed by the central Government and the governments of Jammu & Kashmir, Punjab, Rajasthan and Uttar Pradesh with the approval of the Central Government. The monies required for running the College are provide entirely by the Central

51. *Ibid.*

52. *Ibid.*

Government and the Governments of Jammu & Kashmir, and even if any other monies are to be received by the Society, it can be done only with the approval of the State and the Central Governments. The rules to be made by the Society are also required to have the prior approval of the State and the Central Governments and the accounts of the Society, have also to be submitted to both the Government for their scrutiny and satisfaction. The Society was also to comply with all such directions as may be issued by the State Government with the approval of the Central Government in respect of any matter dealt with in the report of the Reviewing Committee.

The control of the State and the Central Governments was indeed so deep and pervasive that no immovable property of the society can be disposed of in any manner without the approval of both the Governments. The State and the Central Government have even the power to appoint any other person or persons to be member of the Society and any member of the Society other than a member representing the State or the Central Government can be removed from the membership of the Society by the State Government with the approval of the Central Government. The Board of Governors, which was in charge of General superintendence. Directions and Control of the affairs of Society and of its income and property was also largely controlled by nominees of the State and the Central Governments. Thus the State Government and by reason of the provision for approval. The Central Govt. also have full control of the working of the Society⁵³.

While considering this question it is necessary to bear in mind that an authority falling within the expression "other authorities" is, by reason of its inclusion within the definition of 'State' in Article 12, subject to the same constitutional limitations as the Government and is equally bound by the basic obligation to obey the constitutional mandate of the Fundamental Rights enshrined in Part III of the Constitution. We must therefore give such an interpretation to the expression 'other authorities' as will not stultify the operation and reach of the fundamental rights by enabling the Government to

53. *Ibid.* at 488.

its obligation in relation to the Fundamentals Rights by settings up an authority to act as its instrumentality or agency for carrying out its functions. Where constitutional fundamentals vital to the maintenance to human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form. Now it is obvious that the Government may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions⁵⁴.

In the early days when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions which were of traditional vintage. But as the tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the frame work of civil service was not sufficient to handle the new tasks which were often specialized and highly technical in character and which called for flexibility of approach and quick decision making.

The inadequacy of the civil service to deal with these new problems came to be realized and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstance and with a view to supplying this administrative need that the corporation came into being as the third arm of the Government and over the years it has been increasingly utilized by the Government for setting up and running public enterprises and carrying out other public functions⁵⁵.

Today with increasing assumption by the Government of commercial venture and economic projects, the corporation has become an effective legal contrivance in the hands of the Government for carrying out its activities, for it is found that this legal facility of corporate instrument provides considerable flexibility and elasticity and facilitates proper and efficient management with

54. *Ibid* at 492.

55. *Ibid*.

professional skills and on business principles and it is blissfully free from “departmental rigidity, slow motion procedure and hierarchy of officers”⁵⁶.

The Government in many of its commercial ventures and public enterprises is resorting to more and more frequently to this resourceful legal contrivance of a corporation because it has many practical advantages and at the same time does not involve the slightest diminution in its ownership and control of the undertaking. In such cases “the true owner is the State, the real operator is the State and the effective controller is the State and accountability for its actions to the community and the Parliament is of the State”⁵⁷.

It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management, but behind the formal ownership which is cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government. Now it is obvious that if a corporation is an instrumentality or agency of the Government, it must be subject to the same limitations in the field of constitutional law as the Government itself, though in the eye of the law it would be a distinct and independent legal entity. If the Government acting through its officer is subject to certain constitutional limitations, it must follow a fortiori that the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitations. If such corporation were to be free from the basic obligation to obey the Fundamental Rights, would lead to considerable erosion of the efficiency of the Fundamental Rights, for in that event the Government would be enabled to override the Fundamental Rights by adopting

56. *Ibid.*

57. *Ibid* at 493.

the stratagem of carrying out its functions through the instrumentality or agency of a corporation, while retaining control over it. The Fundamental Rights would then be reduced to little more than an idle dream or a promise of unreality⁵⁸.

It must be remembered that the Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the Fundamental Rights⁵⁹

The constitutional philosophy of a democratic socialist requires the Government to undertake a multitude of socio-economic operations and the Government, having regard to the practical advantages of functioning through the legal device of a corporation embarks on myriad commercial and economic activities by resorting to the instrumentality or agency of a corporation, but this contrivance of carrying on such activities through a corporation cannot exonerate the Government from implicit obedience to the Fundamental Rights.

To use the corporate methodology is not to liberate the Government from its basic obligation to respect the fundamental Rights and not to override them. The mantle of a corporation may be adopted in order to free the Government from the inevitable constraints of red-tapism and slow motion but by doing so, the Government cannot be allowed to play truant with the basic human rights. Otherwise it would be the easiest thing for the Government to assign to a plurality of corporations almost every State business such as Post and Telegraph, TV and Radio, Rail Road and Telephones- in short every

58. *Ibid.*

59. *Ibid* at 493.

economic activity - and thereby cheat the people of India out of the Fundamental Rights guaranteed to them. That would be a mockery of the Constitution and nothing short of treachery and breach of faith with the people of India, because, though apparently the corporation will be carrying out these functions. It will in truth and reality be by the Government which will be controlling the corporation and carrying out these functions through the instrumentality or agency of the corporation⁶⁰.

By a process of judicial construction it can not be allowed that, the Fundamental Rights to be rendered futile and meaningless and thereby wipe out Chapter III from the Constitution. That would be contrary to the constitutional faith of the Post Menaka Gandhi era. It is the Fundamental Rights which along with the Directive Principles constitute the life force of the Constitution and they must be quickened into effective action by meaningful and purposive interpretation. If a corporation is found to be a mere agency or surrogate of the Government, "in fact owned by the Government, in truth controlled by the government and in effect an incarnation of the government" the court must not allow the enforcement of Fundamental Rights to be frustrated by taking the view that it is not the Government and therefore not subject to the constitutional limitations. Where a corporation is an instrumentality or agency of the government, it must be held to be an 'authority' within the meaning of Article 12 and hence subject to the same basic obligation to obey the Fundamental Rights as the Government⁶¹.

Krishna Iyer, J. in this context rightly observed:

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 is non-socialist republic may fall within the private sector. Any person's employment may appropriately embark upon almost any activity which is a non-socialist republic may fall within the

60. *Ibid.*

61. *Ibid* at 494

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 corporation *in form*. If only fundamental rights were forbidden access to Corporation, Companies, bureaus, institutes, councils and kindered bodies which act as agencies of the Administration, thereby 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 Article 12 offers no other alternative.⁶²

His Lordship rightly observed:

If a corporation is found to be a mere agency or surrogate of the government, "in fact owned by the government, in truth controlled by the government and in effect in incarnation of the government", the court must not allow the enforcement of Fundamental Rights to be frustrated by taking the view that it is not the government and therefore not subject to the constitutional limitation.⁶³

"The Court cannot", Krishna Iyer, J. propounds, "connive at a process which eventually makes fundamental rights as rare as roses in December, ice in June".⁶⁴

62. AIR 1981 SC 212.

63. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487, 731-34.

64. *Som Prakash Rekhi v. Union of India*, AIR 1981 SC 212, 224

A special mention must be made of the recent pronouncement of the Supreme Court in the Case of *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*⁶⁵. In that case the Supreme Court was called upon to decide whether Central Inland Water Transport Corporation, a Government Company incorporated under the Companies Act can be said to be 'State' within the meaning of Article 12 of the Constitution. After referring to all the previous judgements and after applying various tests laid down therein, the court held the Corporation to be "State" under Article 12 of the Constitution. In order to arrive at the said conclusion, the Supreme Court took into consideration, inter alia, the following factors: (i) the Corporation was 'wholly owned' and 'entirely financed' by three Governments : (1) Union of India; (2) State of W.B. and (3) State of Assam; (ii) it was "completely under the control of the Central Government, and was managed by the Chairman and Board of Directors appointed by the Central Government and removable by it"; and (iii) the activities carried on by the Corporation "were of great importance to public interest, concern and welfare". Thus, in every aspect, it was a "veil behind which the Central Government operated through instrumentality of a Government company". Speaking for the Court, Madon, J. rightly observed:

For the purposes of Article 12 one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State. The Corporationsquarely falls within these observations, and it also satisfies the various tests which have been laid down *It is nothing but the government operating behind a corporate veil, carrying out a governmental activity and governmental functions of vital public importance.* These can thus be no doubt that the Corporation is 'the State within the meaning of Article 12 of the Constitution.'⁶⁶

65. AIR 1986 SC 1571.

66. *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*, AIR 1986 SC 1571 (emphasis added).

In *Ramachandra Iyer v. Union of India*⁶⁷ distinguishing *Tewary Case*⁶⁸, the Supreme Court observed:

Much water has flown down the Jamuna since the dicta in *Sabhajit Tewary case*⁶⁹ and conceding that it is not specifically overruled in later decision, its ration is considerably watered down so as to be a decision confined to its own facts.⁷⁰

In *General Manager, Kisan Sahkari Chini Mills Ltd., v. Satrughan Nishad*⁷¹, the facts are that the Mill is a co-operative society registered as such under Uttar Pradesh Co-operative Societies Act, 1965. The contesting respondents filed various writ applications in the High Court alleging therein that they had worked on Class III and IV posts in the Mill for a period ranging from 5 to 12 years. According to them some of them were permanent workmen whereas others were seasonal. Uttar Pradesh Co-operative Sugar Factories Federation Limited (hereinafter referred to as 'the Federation') is the apex body of co-operative sugar mills in the State and its function is advisory in order to safeguard operational and financial interest of the sugar mills.

On 22nd November, 1999, Chairman-cum-Managing Director of the Federation, who was also Secretary to the Government of Uttar Pradesh in the Department of Sugar Industry and Cane Development, had sent a letter to General Manager of the Mill in which it was mentioned that during the course of discussion the Managing Director had with the General Manager and other officers of the Mill, it transpired that out of 708 were surplus whose services were required to be dispensed with in view of the deteriorating financial condition of the Mill. By the said letter the Mill was advised to consider the desirability of dispensing with services of its surplus workmen. Thereupon, services of surplus workmen were dispensed with without giving any notice

67. AIR 1984 SC 514.

68. AIR 1975 SC 1329.

69. *Ibid.*

70. *Sabhajit Tewary v. Union of India*, AIR 1975 SC 1329 (emphasis supplied).

71. AIR 2003 SC 4531

and paying retrenchment compensation as required under Section 6N of the Uttar Pradesh Industrial Disputes Act, 1947 (hereinafter referred to as the Act') in spite of the fact that they had worked for more than 240 days which necessitated filing of the various writ applications in the High Court.

Writ applications were contested by the Mill on grounds, *inter alia*, that the Mill, which is a co-operative society, was neither State nor instrumentally or agency of the State within the meaning of Article 12 of the Constitution of India, hence, the writ jurisdiction of the High Court could not be invoked. According to them, service conditions of the contesting respondents, who were the workmen, were governed by standing orders of the Mill and the dispute raised by them related to enforcement of rights and obligations created under the Act, as such the remedy available to them was to raise an industrial dispute under the provisions of the Act. Further ground of contest was that although the workmen had claimed to have worked between the years 1983-84 to 2000-01 but in not a single year, the Mill during these aforesaid period was from 45 days to 99 days. According to them, the contesting respondents were seasonal workers and as they did not work for a period of 240 days in any year, were not entitled to claim protection under Section 6N of the Act.

The learned single Judge of the High Court overruled preliminary objection raised on behalf of the Mill, came to the conclusion that the Mill, which is a society, was State within the meaning of Article 12 of the Constitution as it was instrumentality of the State and there was infraction of the provision of Section 6N of the Act. Accordingly, the writ applications were allowed, orders of termination of the contesting respondents were quashed and it was directed that their services shall be regularized in a phased manner within a period of two years. The said order has been affirmed by the Division Bench on appeals being preferred by the Mill⁷².

In the case of *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and other*⁷³, a Bench of seven Judges of this Court has noted and

72. *Ibid* at 4532.

73. (2000) 5 SCC 111

quoted with approval in extenso the tests propounded in International Airport Authority case and approved in the case of Ajay Hasia for determining as to when a Corporation can be said to be an instrumentality or agency of the Government so as to come within the meaning of the expression 'authority' in Article 12 of the Constitution. There the Bench referred to the case of *Chander Mohan Khanna v. NCERT*⁷⁴, where, after considering the memorandum of association and the rules, this Court came to the conclusion that NCERT was largely an autonomous body and its activities were not wholly related to governmental functions and the Government control was confined only to the proper utilization of the grants and since its funding was not entirely from Government resources, the case did not satisfy the requirements of the State under Article 12 of the Constitution. Further, reference was also made in that case to the decision of this Court in *Mysore Paper Mills Ltd. v. Mysore Paper Mills Officer*⁷⁵, where it was held that the company was an authority within the meaning of Article 12 of the Constitution as it was substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government.

From the decisions referred to above, it would be clear that the form in which the body is constituted, namely, whether it is a society or co-operative society or a company, is not decisive. There can be no hard and fast formula and in different facts or situations, different factors may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution. In this context, Bye-Laws of the Mill would have to be seen. In the instant case, in one of the writ applications filed before the High Court, it was asserted that the Government of Uttar Pradesh held 50% shares in the Mill which fact was denied in the counter-affidavit filed on behalf of the State and it was averred that majority of the shares were held by cane growers. Of course, it was not said that the Government of Uttar Pradesh did not hold any

74. (1994) 4 SCC 578.

75. (2002) 2 SCC 167

share. Before this Court, it was stated on behalf of the contesting respondents in the counter-affidavit that the Government of Uttar Pradesh held 50% shares in the Mill which was not denied on behalf of the Mill. Therefore, even if it is taken to be admitted due to non-traverse, the share of the State Government would be only 50% and not entire. Thus, the first test laid down is not fulfilled by the Mill. It has been stated on behalf of the contesting respondents that the Mill used to receive some financial assistance from the Government. According to the Mill, the Government had advanced some loans to the Mill. It has nowhere been stated that the State used to meet any expenditure of the Mill much-less almost the entire one, but as a matter of fact, it operates on the basis of self-generated finances. There is nothing to show that the Mill enjoys monopoly status in the matter of production of sugar. A perusal of Bye-Laws of the Mill would show that its membership is open to cane growers, other Societies, Gram Sabha, State Government, etc. and under Bye-Law 52, a Committee of Management consisting of 15 members is constituted, out of whom, 5 members are required to be elected by the representatives of individual members, 3 out of co-operative society and other institutions and 2 representatives of financial institutions besides 5 members who are required to be nominated by the State Government which shall be inclusive of the Chairman and Administrator.⁷⁶

Thus, the ratio of the nominees of State Government in the Committee is only 1/3rd and the management of the Committee is dominated by 2/3 non-Government members. Under the Bye-Laws, the State Government can neither issue any direction to the Mill nor determine its policy as it is an autonomous body. The State has no control at all in the functioning of the Mill much-less deep and pervasive one. The role of the Federation, which is the apex body and whose ex-officio Chairman-cum-Managing Director is Secretary, Department of Sugar Industry and Cane, Government of Uttar Pradesh, is only advisory and to guide its members. The letter sent by Managing Director of the Federation on 22nd November, 1999 was merely by way of an advice and was in the nature of a suggestion to the Mill in view of its deteriorating financial

76. *General Manager, K.S.C.M. Ltd. v. Satrughan Nishad*, AIR 2003 SC 4531 at 4534.

condition. From the said letter, which is in the advisory capacity, it cannot be inferred that the State had any deep and pervasive control over the Mill. Thus, it is found that, the indicia exists in the case of Mill, as such the same being neither instrumentality nor agency of Government cannot be said to be an authority and, therefore, it is not State within the meaning of Article 12 of the Constitution⁷⁷.

77. *Ibid.* at 4535.